

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

In the Matter of:

OAH CASE NO. N2007080099

STUDENT,

Petitioner,

v.

BERKELEY UNIFIED SCHOOL DISTRICT,

Respondent.

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter from February 5 to 8, 11, and 14, 2008, at the OAH office in Oakland, California.

Roberta S. Savage, Attorney at Law, represented Student. Student's mother and father (Parents) were present during the entire hearing. Student was not present.

Peter Sturges, Attorney at Law, Atkinson, Andelson, Loya, Ruud & Romo, represented Berkeley Unified School District (District). Special Education Manager Elaine Eger was present on behalf of the District on the first day of hearing, and thereafter Special education program supervisor Kathrene Hatzke was present.

On August 3, 2007, Student filed a request for a due process hearing (complaint). On September 12, 2007, OAH granted a continuance of the hearing on motion of the parties.

At hearing, oral and documentary evidence were received. At the request of the parties, the record remained open until February 29, 2008, for the submission of written closing arguments, at which time the record was closed, and the matter was submitted.

ISSUES¹

1. Was District's assessment of Student in the fall of 2007 inappropriate?
2. Did District's determination at the November 7, 2007 individualized education program (IEP) meeting that Student was not eligible for special education and related services deny Student a free appropriate public education (FAPE)?
3. Did District's determination at the January 25, 2008 IEP meeting that Student was eligible for special education and related services under the category of speech and language impairment, instead of autistic-like behaviors, deny Student a FAPE?
4. Did District commit the following violations at the November 8, 2007 and January 25, 2008 IEP meetings that resulted in the denial of FAPE by:
 - A. Failing to ensure the participation of a general education teacher, District's speech therapy assessor, and Student's private service providers, including his

¹ In September 2007, the parties settled all issues in Student's complaint through September 12, 2007. Prior to hearing, the parties stipulated to add issues to Student's complaint, without amendment, involving a January 25, 2008 IEP meeting, eligibility, independent educational evaluations, and reimbursement. The parties stipulated that the hearing would go forward as scheduled and that statutory timelines would not recommence because of the added issues. The ALJ has reframed and reorganized the issues for purposes of clarity in this decision.

speech therapist, occupational therapist, and representatives of the Fine Arts
Preschool;

- B. Making a predetermined offer and failing to consider a continuum of placement options;
- C. Failing to make a clear written offer of placement; and
- D. Failing to provide prior written notice?

5. Did District deny Student a FAPE for the 2007-2008 school year by failing to provide him with appropriate special education and related services to address his unique needs as follows:

- A. Developing inappropriate annual goals;
- B. Offering placement in an inappropriate integrated inclusion program with inappropriate aide support;
- C. Offering inappropriate social skills training;
- D. Offering inappropriate occupational therapy services; and
- E. Failing to offer an applied behavior analysis (ABA) program and reducing Student's total hours of intervention per week by fifty percent; and
- F. Failing to offer transition services?

REQUESTED REMEDIES²

Student requests reimbursement to the Parents for the costs that they have incurred for his private educational placement and services from September 13, 2007

² During the hearing, the parties represented that they had stipulated to two proposed remedies without regard to liability. The parties were directed to submit agreed-upon language for the stipulations to the ALJ by the deadline for closing briefs, but the parties did not do so. District's closing brief concludes with a request that Student "take nothing" by way of his complaint. Student's closing brief states that

through the date of this Decision for Fine Arts Preschool, Milestones ABA services, weekly occupational therapy; and weekly speech and language therapy, including transportation for all services. Student requests that the District should be ordered to prospectively fund the above services from the same providers to the end of the 2007-2008 school year in June 2008. In addition, Student requests an order for the District to fund an independent, comprehensive speech, language and communication assessment, and to reimburse Parents for the independent educational evaluation (IEE) by Dr. Cynthia Peterson.

CONTENTIONS OF THE PARTIES

Student contends that District's November 2007 assessments were inappropriate. He contends that not all necessary members of the IEP team were present at the November 8, 2007 and January 25, 2008 IEP meetings. Student avers that the District members of the IEP team at the January 2008 IEP meeting failed to consider Student's independent evaluation by Dr. Peterson, predetermined the offer, failed to consider a continuum of placement options; failed to make a clear written offer of placement that Parents could understand, and failed to provide prior written notice of District's refusal to make Student eligible for special education and related services under the category of autistic-like-behaviors. Student further contends that he is eligible for special education services under the category of autistic-like behaviors, not speech and language impairment as found by the District. Student contends that District's offer of placement and services made at the November 2006 IEP meeting operated to deny

District agreed to reimburse Parents for an independent assessment. In the absence of receipt of an unequivocal written stipulation from the parties, the ALJ concludes that any stipulations for relief were not finalized.

Student a FAPE for the beginning of the 2007-2008 school year. Student finally contends that District's November 2007 and January 2008 IEP offers were inappropriate and denied Student a FAPE.

District contends there were no violations involved at either the November 2007 or the January 2008 IEP meetings, and that, if there were, they did not deny Student a FAPE. District contends it had no obligation to have an offer of services at the start of the 2007-2008 school year because Student had rejected its 2006 IEP offer and remained placed in a private preschool. District contends that the November 2007 and January 2008 IEPs offered Student a FAPE for the 2007-2008 school year, and that the special education program and related services offered were appropriate because they were based on valid assessments, considered Student's present levels of academic and functional performance, as well as his unique needs related to his disability, and that the proposed annual goals were appropriate. District contends that Student is not eligible for services under the category of autistic-like-behaviors because Student is high functioning and his autism did not adversely affect his educational performance. Instead, District contends that Student is eligible for special education and related services under the category of speech and language impairment.

FACTUAL FINDINGS

BACKGROUND

1. Student is now four and a half years old and lives with Parents within the geographical boundaries of the District. In January 2008, Student was determined by the District to be eligible for special education and related services in the category of a speech and language impairment, which is at issue in this case.

2. When Student was about seventeen months old, Parents consulted a doctor at Kaiser Richmond Pediatrics because they were concerned about his speech

and language delays, as well as symptoms and behaviors commonly associated with autism since the family had a history of autism.³ The family was referred to the Autism Spectrum Disorders Center at Kaiser Permanente. On May 2, 2005, doctors evaluated Student using a variety of procedures and tools and concluded that he met the diagnostic criteria in the Diagnostic Statistical Manual (DSM) IV for an autism spectrum disorder. Student displayed a marked impairment in the three primary categories of deficiencies shared by children on the autistic spectrum, communication, socialization, and rigid adherence to routines.

3. As of June 2006, when Student was two years and seven months old, Michele Gibson, a certified speech and language pathologist with Alta Bates Summit Medical Center in Berkeley reported on Student's progress since initial treatment there in July 2005, with a diagnosis of autism spectrum disorder. Student had "moderate to severe receptive and severe to profound expressive language impairment, severe delay in acquisition of symbolic play skills, moderate impairment of speech production skills/limited phonemic repertoire." Student's receptive language skills were in the age equivalency of 12 to 18 months, with scattered skills up to 25 months. In contrast, Student's expressive language skills were at a 10 to 13 month age level, was primarily nonverbal, and was just beginning to build his sound inventory.

4. In June and July 2006, Student participated in an autism assessment research project conducted by the M.I.N.D. Institute of the University of California, Davis. Student was evaluated and found to meet the criteria for autism in all four domains:

³ Student's mother is a licensed speech and language pathologist, holds a teaching credential, and provided speech and language therapy services to school children for a number of years. Student's older brother is autistic.

reciprocal social interaction, communication, repetitive behaviors, and abnormality of development at or before 36 months.⁴

5. In about July 2005, Student began receiving in-home ABA therapy from Milestones, a nonpublic agency (NPA), through the East Bay Regional Center. In September 2006, Parents unilaterally enrolled Student in the Fine Arts Preschool, run by the City of Walnut Creek, about 21 miles away from Parents' residence in Berkeley, and have paid privately for his monthly tuition there since then.⁵

DISTRICT'S 2006 ASSESSMENTS AND IEP MEETINGS

6. In the fall of 2006, Parents were referred to the District by the Regional Center in anticipation of Student's third birthday. Parents requested special education and related services from the District, and signed an assessment plan on November 7, 2006, prior to Student's third birthday. Even though Student was privately placed in a preschool in Walnut Creek, Parents resided in the District and it was obligated by law to make an offer. District thereafter quickly conducted assessments, held an initial IEP meeting on November 17, 2006, and offered a special education placement and services.⁶

⁴ The report, called the CHARGE Research Study, cautioned that it was a research assessment and "should not be considered a substitution for a complete clinical developmental evaluation."

⁵ Student's older brother attended Fine Arts Preschool and District funded the arrangement for an unknown period of time.

⁶ District claimed that Regional Center delayed in making the referral and that it had to hold the IEP meeting before Student's third birthday.

7. The District's 2006 IEP meetings, assessments, and offers are relevant to evaluate District's 2007 assessment because they were reviewed and considered by District's 2007 assessors. In addition, Student contends that District's 2006 IEP offer must be viewed as the offer on the table during the window period between September 13, 2007 and January 25, 2008, when District made another offer of placement and services.

8. The November 17, 2006 IEP team found Student eligible for special education and related services. In addition to the Parents, the IEP team consisted of District special education program supervisor Kathrene Hatzke, a school psychologist, a preschool teacher, a speech therapist, an occupational therapist, and Milestones assistant director Becky Mengarelli. The evidence showed that autism was the only category of eligibility considered by the assessors and that no question about eligibility was discussed at the meeting.

9. The November 2006 IEP team made its offer for eligibility and placement after consideration of District's November 2006 Preschool Team Report, the November 7, 2006 speech and language assessment report, the June 20, 2006 occupational therapy progress notes, and a November 10, 2006 Goals and Objectives report from Milestones. The joint Preschool Team Report reported that Student was referred by the Regional Center of the East Bay "because he was diagnosed with an Autistic Spectrum Disorder and is in need of early intervention services." The report concluded that Student was eligible for special education and there was no discussion of any other category of eligibility. However, the report incorrectly stated that Student's diagnosis from Kaiser was not autism, but pervasive developmental disorder-not otherwise specified (PDD-NOS), another disability on the spectrum. The report found it was difficult for Student to stay focused on table activities during a behavior assessment, and that he needed goals in the social/emotional domain. The District members of the team considered three possible placements, including a special day class (SDC) at Hopkins Preschool, a general

education class with inclusion support, and an integrated class of both disabled and typically developing children. They recommended a full inclusion general education preschool classroom placement with instructional aide support for three hours a day, two 30-minute occupational therapy sessions per week plus one monthly consultation, and two 30-minute speech and language therapy sessions per week.

10. Parents informed the team members that the Preschool Team Report was incorrect because Student had been diagnosed with autism. In addition, Parents were critical of the proposed annual goals because Student had already met some of them and District's assessors did not have much time to assess Student and generate their reports prior to the initial IEP meeting. Parents wanted to observe all three potential placement options in order to evaluate District's offer. The team agreed to reconvene on December 8, 2006 to "officially discuss" the offer.

11. On December 8, 2006, the IEP team reconvened to further discuss the placement and proposed goals. District's special education program supervisor Kathrene Hatzke, preschool teacher Joni Miller, Milestones assistant director Becky Mengarelli, Parents, and Student's advocate Karlin Merwin from the Law Office of Roberta Savage were present at the meeting. Parents raised more concerns about the assessments upon which the placement and goals were based because no one observed Student in his preschool setting or in his in-home ABA program, and were again critical of the goals. Parents pointed out that Student had a one-to-one aide with him at his private preschool and did not understand why District did not offer an aide or an ABA program.

12. Ms. Hatzke credibly testified that she learned for the first time at the December 8, 2006 IEP meeting that school psychologist Amy Rosenbaum and preschool teacher Joni Miller had not observed Student in his home ABA program with Milestones or his preschool class environment when they conducted their respective psychological and cognitive/pre-academic assessments. She had assumed at the November 17, 2006

IEP meeting that they had observed Student in a variety of settings when in fact they had jointly observed him once for about 45 minutes in a play based assessment in the District's assessment room. Ms. Hatzke immediately informed the team that further assessment of Student was necessary to complete the District's assessment to obtain more accurate information about his levels of performance, functioning and needs. The team agreed that further assessment and observation of Student was warranted.

13. On the same date, December 8, 2006, Student's mother signed a letter giving permission for the District to observe Student in his home ABA program with Milestone and in his preschool class at the Fine Arts Preschool. Parents understood and consented to continue the IEP meeting and to reconvene it when the additional observation and assessment was completed. No new IEP meeting date was scheduled at that time.

14. On December 14, 2006, six days later, Student's attorney Roberta Savage faxed a letter to Ms. Hatzke's attention, in which she gave notice of Parents' intent to seek reimbursement from the District of the costs of Parents' private educational placement and services. The letter criticized District's desire for further assessment and asserted that District had already had an opportunity to assess Student. The letter stated that Parents disagreed with District's offer of placement, services and goals made at the November 2006 IEP meeting.

15. District reasonably interpreted the above letter to mean that Parents declined any further assessment of Student, and requested reimbursement for their private educational costs. However, in January 2007, Ms. Rosenbaum and Ms. Miller called Parents and left messages trying to set up appointments to observe Student as agreed upon on December 8. On January 17, 2007, Parents emailed the District members of the IEP team in response, indicating that they did not understand why further assessment was necessary. Further communications between the parties or their

attorneys took place that spring, in one of which Parents inexplicably averred they were waiting for another assessment plan.

16. Parents never made Student available for further observation and assessment and District never convened another IEP meeting. During a mediation meeting on September 12, 2007, the parties settled all issues pertaining to the 2006-2007 school year through that date. Commencing on September 13, 2007, there was no existing IEP offer on the table from the District because Parents had rejected it in December 2006. Student's complaint, filed in August 2007, included the 2007-2008 school year. District was therefore obligated to proceed to reassess Student and make an offer of services for Student's entry into the District's public school system.

2007 ASSESSMENTS

District's 2007 Psychoeducational Assessment

17. Before any action is taken with respect to the initial placement of a student with exceptional needs in special education, an individual assessment of a student's educational needs shall be conducted. An individualized education program (IEP) meeting to review the assessment must occur within 60 days of the receipt of parental consent for the assessment.

18. Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall be conducted if the LEA determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment. The LEA shall conduct a reassessment if the pupil's parent or teacher requests a new assessment.

19. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. If a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an independent educational evaluation (IEE) under certain circumstances. The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district must: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense.

20. On September 12, 2007, the parties agreed that District would reassess Student to obtain updated information regarding his levels of performance, functioning, and needs, and that an IEP team meeting would be scheduled on November 8, 2007, within 60 days of the mediation meeting. However, District's initial assessment of Student in the fall of 2006 was admittedly incomplete and Student never enrolled in the District or received any special education services from it. Therefore, District's assessment in the fall of 2007 was still an assessment for initial placement.

21. District delayed scheduling Student's assessments until late October 2007 when its personnel were notified that they had less than two weeks to conduct assessments prior to the IEP meeting on November 8, 2007. Parents were first contacted by the occupational therapist on October 26, 2007.

22. District school psychologist Holly Lee assessed Student on November 1 and 5, 2007. Ms. Lee obtained a Bachelor of Arts degree in Psychology in 2000, and a Master of Science degree in Counseling, clinical child/school psychology and marriage and family therapy in 2004. From the mid-1980s, she was a paraprofessional educator

and administrative assistant. She was a psychologist intern with the District for the 2004-2005 school year, and has been a school psychologist with District since August 2006. Ms. Lee has conducted many assessments, including about 35 of children on the autistic spectrum, most of whom had low cognitive functioning. Ms. Lee does not diagnose medical disabilities but applies the special education eligibility criteria in the Education Code.

23. Ms. Lee reviewed prior records and reports, including the 2006 assessments, observed Student at home interacting with his mother for about an hour, interviewed his mother for over an hour more, observed Student at the Fine Arts Preschool for about an hour and a half on November 5, 2007, along with District's speech therapist, and special education teacher. She administered the following assessment tools: Vineland-II Adaptive Behavior Scales (ABS), Parent/Caregiver Rating Form, Vineland-II ABS, Teacher Rating Form, Gilliam Autism Rating Scale (GARS), and the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPCI-III). The assessment tools were all standardized tests that were selected and administered so as not to be racially, culturally or sexually discriminatory, and were administered in English, Student's primary language. The tests were validated for the specific purposes for which they were used to assess Student.

24. Parent reported to Ms. Lee that Student's areas of concern were self-help skills (specifically toileting and tactile sensitivity around eating), aggressive behaviors when upset (grabbing, pushing or hitting), difficulty with sustained attention, and limited play repertoire.

25. Ms. Lee conducted the Vineland-II ABS, Teacher Rating Form, verbally over the telephone with Karen Quesada, Student's teacher at Fine Arts Preschool, for about 45 minutes while Ms. Quesada was driving in her car. Ms. Quesada has been a preschool teacher for over 20 years, and lead teacher at Fine Arts Preschool for four years. Ms. Lee

read the questions and the rating answer choices to her over the phone and never sent her the form.⁷ Ms. Quesada informed Ms. Lee that she had been Student's teacher only since the beginning of the school year,⁸ and recommended that Ms. Lee ask Student's aide from Milestones to complete the ratings since she was more knowledgeable about Student's functioning. Ms. Lee did not ask anyone else to provide classroom ratings and never spoke with Student's classroom aide or any other representative of Milestones, despite the fact that they had been providing Student early intervention services for autism since July 2005. Based solely on Ms. Quesada's answers, Student was rated as "adequate" in the domains of communication (a score of 112, with scores between 85 and 115 being in the average range), daily living skills (102), socialization (97), and motor skills (111), with an overall adaptive behavior composite score of 106.

26. Ms. Lee conducted the Vineland-II ABS, Parent/Caregiver Rating Form, with Student's mother, using the form, and her rating responses were significantly different. Student was rated as "adequate" in the communication domain (93),

⁷ However, Student's mother emailed Ms. Lee and requested a telephone interview with Ms. Quesada because she did not want Ms. Lee to disrupt the classroom, and everyone agreed.

⁸ Ms. Lee insisted that Ms. Quesada told her she had known Student for five months, not two months, but that appears to have been a misunderstanding. However, Ms. Lee testified that it would probably not matter if Ms. Quesada had only known Student for a couple of months because she was rating current behavior. However, since the rating choices included whether the child "is usually able" or is "sometimes able" or is "not yet able" to do something, clearly knowledge of the child over a longer or shorter period of time could make a material difference in the answer.

“moderately low” in daily living skills (79), moderately low in socialization (74), no reported score in the area of motor skills, with a maladaptive behavior index score (internalizing, externalizing) in the clinically significant range. While many of the mother’s rating scores were indicative of autism, Ms. Lee did not give them great weight in her evaluation.

27. The GARS, autism rating scale, was also administered with Ms. Quesada and Student’s mother and no one else. Mother reported that she “frequently observed” a list of behaviors on the autism spectrum, with a resulting autism quotient score of 102, indicating an average probability of autism. Ms. Quesada reported that she “sometimes observed” and “never observed” lists of other behaviors, with a resulting standard score of 83, indicating a below average probability.

28. The WPPSI-III assessed Student’s cognitive functioning. Student’s verbal IQ was in the high average range (113), and his Performance IQ was in the average range (93).

29. Ms. Lee’s classroom observations of Student at Fine Arts Preschool emphasized his ability to communicate verbally with adults. She reported seeing Student play with toy cars with two other boys on a carpet. However, District’s speech therapist, Ms. Ramstad, who observed Student at the same time, reported that Student engaged in parallel play, “but spoke seldom to the other children.” Thus, Ms. Ramstad described the car driving incident as parallel play, and not as appropriate interactive play. District’s special education teacher, Ms. Thies, who was also there, reported that Student watched his classmates play and at times would imitate their play.

30. Ms. Lee concluded that Student did not meet the criteria for an educational “diagnosis” of autistic-like-behaviors because he did not display a combination of autistic-like behaviors on her list of the legal criteria and because, even if he did, there was no showing in her assessment that Student’s needs could not be met

solely within the general education setting, with or without modifications. Ms. Lee concluded that Student was not eligible for special education and related services.

31. Specifically, Ms. Lee did not observe any of the following characteristics set forth in California Code of Regulations, section 3030, subdivision (g):

- (a) Documentation of evidence of developmental disability (generally although not necessarily before the age of three years):
- (b) Any combination of the following autistic-like behaviors, to include but not limited to:⁹
 - (i) Inability to use oral language for appropriate communication
 - (ii) History of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood
 - (iii) Obsession to maintain sameness
 - (iv) Extreme preoccupation with objects and/or inappropriate use of objects
 - (v) Extreme resistance to controls
 - (vi) Peculiar motoric mannerisms and mobility patterns
 - (vii) Self-stimulating, ritualistic behavior
- (c) These deficits adversely affect the student's educational performance; and
- (d) The student's needs cannot be met solely within the general education setting, with or without modifications.

32. Ms. Lee concluded that Student did not meet the requisite history of developmental disability because she believed a Regional Center report regarding

⁹ Ms. Lee's report left out the phrase "to include but not limited to," leaving the impression that the list is exclusive when it is not, and also used the phrase, "a combination of" instead of "any combination of..."

Student's autism was erroneous and based on outdated information, and she relied on District's 2006 assessment's erroneous conclusion that Kaiser had diagnosed Student with PPD-NOS instead of autism. Ms. Lee did not receive the actual 2005 Kaiser report until after the assessment. Ms. Lee testified at hearing that she changed her mind and Student did meet factor (a) above.

33. Regarding the autistic-like behaviors under factor (b) above, while Ms. Lee did not find that Student had any inability to use oral language for appropriate communication, her assessment of his language skills was limited, and she did not consider his lack of oral communication with his peers. Other witnesses, including other District assessors, Student's preschool teacher and ABA service provider, established that Student communicated in class primarily with his aide, sometimes with the teacher, and did not initiate communication with his peers. Lack of initiation of oral communication with other peers in the class demonstrates an inappropriate use of oral language.

34. Regarding factor (d) above, Ms. Lee testified that she observed Student do "quite well" in his class at Fine Arts Preschool, where she conceded he was supported by a one-to-one ABA aide. Ms. Lee has only experienced one-to-one aides in connection with severely handicapped children. Ms. Lee stated that she did not observe Student without his aide present because having his aide in class was Student's "natural setting" for purposes of her assessment. Ms. Lee did not assess Student's levels of performance in the classroom without his aide.

35. Ms. Lee's assessment report, dated November 7, 2007, cautioned that the results may not be "a valid estimate of [Student's] cognitive functioning" because Student had difficulty being cooperative with her, was often off-task and needed to be held by his mother during most of the testing, and was ill and coughing for most of the

assessment. Ms. Lee stated that she would have preferred to have observed Student when he was healthier, but there was not enough time.

36. Ms. Lee emphasized several other factors in interpreting the results of her assessment. First, Student had a history of ear infections until tubes were put in place, and at the time of her assessment, Student still had one tube in place. Student had experienced a "significant language explosion" a few months prior to District's 2006 assessment. In addition, Student had asthma and took the drug Albuterol as needed by using an inhaler at home and a nebulizer at the doctor's office. Based on speculation, Ms. Lee concluded that Student may not have been properly diagnosed with autism because ear infections can cause hearing loss, and since Student's ear tube surgery, his language and communication skills had blossomed. However, Kaiser's 2005 medical evaluation showed no hearing problems whatsoever. Ms. Lee did not consider that Student's early intervention services with the Regional Center and Milestones could have had anything to do with his language improvement. She did not think Student needed any ABA services, although she did not observe him in his home ABA program or assess in that area. Ms. Lee also speculated that Student's inattentive, off-task and aggressive behaviors during the assessment were attributable to the drug Albuterol, and not to autistic-like behaviors. Parents, who regularly monitored administration of the Albuterol to Student, did not observe any adverse effects such as increased attention or aggression, with the exception of increased energy at night when he should have been sleeping.

37. Ms. Lee's administration of the Vineland teacher form was inappropriate because it was limited to only one teacher who had known Student for a short time and she did not distribute the rating scales to several instructors, therapists, or the aide, in order to get a broader picture of the range of evaluations. Secondly, despite the fact that in December 2006, District admitted it should have observed Student in his home

ABA program (as well as in the preschool), and continued an IEP meeting in order to further assess Student. Ms. Lee did not observe Student in his ABA program either at home or in Milestones' enrichment preschool program. Her assessment of Student's communication and social skills, two of the core areas associated with autism, was limited. She overlooked information that Student did not initiate communication with peers, and undervalued the significance of Student's recent growth and progress during a period of early intervention for autism. Her opinions were also influenced by speculation about undocumented hearing loss and drug side effects. Accordingly, District's November 2007 psychoeducational assessment was inappropriate and denied Student a FAPE.

District's 2007 Speech and Language Assessment

38. District's speech therapist Vivian Ramstad conducted a speech and language assessment on November 5 and 6, 2007. Ms. Ramstad obtained a Bachelor's degree in audiology in 1964, a master's in speech and language therapy in 1971, and a Doctor of Philosophy in Education. She has many years experience as a speech therapist, with particular expertise in sensory integration development, including working with and assessing children with autism. Ms. Ramstad reviewed District's 2006 speech assessment done by Louise Fender, and reviewed the other reports. She noted that District's 2006 assessment concluded that Student had been in a "growth explosion of language" for about two months prior to that assessment. "Testing at the time of her report, 11-06, thru Alta Bates [Hospital in Berkeley] indicated that receptively he was functioning within the 25-27 month range ... and his expressive skills were at 16-22 months." Ms. Ramstad saw the language explosion primarily as indicative of higher functioning capacity.

39. District did not assign Ms. Ramstad to do the 2007 speech and language assessment until shortly before the scheduled IEP meeting on November 8, 2007 and she credibly established that she did not have enough time to do a thorough evaluation.

While she would have preferred to do a more comprehensive evaluation, Ms. Ramstad believed the “brief” work she did was sufficient to assess Student’s language functioning for an annual update, and took Student’s diagnosis of autism for granted. She did not contact Student’s private speech therapist for an interview or information. She did not conduct a comprehensive initial assessment addressing the issue of eligibility for services.

40. Ms. Ramstad observed Student in his preschool environment along with Ms. Lee, the school psychologist, and Deborah Thies, the special education teacher. All three of them observed Student at the same time and wrote down “verbatim” things he said. She also observed Student at Hopkins Preschool School in the District.¹⁰ Ms. Ramstad never observed Student talk to his peers at Fine Arts Preschool or focus on them. She did observe him to engage in any reciprocal play with his peers or parallel play near them (following along or imitating the play of his peers). She concluded that Student had good pragmatic skills to relate to his aide and his teacher but not to his peers. She noted in her report that Student had sensory issues, such as often leaning, touching both himself and his aide, fingers in his mouth and nose, pressing one hand with the other, in motion, or touching his aide. Ms. Ramstad testified that she believed he needed additional services that an occupational therapist could provide in the areas of sensory integration. She did not put that in her report but informed District staff.

¹⁰ Student contends that sending all three assessors to observe Student in his preschool at the same time was inappropriate. The Fine Arts Preschool director and teacher both wrote letters objecting to this procedure. However, Student failed to establish any observation standards in the industry on this point and did not establish any prejudice.

41. In the area of receptive language, Ms. Ramstad used the receptive language portion of the Preschool Language Scale, a standardized test, and found Student to be functioning in the 70th percentile or at an appropriate age equivalent of 4.2 years. Student appeared to be listening and responsive, his actions were aligned with his understanding, he followed directions, answered questions, and was not confused. However, this general description conflicted with her observations of him during circle time, where Student had to be moved repeatedly to come and to stay in the circle, he shifted attention to his toy car, and it required several repetitions for each request to get him to follow directions. In general, Student's aide prompted him and kept him quiet by physical touching.

42. Although expressive language was documented as an historical area of deficit for Student, Ms. Ramstad did not administer any standardized tests to evaluate Student's functional expressive language. She instead gathered and listed a series of sentences obtained from the psychologist, teacher and her personal observations, to show the range and complexity of his expression, without any contextual reference. Student used many sentences of four to ten words. Ms. Ramstad conceded it was not a formal language sample. However, she was not aware that Milestones had been working with Student using scripted phrases. Ms. Ramstad observed what she recognized as behaviors characteristic of autistic-like behaviors, including repeated car wheel movements, rotating a toy robot (or gorilla) from his head down to the ground repeatedly, and getting down to eye level on the floor rotating a string of beads.

43. Ms. Ramstad's report did not make any formal recommendations. She was complementary of all those who had worked with Student over the previous two years because of the significant progress Student had made compared to earlier evaluations. Ms. Ramstad's report mentioned that, "with help and time" Student's interaction skills would lead to social pragmatics and play with peers, and that he needed to continue

developing flexibility with his language. She recommended a formal assessment of all areas when he enters kindergarten.

44. As set forth in Factual Findings 69 through 71 herein, in January 2008, District justified determining that Student was eligible for special education under the speech and language impairment category using Ms. Ramstad's assessment along with other information. Based on her own testimony, she did not conduct a comprehensive assessment of Student's eligibility and did no standardized testing of Student's expressive language. She nevertheless found his expressive language to be "age-appropriate" without regard to his significant historical deficits in that area. No standardized tests of pragmatic language were available for Student's age; nevertheless, Ms. Ramstad did not make any inquiry into his pragmatic communication skills with his peer. Ms. Ramstad's assessment was therefore insufficient and inappropriate for that purpose.

District's 2007 Academic Readiness Assessment

45. Deborah Thies is a special education teacher with the District and teaches an integrated special day class (SDC) at Hopkins Preschool. She obtained a Master's degree in Early Childhood Special Education in 1998. She holds a clear, level two Early Childhood Special Education teaching credential. Ms. Thies has conducted over 100 academic readiness assessments over the past six years. She similarly only had about a week and a half to schedule and conduct the assessment and prepare a report before the IEP meeting on November 8, 2007. She conducted the academic readiness assessment of Student by observing him on November 5, 2007 for about one and a half hours at Fine Arts Preschool, along with two of District's other assessors. On November

6, she conducted assessments of Student at Hopkins Preschool,¹¹ using the Developmental Indicators for the Assessment of Learning (DIAL 3), and the Teacher Made Assessment.

46. There were about 15 children in Student's class with 3 adults including Student's one-to-one aide. During free play time, Ms. Thies observed Student watch other children and imitate their play but did not approach or interact with them. Student protested the transition to circle time and his aide assisted him, having to restate the command several times. He required prompting to attend to a group song, had difficulty staying still, rolled on the ground, and hit his aide. He had difficulty with several other transitions including table time and potty time, and was again observed slapping his aide.

47. Ms. Thies testified that if she had had more time she would have observed Student in the classroom separate from the rest of District's team, and in his play group at the Milestones class, to obtain more data. Parents informed her that academics were not a great area of concern for them, and that of more concern was the area of play. Ms. Thies assumed Student was autistic pursuant to District's 2006 assessments.

48. District did not have a complete preschool academic readiness test, so Ms. Thies obtained the DIAL 3 from another school district and had not used it before. The academic readiness testing took about a half an hour at Hopkins, and Student took brief breaks but was easily redirected. He was able to engage in a variety of tasks and skills and exhibited understanding of concepts including longest, most, empty, night, full and littlest. Ms. Thies concluded that Student presented with age appropriate to advanced prekindergarten skills. She noted that he demonstrated difficulty with transitions, and

¹¹ Ms. Thies' report dated November 7, 2007, refers to the school as the Hopkins Early Childhood Center.

may benefit from picture schedules for his preschool day, advance reminders of upcoming transitions, and structured activities to enhance his social skills with peers. At hearing, Ms. Thies persuasively established that these features are available and used in her integrated class at Hopkins, and a transitioning goal was offered by the IEP team.

49. District's preacademic assessment report supplemented District's 2006 assessment. Student's cognitive ability was age appropriate and academic readiness was not an area of concern to Parents. In addition, there was no suggestion that Student had a specific learning disability such that standardized measurements of his levels of preacademic functioning would be necessary in evaluating his eligibility. Observing Student in his home ABA program, while helpful, did not implicate information needed to determine his eligibility for special education. Student did not establish what other tests or assessment tools Ms. Thies should have used at the preschool level. Accordingly, District's academic readiness assessment was appropriate.

District's 2007 Occupational Therapy Assessment

50. Paulette Schafir, an occupational therapist with the District, conducted the occupational therapy assessment of Student in his home. Ms. Schafir obtained a Master's degree in occupational therapy in 1998 and has been an occupational therapist with the District since 1999. She has training and experience in treatment services for children on the autistic spectrum or whose characteristic behaviors may be similar. She was not notified by the District to assess Student until the end of October 2007. She reviewed District's 2006 assessments and accepted the diagnosis of autism. On November 3, 2007, she assessed Student for about an hour and a half with his ABA aide and the director of Milestones, Susan Nachand present. Student's father was in a different room and his mother arrived home shortly before the end of the assessment. The assessment included clinical observation during both free play and therapist-directed activities, and informal interviews with Parents, the ABA aide and Milestones'

director. Student had good attention but required assistance transitioning between activities.

51. Ms. Schafir would have preferred to observe Student in his preschool setting, as well as Milestones' enrichment class, but there was not enough time. She examined Student's fine motor skills, gross motor skills and sensory processing using a variety of objects, toys and activities. Overall, Student demonstrated functional fine motor skills but did not have consistent age-appropriate grasp patterns and lacked motivation in drawing tasks which was a barrier to mastering fine motor skills. Student's gross motor skills were age-appropriate and he was able to run, jump and use his arms. Ms. Nachand reported to her that Student could ride a tricycle but needed help steering because he becomes distracted looking at the wheels turning.

52. District's 2006 occupational therapy report documented behaviors consistent with sensory processing impairment. In the 2007 assessment, Ms. Schafir understood Student was receiving private occupational therapy, but no report was available. Ms. Schafir analyzed thirteen observed and reported sensory behaviors, their possible purposes and causes, and the sensory system involved, including spinning, seeking movement/crashing, leaning/lying on people, biting, resistance to touching textures, pinching/hitting, poor sustained attention, avoidance of hand holding, restricted diet, and not indicating soiled diaper. Ms. Schafir was persuasive in confirming that these behaviors involved impaired sensory processing involving both registration and modulation of sensory information across most of his sensory systems, and that many of these behaviors were consistent with autistic behaviors. Student needed sensory based activities throughout his day and night to assist him to access learning and participation. At the time of her assessment, Student was not toilet trained, and required assistance with most dressing tasks, and he had a low frustration threshold for self-care.

53. Ms. Schafir concluded that Student needed intervention for sensory processing impairment, which affected his participation in daily life skills, learning and socialization. She recommended annual goals in the areas of fine motor, sensory processing, attention, and self care, direct occupational therapy for 60 minutes per week, and 45 minutes per month of consultation services for school staff and the family to work on those goals.

54. Ms. Schafir credibly established that there were no standardized assessments for Student's preschool developmental level in the area of occupational therapy. Her reliance on clinical observations and interviews to supplement District's 2006 assessment was therefore reasonable and resulted in an appropriate assessment.

November 2007 IEP Meeting and Independent Psychoeducational Evaluation

55. On November 8, 2007, the IEP team convened a meeting to review District's assessments and discuss Student's educational placement. District's assessment results and reports were presented to the team, including Parents. School psychologist Ms. Lee discussed the educational criteria for autism and explained why Student was not eligible for special education according to her assessment. Since the District had offered eligibility a year earlier under the autistic-like category, Parents were surprised and confused. The IEP meeting notes stated: "Both attorneys caucused and it appears that the parents disagree with the assessment and will be requesting an IEE [independent educational evaluation]." The eligibility section of the IEP was not filled out, and the meeting terminated.

56. On November 19, 2007, Student's attorney Ms. Savage faxed a letter to Mr. Sturges, attorney for the District, requesting District's agreement that Cynthia Peterson, Ph.D., was available to conduct the IEE. The letter indicated that if District did not agree to fund Dr. Peterson's evaluation, Parents would proceed with it and seek

reimbursement from the District. District did not agree to fund the IEE. At some point after Dr. Peterson's IEE, and after the winter holidays, an IEP meeting was scheduled for January 25, 2008.

57. Dr. Cynthia Peterson, a licensed psychologist and pediatric neuropsychologist, was retained by Parents to conduct an independent evaluation of Student, which she conducted on November 27, 29, and 30, 2007. Dr. Peterson charged the family \$6,013.20 for the evaluation, representing 27.2 hours of evaluation and report writing at the rate of \$220 per hour. Parents paid the invoice and request reimbursement herein.

58. Dr. Peterson obtained a Bachelor of Science degree in elementary education in 1991, and a Master of Arts degree in clinical psychology in 1992. In 1996, she obtained a Doctor of Philosophy degree in clinical psychology. In addition to her private practice, Dr. Peterson is a consultant for Hastings School of Law Special Needs Clinic, and for several years was with the Department of Neurology, Pediatric Neuropsychology Assessment Service at Children's Hospital in Oakland. She has conducted over 800 medical assessments in the past eleven years, about 25 percent of which involved developmental disorders including autism. Dr. Peterson also conducts special education eligibility assessments for both students and school districts, and has conducted about 200 educational assessments involving autism since 1996.

59. Dr. Peterson was critical of District's November 2007 psychoeducational and speech and language assessments, and concluded that Student met the educational criteria of eligibility for special education under the category of autistic-like behavior. Dr. Peterson did not duplicate District's 2007 assessment tests. She reviewed Student's other prior records and reports, and observed Student in her office during about five hours of additional testing, in his preschool class environment for about an hour, and in his home ABA program for about an hour. She spoke to Student's preschool teacher, his

ABA specialists with Milestones, and had Parents and his occupational therapy and speech therapy providers fill out test questionnaires. Dr. Peterson administered the Leiter International Performance Scale-Revised, Brief IQ, the McCarthy Scales of Children's Ability, selected subtests; the NEPSY-II: A Developmental Neuropsychological Assessment, the Diagnostic Analysis of Nonverbal Accuracy-2, and the Autism Diagnostic Observation Schedule (ADOS).

60. Dr. Peterson criticized Ms. Lee's rejection that Student had any documented history of developmental disability related to autism which Ms. Lee has since rescinded. Dr. Peterson found that Student was not able to use oral language to communicate appropriately with his peers in the preschool classroom, that he did not relate appropriately to his peers, and that those deficits were historical. She found that Student did not engage in the typical play of a four year old. Without his aide prompting him, Student often did not initiate parallel play and withdrew. Dr. Peterson questioned the validity of the teacher ratings limited to only Ms. Quesada, who had not known Student very long, and lack of any assessment ratings or interviews with Student's prior teacher, his one-to-one aide, or the Milestones ABA supervisor, all of whom had known him for over a year.

61. Consistent with District's assessment, Dr. Peterson found Student to be functioning cognitively at a strong average to high average level. She defined "high functioning autism" to mean autism that does not involve mental retardation, because mental retardation is often associated with autism.

62. Dr. Peterson persuasively found that Student's language had significant inappropriate use of pronouns, prosody, and intonation for intent, and that his verbal output tended to be stereotyped or echolalic, contrary to that reported by Ms. Ramstad. Student could easily repeat three to four words, or six to eight words if provided in a rhythmic fashion. However, Student had difficulties understanding verbal input unless it

was kept short and uncomplicated, consistent with the spectrum disorder. Student displayed difficulty recalling a story, even with prompting. In addition, Student's pragmatic language skills were poor, and he struggled in social expression. Dr. Peterson found that he performed in the low average range on the NEPSY-II, differentiating emotion given facial expression. Student's score (16th percentile) was only raised to that level because he could identify happiness. In all other areas of emotion, Student incorrectly identified them, including scores regarding feelings of sadness, fear and anger in the impaired range (less than two percentile), and feelings of disgust or neutrality in the borderline range (two to ten percentile).

63. Dr. Peterson found, consistent with the testimony of Parents and service providers who worked with Student, that he exhibited restricted, repetitive interests that generally focused on circles. Student engaged in repetitive restrictive sensory motor play, at the 12-18 month age level. Student was observed perseverating on the spinning actions of objects. In the classroom, he was observed to need his aide's intervention to stop his spinning when he became overwhelmed. In addition, Student displayed resistance to change in routines. Student's conduct did not interfere with the class. Dr. Peterson was the only assessor who asked the ABA aide to leave Student alone during a period of her observation, so she could see what happened. Dr. Peterson was persuasive in her conclusion that, without his aide prompting him, Student withdrew from peer interaction and engaged in isolate self stimulating activities such as moving around and watching car wheels spin.

64. Dr. Peterson made a number of recommendations, among which was that Student should have a comprehensive speech and language evaluation conducted by a qualified speech pathologist who is trained and experienced in working with children with autism, and that he should continue with his early autism intervention with Milestones to maintain the benefits achieved and to progress. In addition, she advised

that Student's rapid language progress should be monitored for hyperlexia (reading the word but not understanding the meaning).

65. In comparing Ms. Lee's testimony and psychoeducational report to that of Dr. Peterson, Dr. Peterson's evaluation is given greater weight for a number of reasons. Ms. Lee had only two years of experience as a school psychologist at the time she assessed Student. Her assessment was incomplete and inappropriate as set forth in Factual Findings 22 through 37. Dr. Peterson's experience and qualifications are entitled to greater weight.¹² Her assessment included administration of the ADOS, a nationally standardized assessment tool for the diagnosis of autism, and she balanced her assessment with a variety of tools instead of relying primarily on questionnaire surveys of one teacher. In contrast, Ms. Lee discounted the opinions and observations of other qualified experts in prior reports and evaluations as well as Student's mother.

STUDENT'S ELIGIBILITY FOR SPECIAL EDUCATION AND RELATED SERVICES

66. Student contends that District erred in determining that he was not eligible for special education at the November 2007 IEP meeting. He contends that District erred in determining that he is eligible for special education as speech and language impaired, and instead contends that that he is eligible under the category of

¹² Dr. Peterson's evaluation was not above criticism. She accepted Parents' representations about District's actions at face value without independent verification, and her report consequently contained inaccurate or biased statements. She also gave District the appearance of bias by advocating on Parents' behalf instead of remaining a more neutral participant at the January 2008 IEP meeting. However, Dr. Peterson credibly established that she provides services to many school districts, and, overall conducted a professional evaluation.

autistic-like behavior. Eligibility is at the heart of a school district's offer as it defines or focuses on a student's deficits and the unique needs arising from those deficits that should be addressed in the educational setting. However, a dispute regarding the category of eligibility may not result in a denial of FAPE if there would be no difference in the services offered. Where multiple deficits are involved, districts may find more than one category of eligibility to be applicable. Under the IDEA, the determination of eligibility for special education is not made by a school administrator or psychologist. Instead, the law requires that decision to be made by the student's IEP team. In addition to the legal criteria with specified categories of eligibility and definitional boundaries, there is also room for the team to weigh a variety of factors.

Speech and Language Impairment

67. A child who demonstrates difficulty understanding or using spoken language under specified criteria, and to such an extent that it adversely affects his or her educational performance, which cannot be corrected without special education services, has a language or speech disorder that is eligible for special education services. The criteria includes: (1) Articulation disorder, (2) Abnormal voice disorder, (3) Fluency Disorder, and (4) Language Disorder: the pupil has an expressive or receptive language disorder, in pertinent part, when he or she scores at least 1.5 standard deviations below the mean, or below the seventh percentile for his or her chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics.

68. Ms. Hatzke was present at the January 25, 2008 meeting and interpreted the District's 2006 and 2007 speech assessments, along with all the other assessments and data collected, and found that Student was eligible for special education under the category of speech and language impairment. The other District members of the IEP team provided consensus for Ms. Hatzke's proposal. Ms. Hatzke tried to explain the

basis for District's proposed eligibility to the team orally at the meeting but Parents and Dr. Peterson were upset. The IEP meeting notes merely reported the proposal without explanation. Thus, it would have been important to the participants to have written notice with an explanation and documentation of District's reasoning.

69. The weight of the evidence established that speech therapist Ms. Ramstad did not conduct a comprehensive assessment in November 2007 addressing Student's eligibility as speech and language impaired. Ms. Ramstad testified that she did not play any role in determining Student's eligibility category at the January 25, 2008 IEP meeting because she was not there, although her report was considered. (Factual Findings 38 through 44.)

70. In the District's psychoeducational assessment, Student's verbal IQ on the WPPSI-III was in the high average range (113). On the Vineland, his communication rating scores varied from 112 (teacher) to 93 (parent). In the District's speech and language assessment, his receptive language skills were in the average range (70th percentile). Student's expressive language, an area of historical impairment, was not formally assessed.

71. The weight of the evidence established that Student has language deficits in the areas of expressive and pragmatic language. However, neither party produced evidence consistent with the statutory requirements of two or more standardized tests in either area with standard scores at least 1.5 standard deviations below the mean or below the seventh percentile for his chronological or developmental age. Therefore, Student did not qualify for special education under the category of speech and language impairment pursuant to the statutory definition either by score or percentile and District's offer of eligibility under this category cannot be sustained.

Autistic-Like Behaviors

72. The educational criteria for eligibility under the category of autistic-like behaviors, set forth in Factual Finding 31 regarding District's psychoeducational assessment, involves a four-step inquiry.

73. As set forth in Factual Findings 22 through 37 and 67 through 71, there is a factual dispute between the parties as to whether Student meets the eligibility criteria based on autistic-like behaviors. District's psychoeducational assessment concluded that he did not meet the criteria for autistic-like behaviors, even though most of District's other assessors took Student's autism for granted. The psychoeducational assessment, found to be incomplete and inappropriate, and is therefore not persuasive. District's argument that because Student is now verbal, uses expressive language, and speaks to adults, he is able to use language for appropriate communication ignores the overwhelming evidence that Student rarely speaks to his peers. This was corroborated by Dr. Peterson during her independent assessment.

74. Susan Nachand, the director of Milestones, has held that position since she obtained a Master's degree in clinical psychology in 2004, and has been with Milestones since 1999, beginning as a home tutor. Milestones is a certified NPA providing treatment and services for children on the autistic spectrum. She met Student in July 2005 when he was not able to speak, ran in circles, and self-stimulated, with isolated play. In addition to the home ABA program for Student since July 2005, and the one-to-one classroom aide support at Fine Arts Preschool since September 2006, Milestones also has an enrichment preschool two mornings a week that Student has attended. Ms. Nachand last observed Student in January 2008. She persuasively testified that Student still does not initiate verbal communication with peers, except occasionally in highly structured settings. Student still engages in a perseverative theme of crashing, reverses

pronouns, needs regular reminders and prompts, and still tends to revert to tantrums when transitioning.

75. Student meets the educational criteria for autism because the evidence established that he has the requisite history of developmental disability including a medical diagnosis of autism at the age of one and a half years old. District conceded that his historical development met that criterion at hearing. In addition, he displayed a combination of "any" (e.g., at least two) of the nonexclusive factors listed in the law. Credible evidence established that Student displayed an inability to use oral language for appropriate communication with his peers (virtually none), and had a history of relating to people inappropriately, with continued impairment in social interaction from infancy through early childhood.

76. Student displayed some level or range in all areas considered in the autism inquiry, including a preference to maintain sameness, preoccupation with objects and/or inappropriate use of objects, resistance to controls, and self-stimulating, and ritualistic behavior. However, the evidence did not establish that the behaviors generally rose to the level of "extreme" or "obsessive," compared to prior years. For example, all assessors observed Student regularly acting out resistance to controls, including directions to transition from one activity to another. However, after some prompting and guidance, Student complied, except there were instances of hitting. It was common knowledge among his private providers that he "obsessed" or perseverated on spinning things like car wheels or beads.

77. Credible evidence established that the above deficits adversely affected Student's educational performance, which encompasses his functional ability to play and socialize with his peers. District's emphasis on Student's cognitive strengths thus failed to consider Student's functional performance. Finally, the weight of the evidence showed that Student's needs have been met in his general education preschool setting

only with the daily support and assistance of a one-to-one aide. The Fine Arts Preschool teacher Ms. Quesada, as well as the director Douglas Rowe, and the director of Milestones, Susan Nachand, established by persuasive testimony that Student needs constant prompting and redirection by his aide to stay on task and attend to class activities. District did not assess Student without his aide present and did not establish his levels of performance on his own. Thus, there is no credible objective evidence that Student's needs could be met solely within the general education setting, with or without modifications.

78. In addition, several persuasive factors weigh in favor of finding eligibility as autistic, including Student's age and history of developmental delay with a medical diagnosis of autism. According to District's own 2006 speech and language assessment, as late as June 2006 Student was primarily nonverbal, using signing and picture communication, with "moderate to severe receptive and severe to profound expressive language impairment, severe delay in acquisition of symbolic play skills, moderate impairment of speech production skills/limited phonemic repertoire." Student's rapid "language explosion" in the fall of 2006, and remarkable progress since then, require support to ensure continued progress and to avoid regression, not result in premature removal of intervention and supports to meet his needs. Dr. Peterson's report and testimony on this point were persuasive. All assessors noted autistic-like behaviors, and District's occupational therapist found much of Student's sensory processing impairment to be consistent with autistic-like behaviors. Student is still in preschool and at an age emphasized in the scientific research for effective early intervention.¹³ For all

¹³ Official notice is taken of the 2001 report by the National Academy of Sciences, Educating Children with Autism (Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, Washington D.C.;

of the foregoing reasons, the evidence established that Student is eligible for special education and related services under the category of autistic-like behaviors. District's denial of eligibility at the November 8, 2007 IEP meeting denied Student a FAPE.

However, Student did not establish that District's determination of eligibility as speech and language impaired at the January 8, 2008 IEP meeting denied Student a FAPE. While District's psychoeducational assessment was inappropriate, and disregarded Student's history of autism, his impairments in expressive language, pragmatics and communication with his peers, and other unique needs were taken into consideration when the District offered placement and services, as set forth in Factual Findings 106 through 153.

MISCELLANEOUS VIOLATIONS

79. To determine whether the District offered Student a FAPE in November 2007 and January 2008, the IEP must meet both the procedural and substantive requirements of the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). The first question is whether District complied with the procedural requirements of the law. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or (c) caused a deprivation of educational benefits.

National Academy Press). Dr. Peterson made a general reference to this in her testimony but no citation was provided.

Absence of General Education Teacher from IEP Meetings

80. A student's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment. The purpose of the attendance of a regular education teacher is to obtain that teacher's input and participation, so that the parents and other members of the IEP team will have accurate information upon which to base a decision, and an LEA's failure to ensure this input seriously infringes on the parents' participation in the IEP team meeting. The general education teacher need not be the Student's present teacher.

81. At the November 8, 2007 IEP team meeting, Parents, their attorney Roberta Savage, and Milestones director Susan Nachand were present. The District team members who attended the meeting were Ms. Hatzke, Ms. Lee, Ms. Thies, and Ms. Ramstad.¹⁴

82. On January 25, 2008, the IEP reconvened following the IEE by Dr. Paterson. In addition to Parents and Dr. Peterson, Student's pediatric neuropsychologist, the District team members who attended the meeting were Ms. Hatzke, Ms. Lee, Ms. Thies, and Ms. Schafir.

83. Parents had informed District beginning in 2006 that Student was in a general education preschool classroom at Fine Arts Preschool and that they wanted a full inclusion placement for him among typically developing peers. District staff had finally observed Student in his preschool as part of their assessments in November 2007. District's 2006 IEP offer had offered Student a special education full inclusion placement at Hopkins Preschool, and a full inclusion placement in a regular classroom was one of

¹⁴ Apparently Peter Sturges, attorney for the District, was present but did not sign the IEP for attendance.

the options considered by the IEP team. Without eligibility for special education, however, Student would be placed in the general education setting. Nevertheless, District did not have a general education teacher in attendance at either the November 2007 or January 2008 IEP meetings.

84. On November 8, 2007, District staff recommended that Student would be placed in a general education preschool class because he was not eligible for special education. A general education teacher should therefore have been present at that IEP meeting to provide vital input to the team, including Parents. The director of the ABA program at Milestones provided the IEP team with information about Student's lack of tools to interact with peers, need for adult facilitation to participate socially with peers, and constant reminders to stay on task. A general education teacher evaluating such information could have provided important feedback to the team about how or whether Student's needs could be met in a general education setting.

85. At the January 25, 2008 IEP meeting, District offered a special education placement in Ms. Thies integrated SDC class at Hopkins. The placement offered integration with typically developing peers (approximately 50 percent in the regular early childhood program) and students with disabilities. The overall percentage of time Student would be in the general curriculum was not stated. The IEP provided a space for Parents to sign their consent to waive the presence of any District member of the IEP team, with "general education teacher" typed in the space, but Parents did not sign the waiver.

86. District failed to have a general education teacher at both the November 2007 and January 2008 IEP meetings and thereby committed a material violation at each meeting. The violations were not harmless error because they significantly impeded Parents' opportunity to meaningfully participate in the IEP process and impeded Student's right to a FAPE. The violations therefore denied Student a FAPE.

Absence of District's Speech Therapist from January 2008 IEP Meeting

87. A student's IEP team shall include specified participants, including "an individual who can interpret the instructional implications of the assessment results." The law does not require all of the assessors to personally be present at the IEP meeting.

88. Student contends that District's speech therapist, Vivian Ramstad, should have attended the January 2008 IEP meeting because she conducted the District's speech and language assessment that formed the basis for its offer of eligibility and services under that impairment category.

89. Student's argument would be compelling if Ms. Ramstad had found in her assessment that Student was or was not eligible for special education services due to a speech and language impairment. She would then have been able to interpret the assessment results and instructional implications. However, as found in Factual Findings 38 through 44, Ms. Ramstad did not conduct a comprehensive assessment addressing eligibility. Ms. Ramstad testified that she did not play any role in determining Student's eligibility category, although her report was considered and she proposed two language goals. Moreover, pursuant to Factual Findings 69 through 72, District's special education program supervisor Ms. Hatzke was present at the meeting to interpret the assessments.

90. Ms. Hatzke interpreted the speech assessment, along with all data collected, to support a conclusion to allow Student to become eligible for special education. Therefore, Ms. Ramstad's presence at the January 2008 IEP meeting was not required and District did not commit a violation by her absence. Even if her presence was required due to her many years of experience as a speech therapist, and ability to interpret the implications of her assessment, the violation was harmless error because she did not assess eligibility in this case.

Absence of Private Service Providers from IEP Meetings

91. Student contends that District should have arranged to have Student's private service providers, including his private preschool teacher or other representative from Fine Arts Preschool, his private occupational therapist Cynthia Ng, and his private speech therapist from Speech Inc. present at both the November 2007 and January 2008 IEP meetings.

92. This claim is specious. Parents were represented by legal counsel. The law clearly permits parents, at their discretion, to invite "other individuals who have knowledge or special expertise regarding the pupil, including related service personnel, as appropriate." Parents and their attorney were fully capable of ensuring that Student's private service providers were present, as evidenced by the presence of the Milestones director at the November 2007 IEP and Dr. Peterson at the January 2008 IEP. Since Student was critical of District's failure to contact the two private therapists during their assessments, Student could have made sure they were invited to provide input to the team, and did not. District did not commit a violation by not inviting them.

Predetermination of District's Offer/Failing to Consider a Continuum of Placements

93. A school district violates IDEA procedures if it independently develops or predetermines an IEP, without meaningful parental participation, and simply presents the IEP to the parent for ratification. The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. School district personnel may discuss their proposed options before the IEP meeting or may begin the meeting with initial proposals, provided there is open discussion.

94. Student contends that District predetermined its January 25, 2008 IEP offer, particularly since the IEP document itself was preprinted and stapled together when it was handed out at the meeting. In addition, the placement and services offered were already printed on the IEP services page, as follows: an integrated SDC classroom at Hopkins Preschool, two 30-minute sessions of speech and language per week to address Student's pragmatic language and maintain his levels of expressive and receptive language, and two 30-minute sessions of occupational therapy per week plus one hour per month of consultation to implement a sensory diet. District informed Parents that the IEP was a "draft." There were ten proposed annual goals included in the IEP.

95. District contends that it came to the initial November 2006 IEP meeting with an open mind, and offered Parents three possible placements for preschool, and then continued the meeting so that Parents could observe all three locations. Ms. Hatzke and other staff personally showed Parents a full inclusion class, an SDC class, and the integrated class at that time. In January 2008, Ms. Hatzke established that the District staff again considered the same three possible placements for Student, even though his eligibility category was changed. District had converted to a web-based IEP system, which required information to be typed onto a page in order for it to print that page out. In addition, the form retained portions that had not been filled out in advance.

96. The weight of the evidence establishes that the parties to the January 2008 IEP meeting engaged in vigorous, if not heated, discussion.¹⁵ The IEP meeting notes

¹⁵ While some members of the IEP team had not yet reviewed Dr. Peterson's report, the fact that they were not fully prepared does not prove predetermination of placement. Although Dr. Peterson delivered her report to Parents in December, it was not provided to the District until a week or two before the January 25, 2008 IEP meeting.

corroborate that “classroom placement options [were] discussed.” The meeting was adversarial in nature. District staff felt that Dr. Peterson was acting as Student’s advocate instead of an independent assessor, and that she was too critical of their assessments. In addition, District staff believed that Parents had predetermined their placement of preference at Fine Arts Preschool because that is where Student’s older brother was placed by the District in prior negotiations with Parents. Parents believed that the IEP had been scheduled to review Dr. Peterson’s IEE. They were surprised that District now proposed that Student was eligible as speech and language impaired.

97. By the end of the meeting, District agreed to modify the speech offer to three times a week instead of two, and also agreed to add more goals regarding social skills. Parents agreed to view the offered placement at Hopkins. For the foregoing reasons, the January 2008 IEP meeting involved open discussion, and District did not predetermine the offer of placement or fail to consider a continuum of placement offers at the meeting.

Clear Written Offer of Placement

98. The IEP must contain a clear written offer of placement. This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, and a statement of the anticipated frequency, location and duration, designed to address Student’s unique needs. The offer should contain sufficient information so that the level of the district’s

District nevertheless did not ensure that all District members of the IEP team received a copy of the IEE report prior to the meeting in order to participate in the meeting in an informed capacity.

commitment of resources is clear to the parent, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child.

99. Student contends that the November 2006 IEP did not contain a clear written offer for the location of the offered preschool classroom. However, all issues for the 2006-2007 school year were settled, and that issue is not involved in this case. Student did not raise any specified issue of lack of clarity of the January 2008 IEP offer. Further, no violation for lack of a clear written offer has been identified or found.

Lack of Prior Written Notice

100. "Prior written notice" under the IDEA is required whenever the LEA proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE. The written proposal or refusal must include a description of the action proposed or refused by the district, an explanation, a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action, an advisement of procedural rights, a description of other options considered by the IEP team and the reason why they were rejected, and a description of the relevant factors. A written IEP may satisfy this requirement.

101. Student contends that District failed to provide prior written notice of its determination that Student was not eligible for special education and related services as autistic-like, and instead, finding him eligible as speech and language impaired.

102. District's November 2007 IEP documents, along with its psychoeducational assessment, provided clear notice, that District did not find Student eligible under the autistic-like behavior category. The action proposed was denial of special educational services, and the IEP referenced all assessments, records and reports used. There is no contention that Student did not receive his procedural rights, and in fact, the due

process complaint had already been filed. The option of autism and services was described and considered.

103. In contrast, District's January 2008 verbal announcement at the beginning of the IEP meeting that District was proposing to change Student's identification, evaluation and placement from "not eligible" to eligibility as speech and language impaired, was not accompanied or followed by adequate prior written notice. The proposal was memorialized in the meeting notes without any explanation whatsoever. The short IEP meeting notes did not provide written notice explaining the basis for the proposal or the documentation relied on. Ms. Hatzke testified that the District members of the team, having reviewed the assessments, recognized that Student had pragmatic communication issues that they wanted to address, and they proposed to "stretch" the eligibility criteria in order to offer services. However, she did not explain why the team did not reconsider the autism category in light of Dr. Peterson's IEE.

104. Parents did not understand the basis for the eligibility proposal as of the hearing. District's failure to provide prior written notice of its proposal to make Student eligible for special education as speech and language impaired thus impeded Parents' ability to participate in an informed capacity in the IEP decision making process. It was not harmless error and denied Student a FAPE.

105. In addition, considering the matters set forth in Factual Findings 80 through 86 regarding District's failure to have a general education teacher at both IEP meetings, the cumulative of the violations found above significantly impeded the family's ability to participate in the decision making process of the IEP team, and constituted a denial of FAPE.

DISTRICT'S 2007-2008 OFFER OF PLACEMENT AND SERVICES

106. The second test in evaluating District's offer is whether the IEP developed was substantively appropriate and reasonably calculated to provide Student with

educational benefit. Because District procedurally denied Student a FAPE as determined above, it is not necessary to evaluate whether District's substantive offer would have provided a FAPE. However, in the interest of thoroughness, the offer is examined.

107. An IEP for each child with a disability must include a statement regarding the child's present levels of academic achievement and functional performance; measurable annual goals designed to meet the child's educational needs and enable the child to make progress; a statement of the special education and related or supplementary aids and services to be provided; an explanation of the extent to which the child will not participate with nondisabled children; any individual accommodations necessary to measure performance on state and districtwide assessments; and other information, including the anticipated frequency, location, and duration of the services. Offers are to be evaluated as of the time the IEP team designed them, as part of the IEP, in light of the information available at the time the offers were made, and are not to be judged in hindsight.

Student's Unique Needs

108. A student is entitled to receive specially-designed instruction and related services that meet his or her unique needs and are necessary to assist in benefiting from the education. To that end, a district must identify a student's unique educational needs.

109. At the November 2007 IEP meeting, the IEP team reviewed District's recent assessments. Based on those assessments, the District members of the IEP team concluded that Student did not have any unique needs due to his autism or language deficits that required special education and related services. At the January 2008 IEP meeting, District had identified unique needs in the areas of language, self care, attention, social skills, transitions, fine motor, and sensory processing, and offered goals to address those needs.

110. For the 2007-20008 school year, based on all of the assessment data, the evidence established that Student's unique needs as a result of his disability were in the areas of language, self care, attention, social skills, transitions, fine motor, and sensory processing. While his language deficits included pragmatics, the separate identification of social skills as an area of need comports with the assessment results.

Annual Goals

111. An IEP must include academic and functional goals and special education and related services designed to meet all of the child's unique needs that result from his or her disability so that the child may progress in the general curriculum. The goals must also be measurable.

112. Student's contention that District's 2006 proposed goals carried over into the window period of the beginning of the 2007-2008 school year, after September 13, 2007, is rejected because all issues for the 2006-2007 school year were settled, Parents had rejected that offer, and there was no new offer on the table while District began a new assessment process.

113. For the November 2007 IEP, the parties postponed any discussion of the annual goals because of the dispute about District's assessments and eligibility. However, District's determination that Student was not eligible for special education was in error, and District should have proposed annual goals at the November 2007 IEP meeting.

114. District's argument that the agreement to continue the IEP meeting, because Parents asked for an IEE, included an agreement or waiver of liability is disingenuous. The law clearly required District to do one of two things upon receipt of Parents' request for an IEE: either provide it or file for due process. District did neither. It did not fund Dr. Peterson's evaluation, agree to reimburse Student for it, or file for due process to establish the appropriateness of its assessments. District did not produce any

written agreement about the scope or effect of the continuance of the November 2007 IEP meeting or elicit any testimony at hearing to establish that the continuance excused District's failure to propose goals to meet Student's needs until the meeting reconvened.

115. At the January 2008 IEP, District IEP members proposed ten annual goals for Student in the areas of language (expressive and receptive language maintenance, understanding, and communication with peers), self care (toileting and dressing), attention (verbal reminders and increased attention to non-preferred tasks), social skills (cooperative play with communicative intent), transitions (visual schedule and advance warning), fine motor (pencil and tool grasp patterns), and sensory processing (sensory based activities and decreased sensory seeking and avoiding).

116. Student contends the goals were inappropriate because, according to Milestones, most of the goals had been "partially met," and two of the goals (self help dressing for jacket, pants, and shoes; and language maintenance and understanding) had been met. However, the July 12, 2007 Milestones Progress Report stated only that Student's self help dressing goal for socks and shoes had been met, and that the goal for pants was partial or in progress. For District's language maintenance and understanding goal, Milestones had detailed multiple goals over several pages, most of which were reported as met. However, the goals do not correlate directly with District's goal, which was based on Dr. Peterson's concerns to support Student's rapid language growth. Student's contentions are not supported by the evidence.

117. Student also contends that District's goals are inappropriate because they failed to address areas of need that had been identified by Milestones. Parents had withheld any information about the July 2007 Milestones goals until the November 2007 IEP meeting, when District saw them for the first time. However, by January 2008, District should have had time to have reviewed and considered them.

118. The goals detailed by Milestones did not purport to address Student's access to his education in the preschool environment. Susan Nachand, Milestones' director, stated that Milestones identifies all areas of child development. Its revised goals as of July 27, 2007, contained 37 separate goals, including ten in the area of fine and gross motor skills and five in cognitive/pre-academic skills. The mere fact that District did not adopt all of the Milestones goals does not demonstrate they were all necessary to meet Student's unique needs related to his education. As to Milestones' five behavioral goals to address Student's pinching, pushing or crashing into others, tantrums, hitting, and biting, District's assessments did not reveal behavioral problems overall. The assessors did observe Student hit his aide, and engage in mild resistant behaviors on transitioning, which were successfully redirected. In the event behavioral excesses interfere with Student's access to the classroom or other students' education, the EIP team would be obligated to address those concerns.

119. The evidence established that District's goals encompassed most of the general areas that Milestones' more detailed goals addressed. In addition, the team anticipated working with Parents to modify and mold them during and/or after the January 25, 2008 IEP meeting.

120. As set forth in Factual Findings 30 through 44, and 110, the evidence does not support a finding that the District's proposed goals were inappropriate or not measurable, except to the extent that a comprehensive speech and language assessment to be conducted may point to modifications or additions.

Placement and Services

121. A school district is required to provide instruction and related services that are designed to meet the student's unique needs and are reasonably calculated to provide the student some educational benefit. The IEP must contain a statement regarding the student's present levels of academic achievement and functional

performance, and a statement of the special education and related or supplementary aids and services to be provided.

INTEGRATED SDC CLASS AT HOPKINS PRESCHOOL AND AIDE SUPPORT

122. District did not make any offer for placement and services at the November 2007 IEP meeting. District would not be liable for lack of an appropriate offer from September 13, 2007, to that date for the reasons previously found herein. (Factual Findings 17, 20, and 55.) Since District's determination that Student was not eligible was flawed, District should have made an offer of placement and services on November 8, 2007.

123. On January 25, 2008, District offered placement in an integrated SDC class at Hopkins Preschool for 180 minutes per day, five days a week "to address IEP goals and provide access to typically developing peers." There is no offer of a one-to-one classroom aide to support Student.

124. District's integrated SDC class at Hopkins is taught by Deborah Thies. As set forth in Factual Finding 45, Ms. Thies is an experienced and credentialed early childhood special education teacher. She has also received training regarding integrated play groups and social communication/emotional regulation transactional supports specific to autism. She conducted the academic readiness assessment and observed Student in his preschool at Fine Arts.

125. District's integrated SDC class has twelve students and Student would bring the total to thirteen. In addition to Ms. Thies, there are two instructional aides in the class on a full time basis, providing a low student to adult ratio of about four to one. In addition, the speech therapist and occupational therapist generally come into the classroom to provide those services to individual students and to the group (push-in services). The students are approximately fifty percent typically developing children and fifty percent children with disabilities. The class is highly structured, and uses the Picture

Exchange Communication System (PECS), among other strategies and methodologies, with a lot of visuals for learning and reminders, circle time, and academic instruction. The class would address Student's needs in pragmatics as typically developing peers are right there in class to model appropriate play and language throughout the day. The teacher directs the activities of the class and the instructional aides are trained to prompt and redirect students and draw them in.

126. As to the atypical students with disabilities, several are academically at or above Student's levels of performance and a few are below his levels, one has motoric issues, and one has a problem with transitions. Student objects that he should not be exposed to anyone in the class with lower cognitive or functional performance. However, he did not establish any objective evidence of harm or educational impairment that could result, and failed to consider any possible benefit to Student, such as being a role model. Ms. Thies' testimony was persuasive that there is a good balance of both typical and disabled children, that the class runs very smoothly, calmly and productively, and that, based on her assessment of Student, he would be successful in the class.

127. Student contends that he needs a dedicated one-to-one aide to be successful in the classroom. Ms. Thies credibly testified due to the small class size and low student to adult ratio, she did not think Student would need his own one-to-one aide in the class in order to learn new skills. She uses ABA strategies in the class, including rewards and praise. She noted, based on District's assessments, including her own, that Student demonstrated difficulty with transitions, and would benefit from picture schedules for his preschool day, advance reminders of upcoming transitions, and structured activities to enhance his social skills with peers. These features were available and used in her integrated class at Hopkins. The two additional aides in the classroom were trained to work with all students in the class to provide prompting and redirection

when appropriate. Ms. Thies' testimony was persuasive based on her experience with children on the autistic spectrum with capabilities similar to Student. Student needed a dedicated aide at Fine Arts Preschool because no one else there was qualified to provide the constant guidance he needed each day. Student did not establish that it is necessary to have an individual one-to-one aide in the Hopkins integrated SDC class environment to ensure his attention and participation. However, since the District's assessors did not determine Student's levels of functional performance without his aide, a transition period with his Milestones aide present in the class would be appropriate, accompanied by a fade plan to transition from the ABA aide to the classroom aides. If, during the transition period, Student demonstrates a need for a dedicated one-to-one aide based on objective data, then the IEP team would be obligated to modify the transition plan or add another aide.

128. Parents contend the offered placement is inappropriate because Student should be fully included in a general education setting with an aide to benefit from his education. Student's mother and the Milestones director visited the integrated class and were concerned that there were inappropriate behaviors and missed opportunities for interaction. However, the general education class at Fine Arts is comprised of typically developing preschoolers, and the teacher has no training in special education. The class did not offer Student strategies and structures such as picture schedules and relied exclusively on Student's ABA aide to prompt and redirect Student and provide him sensory input. Even if Fine Arts were otherwise an appropriate placement for Student, the inquiry is on whether District's placement offers a FAPE and not on the Parents' preferred placement.

129. For the above reasons, District's proposal for the integrated SDC would be appropriate to provide Student a FAPE, provided the team added an addendum for a transition plan.

TRANSITION FROM PRIVATE SCHOOL

130. Where appropriate, an IEP shall include provision for transition into the regular classroom program if the pupil is to be transferred from a special day class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day.

131. Fine Arts Preschool is not an NPA providing private special education services to Student, but is a nonpublic, city-run program for general education preschoolers. District's staff planned to discuss transition options with Parents at the January 2008 IEP meeting, but did not reach that point because the meeting terminated. The weight of the evidence demonstrates that Student has relied on and benefited from an individual ABA aide at Fine Arts Preschool since September 2006. In addition, Student has difficulties with transitions, including schedule changes and District has verbally offered a goal to address his transitioning needs. However, there was no transition plan in the District's January 2008 IEP proposal to address Student's change of schools and change of instructional aides, and no explanation why such a plan was not part of the offer.

132. Specific legal mandates for the inclusion of a transition plan in the IEP, including upon transferring from an SDC class or NPA into a general education class in a public school, do not prohibit the inclusion of a transition plan where it would be appropriate to meet a child's unique needs related to his disability. Student established that he needed a transition plan to help him move to a new school, to fade out his Milestones aide and to fade in the District's classroom aides over a reasonable period of time.

OCCUPATIONAL THERAPY SERVICES

133. Related services must be provided by the District if a student's unique needs related to his disability require such services for the student to obtain educational

benefit. Parent contends that District's offer for OT services does not provide a FAPE because, since Student still has fine motor deficits, he should continue to receive direct OT services to address those deficits.

134. At the January 25, 2008 IEP, District offered two 30-minute sessions of direct occupational therapy services and 45 minutes of occupational therapy consultation monthly, based on the November 2007 assessment by Paulette Schafir, as was found appropriate in Factual Findings 50 through 54.

135. Student contends that he needs one one-hour session each week, based on the recommendation of his private occupational therapist, Cindy Ng. Ms. Ng obtained a Bachelor's degree in occupational therapy in 1994, is licensed by the State, and has been providing occupational therapy evaluations and treatment since then, including autism intervention, and as a vendor for the Regional Center of the East Bay. Regional Center contacted her in July 2005 to provide services to Student, when he could not sit and complete a task for more than two minutes.

136. Ms. Ng has provided occupational therapy services on an ongoing basis through the present, one time a week for 50 (fifty) minutes, at the rate of \$105 per week. After Student's third birthday, Parents have paid privately for her services. Ms. Ng credibly testified that Student has made rapid progress but still has deficits. The deficits she has been working on are consistent with District's November 2007 assessment. Ms. Ng thinks Student still needs direct occupational therapy for 50 to 60 minutes a week.

137. Student did not establish that the difference between District's offer for two 30-minute sessions of direct occupational therapy a week, and Student's preference for one "one-hour" session was material. District's offer for occupational therapy was reasonably designed to offer Student a FAPE to address his unique needs regarding fine motor skills, self help, attention, and sensory processing as set forth in District's proposed occupational therapy goals.

SPEECH AND LANGUAGE SERVICES

138. District's offer for speech and language services at the January 2008 IEP was for two 30-minute sessions of direct speech and language therapy a week in a small group setting with one peer, pulled out from the integrated SDC classroom, "to address pragmatic language issues and maintain level of expressive and receptive language" as set forth in District's proposed goals. At the end of the January 2008 IEP meeting, District agreed to increase the offer to three times a week, with both individual and small group sessions.

139. Student contends he needs a comprehensive speech and language assessment in order to determine the appropriate amount of therapy, based on the recommendations of Dr. Peterson and his private speech therapist, Alexia Dorsa. Student has been receiving private speech and language therapy from Ms. Dorsa through from Speech Inc, an NPA. Ms. Dorsa obtained an interdisciplinary Bachelor's degree in linguistics, psychology, and speech, language and hearing in 2002, and a Master's degree in speech and language pathology in 2004. Ms. Dorsa is an independent, licensed speech and language pathologist who contracts to provide services through Speech Inc. She has provided private, individual speech and language therapy services two times a week to Student since February 2007. Speech Inc. has charged the family at the rate of \$65 per session, for a weekly total of \$130, and Parents have paid privately for the services.

140. Between February and April 2007, Ms. Dorsa conducted an evaluation and developed a treatment plan in April 2007. The plan has been modified twice since then as Student has progressed, particularly in answering "wh" questions.¹⁶ Student still

¹⁶ The record is unclear whether or when Parents ever disclosed to the District that Student began receiving private speech therapy after District's initial 2006

needs to work on oral syntactically correct questions instead of just grabbing an object or just naming it. His conversational skills and eye contact have improved. Student still does not use possessive pronouns correctly. His ability to handle six-turn conversations has improved, and the frequency of his acting out or biting has declined. Ms. Dorsa credibly testified that Student's social skills are still not age appropriate.

141. At hearing, Ms. Dorsa recommended that her therapy should be increased from 30 minutes to 45 minutes per session, and that a weekly social pragmatics group should be added with one to two other peers with complementary needs. She conceded that Parents agreed with her and Speech Inc. that two 30-minute sessions were appropriate for Student, considering his age and inability to tolerate longer sessions.

142. District's therapy, as offered on the services page of the January 2008 IEP, is not individual but small group sessions with a peer, in part to help Student work on pragmatic communication. At hearing and in District's closing brief, District did not address a third weekly session for individual speech therapy as offered in the IEP meeting notes, and it appears to have been abandoned. Student's closing brief requests an order for two individual speech therapy sessions a week, and does not address a small group session as a speech and language service. Student has not shown that adding one peer to his otherwise individual speech therapy, twice a week, would be detrimental or inappropriate.

143. District's proposal for speech and language services to support the language goals offered is reasonably designed to address Student's speech and language needs to the extent they are known at this time, and is therefore appropriate on an interim basis. However, as set forth in Factual Findings 38 through 44 and 68

assessment. District was not given Ms. Dorsa's treatment plans or progress reports before the hearing and they were not placed in evidence.

through 71, District's speech and language assessment was inappropriate for various reasons, including lack of comprehensive assessment in the areas of expressive and pragmatic language. Following a new assessment, the IEP team should meet and determine whether Student's speech therapy should be modified in any way.

SOCIAL SKILLS TRAINING

144. District's November 2006 initial preschool team report summarized Student's social skills level as follows: "[Student's] social/play skills are below age level expectations at this time. Goals will be written to address this area of need." District's January 2008 IEP offer on the services page does not contain any specific thing called "social skills training." The IEP meeting notes reflect that, toward the end of the meeting, District agreed to develop additional social skills goals. No such goals were identified or presented at hearing. Student's Amended Prehearing Conference Statement does not request social skills training as an express remedy, and neither does his closing brief.

145. District's January 2008 IEP offer addressed Student's needs in the area of social skills deficits by offering him a placement in an integrated SDC classroom with approximately fifty percent of the children being typically developing peers to model appropriate behavior. The integrated SDC class is expressly intended to "address IEP goals and provide access to typically developing peers" while being a smaller and more structured environment than a larger general education classroom. The class is language-rich and social skills are imbedded in the curriculum. The two classroom aides and the teacher would all be there to provide cues, prompting and redirection. In addition, District's proposed annual goals contained three goals that involved social skills: two in the area of language (expressive and receptive language maintenance, understanding, and communication with peers), and a social skills goal for cooperative play with communicative intent. In addition, District's proposal for speech therapy was

for two 30-minute sessions per week, in a small group setting with one peer, to address pragmatic language deficits and the two language goals.

146. For all of the above reasons, District's January 2008 IEP offer appropriately addressed Student's social skills deficits, at least on an interim basis, subject to any changes that may be called for after District conducts a comprehensive speech and language assessment.

ABA SERVICES/REDUCTION IN TOTAL HOURS OF INTERVENTION

147. Student contends that intensive ABA intervention services are necessary to continue supporting Student's progress and access to his education. District made no offer in the January 2008 IEP to provide ABA services to Student, either in the home or in the classroom, through Milestones or any other provider. Distinct from the issue of remedies for denial of FAPE, the question is whether District's offer of placement and services would be appropriate without ABA services. In the January 2008 IEP, District has offered 15 hours per week of preschool in Ms. Thies' integrated SDC class, during which Student would have support from a trained special education teacher in a structured environment, along with two classroom instructional aides to assist him as well as other peers.

148. Student's early autism intervention therapy has been provided by Milestones, which focused solely on its applied behavior analysis methodology, since July 2005. Initially begun with funding through the Regional Center, Parents took over privately paying for the services when Student turned three years old in November 2006, and Regional Center stopped paying for the program. Student has consistently received 27 hours a week of direct ABA services through Milestones, at the rate of \$29 per hour (\$783 per week), as follows: a one-to-one classroom aide with Student at Fine Arts Preschool three times a week for three hours each, for a total of nine hours; two weekly Milestones enrichment preschool classes for three hours each, for a total of 6 hours; and

12 hours a week of in-home one-to-one therapy; plus three hours of supervision a month, at the rate of \$73 per hour (\$219 per month). The monthly invoice is \$3,660.

149. The evidence established that Student has needed a dedicated aide at Fine Arts Preschool because the staff there have no training in special education and have no structured strategies or methodologies to help Student in the classroom. They have relied solely on Milestones to address Student's daily deficits and needs and to enable him to participate in the class. Both Mr. Rowe and Ms. Quesada credibly testified that Student could not successfully attend their school without his aide.

150. As set forth in Factual Findings 127 through 132, District's January 2008 offer should include an appropriate transition plan, which would include a plan for fading out the Milestones ABA aide and fading in District's classroom aides. During that transition period, the IEP team would monitor whether Student was able to access his education in the integrated class without a dedicated aide. For example, District's assessors saw that Student needs assistance to participate in circle time. Dr. Peterson's report and testimony were persuasive that Student needs routine attention, prompting and redirecting from an aide to focus and participate. However, Student has not established at this time that only a dedicated one-to-one aide trained in the ABA methodology may provide the needed support to help him participate in circle time or other class activities. Student did not establish that District's classroom instruction, methodologies and strategies were deficient, and Ms. Thies uses some ABA strategies in the class.

151. Ms. Nachand, Milestones director, testified that because Student has learned in the one-to-one environment of their therapy, he should continue to receive that intensified level of intervention across all environments. Student's progress in two short years, during which Milestones provided services as part of his early autism intervention, is consistent with Dr. Peterson's testimony that early intensive educational

intervention has made a significant difference in the educational progress of autistic children. However, no evidence was presented that a particular number of hours is required. Moreover, there is nothing in the law that requires specific instructional methodologies to be included in an IEP, and those methodologies are generally left to the discretion of the district. No evidence was presented that Student is incapable of learning unless the instruction is one-to-one, and his preacademic cognitive functioning shows otherwise.

152. The evidence establishes that the Milestones' ABA enrichment class twice a week, to supplement the Fine Arts Preschool, would no longer be necessary because it would be covered by District's offer for preschool five days a week. As to elimination of the home-based ABA services for 12 hours a week, Student contends that District's proposed reduction in his early autism intervention services from 27 hours per week to 15 hours per week only in the classroom, is inappropriate. However, Dr. Peterson's testimony and report were vague on the issue of ABA intervention. She had no knowledge about District's integrated classroom or the types of strategies and methodologies employed to support educational benefit. There was no evidence that Student could not learn in a group environment with the support of two trained instructional aides or that he still needs home intervention to access his education. While the additional hours may provide Student an optimal opportunity to progress, District is not required to optimize his education at the expense of other Students.

153. Student no longer exhibits many of his previously moderate to severe handicapping behaviors, his language has progressed remarkably, and he has developed many age-appropriate skills. Student does not have excessive maladaptive behaviors or severe autistic behaviors that require intensive intervention at this time. Thus, Student did not sustain his burden of establishing that the home services would be necessary for Student to obtain educational benefit in the integrated classroom. For

all of the foregoing reasons, District's offer without further intensive ABA services would not deny Student a FAPE provided there were a transition plan for the Milestones aide, to monitor the fading in of the District's classroom aides.

REMEDIES AND REIMBURSEMENT

154. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate and replaced services that the district failed to provide. A unilateral educational placement of a child is not required to meet all requirements of the IDEA. Factors to be considered when determining the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*W.G.*, supra, 960 F.2d at p. 1487; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

155. Reimbursement may be denied or reduced based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement "forfeit[ed] their claim for reimbursement."

156. District committed numerous violations that denied Student a FAPE for the 2007-2008 school year. Student requests reimbursement for Dr. Peterson's IEE, and the costs of his private educational placement and related services from Fine Arts Preschool,

Milestones ABA intervention and one-to-one aide services, Cindy Ng for occupational therapy services, and Speech Inc. for speech and language services. Student presented evidence at hearing of expenditures paid for by Parents and calculated for the time period from September 13, 2007 through December 31, 2007.¹⁷ For the period from January 1, 2008, through the date of the Decision herein, Student requests reimbursement for Parents' ongoing expenses from the same persons and entities at monetary rates that are in evidence, but whose totals were not calculated in Student's closing brief. In addition, Student request prospective funding of these services to the end of the 2007-2008 school year in June 2008.

157. Overall, the evidence established that, for the 2007-2008 school year, Parents did not act unreasonably or delay or obstruct District's assessments.¹⁸ They made Student reasonably available for assessment subsequent to September 13, 2007. Parents withheld Milestones' written goals from District's assessors during the assessment process, and only disclosed them at the November 8, 2007 IEP meeting. Parents did not deliver Dr. Peterson's IEE report to the District until only a week or two prior to the IEP meeting of January 25, 2008. Although District had 60 days within which to assess Student, it waited until late October 2007 to begin scheduling assessments prior to the November 8, 2007 IEP meeting, causing both Student and Fine Arts

¹⁷ Pursuant to ALJ Brown's Order Following Prehearing Conference on January 28, 2008, "[t]he party seeking reimbursement of expenditures shall present admissible evidence of those expenditures, or a stipulation to the amount of the expenditures, as part of his case in chief."

¹⁸ While there was evidence that Parents may have been less than cooperative during the previous school year, all issues for the 2006-2007 school year were settled.

Preschool to have to rapidly schedule many assessments in a short time. Thus, Parents actions did not rise to a level of “unreasonableness” to justify a denial of reimbursement.

DR. PETERSON

158. Student is entitled to reimbursement for Dr. Peterson’s November 2007 IEE and report. Dr. Peterson charged the family \$6,013.20 for the evaluation, representing 27.2 hours of evaluation and report writing at the rate of \$220 per hour. As set forth in Factual Findings 55 and 56, Student timely notified District of his disagreement with the November 2007 assessments. District did not file a request for due process to establish at a hearing that its assessments were appropriate. Student has established that District’s psychoeducational and speech and language assessments were inappropriate. Student is therefore entitled to reimbursement for Dr. Peterson’s evaluation in the total sum of \$6,013.20.

FINE ARTS PRESCHOOL

159. During the period from November 8, 2007 through the date of the Decision herein, Student was entitled to a FAPE in a preschool classroom setting. Fine Arts Preschool is a non-profit, fee-based preschool program run by the City of Walnut Creek. Director Rowe credibly established that as a city-run school it is exempt from being certified as an NPA with the State. Parents were charged and paid monthly tuition at the rate of \$330 per month, invoiced on the fifteenth of each month.

160. Douglas Rowe, the Director of the preschool, is certified by California as an early childhood education administrator and has extensive education and experience in education. Fine Arts Preschool addresses children ranging from two to five years old, and has three programs, one for toddlers (2-3 years old), young preschoolers (3-4) and preschoolers (4-5). Art is integrated into all three domains of education:

social/emotional, physical (fine and gross) and cognitive. Student has attended class three times a week, for three hours in each class.

161. In addition to the classroom teacher, Karen Quesada, there are is one instructional classroom aide. Student also has his one-to-one aide from Milestones. As of the hearing, there were 18 children in the class. Excluding Student and his aide, the student/adult ratio is therefore about eight to one. Neither Ms. Quesada nor her aide has any training in special education.

162. The evidence, including the credible testimony of both Mr. Rowe and Ms. Quesada, established that in the absence of Student's aide, the class would not have provided Student the necessary supports to meet his needs. However the evidence established that, with the Milestones aide, Student has benefited from his education and the preschool placement was appropriate. Since the Parents' unilateral placement is appropriate in these circumstances, Student is entitled to the remedy of reimbursement for the costs of his education at Fine Arts Preschool from November 8, 2007, through March, 2008, in the total amount of \$2,178.

However, Student's request for reimbursement for the roundtrip mileage costs of transportation between their home and the preschool is denied for lack of sufficient evidence. First, while Student submitted the total number of daily miles, he did not submit evidence to establish the number of school days in each month for which reimbursement is sought in order involved in order to have a reasonable method of calculation.

163. In addition, as set forth in Legal Conclusions 35 through 38, as a compensatory remedy for District's denials of FAPE District shall be ordered to reimburse Student for the monthly tuition at Fine Arts Preschool to the end of the school year in June 2008, at the rate of \$330 per month, exclusive of transportation.

MILESTONES AND ABA INTERVENTION AND ONE-TO-ONE AIDE

164. During the period from November 1, 2008 through the date of the Decision herein, Student was entitled to a FAPE. As set forth in Factual Finding 162, the presence of the Milestones' instructional aide was necessary for Student to receive a FAPE at Fine Arts Preschool.

165. As set forth in Factual Findings 148, Parents have been privately funding the Milestones ABA services for 27 hours per week of direct intervention, at the rate of \$29 per hour, plus three hours of supervision a month at the rate of \$73 dollars per hour, for a total of \$3,660 per month on an on-going basis. District shall reimburse Student for the period from November 8, 2007, through the date of this Decision as follows: for 15 hours of one-to-one direct ABA therapy and aide services in the Fine Arts Preschool and Milestones enrichment schools per week, at the rate of \$29 per hour, plus 2 hours of supervision per month, at the rate of \$73 per hour. Student submitted an amount in his closing brief of \$12,711 through December, 2007. However, that amount included the time period between September 13, 2007 and November 8, 2007, which is ordered excluded herein. In addition, that amount included a sum for 12 hours of home-based intervention that have not been found necessary to provide Student a FAPE, and is therefore not reimbursable.

166. In addition, as set forth in Legal Conclusions 35 through 38, as a compensatory remedy for District's denials of FAPE, District shall be ordered to reimburse Student for the Milestones ABA services to the end of the 2007-2008 school year at the above rates.

RELATED SERVICES FOR OCCUPATIONAL THERAPY AND SPEECH AND LANGUAGE THERAPY

167. The evidence demonstrated that Student had unique needs related to his disability in the areas of both occupational therapy and speech and language. During

the period from November 8, 2007 through the date of this Decision, Student was entitled to a FAPE which included both related services to address those unique needs.

Student's request for reimbursement for round trip mileage costs of transportation is denied for lack of sufficient evidence. Student did not submit evidence of either the number of miles to and from the location where occupational therapy or speech and language services were provided, or the calendar days involved in order to have a reasonable method of calculation.

168. Pursuant to Factual Findings 135 and 136, occupational therapist Ms. Ng. has charged the family \$105 per week for one 50-minute session a week. Parents are entitled to reimbursement from the District at that rate from November 8, 2007, through the date of this Decision, based on evidence that Parents have been incurring these expenses on an on-going basis. Student submitted an amount of \$1,050 through December 31, 2007, in his closing brief. However, the amount above includes the time period between September 13, 2007 and November 8, 2007, which is ordered excluded herein.

169. Pursuant to Factual Finding 139, speech therapist Alexia Dorsa and Speech, Inc. have charged the family for two 30-minute sessions a week, at the rate of \$65 per session, for a weekly total of \$130. Parents are entitled to reimbursement from the District at that rate from November 8, 2007, through December 31, 2007. Student submitted an amount of \$1,755 through December 31, 2007, in his closing brief. However, the amount above includes the time period between September 13, 2007 and November 8, 2007, which is ordered excluded herein. In addition, Ms. Dorsa testified that she has only seen Student a couple of times since December 31, 2007. Student did not establish evidence of payments made for speech and language therapy since December 31, 2007, and no further reimbursement is warranted.

170. In addition, as set forth in Legal Conclusions 35 through 38, as a compensatory remedy for District's denials of FAPE, District shall be ordered to reimburse Student for occupational therapy and speech and language therapy to the end of the 2007-2008 school year at the above rates.

LEGAL CONCLUSIONS

1. Student, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)
2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

ASSESSMENT

3. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code § 56320.) Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall be conducted if the LEA determines "that the educational or related services needs, including improved academic achievement and functional performance,

of the pupil warrant a reassessment.” (20 U.S.C. § 1414(a)(2)(A); Ed. Code § 56381, subd. (a).)

4. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S. C. § 1414(a)(2), (3); Ed. Code § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code §§ 56320, subd. (g), 56322.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subds. (e), (f).)

5. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an independent educational evaluation (IEE) under certain circumstances. The parent must notify the school district that the parent disagrees with the assessment (but does not need to state why the parent disagrees) and request that the district conduct an IEE at public expense. Faced with that request, the school district must: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense.

Was District’s assessment of Student in November 2007 inappropriate?

6. As set forth in Factual Findings 22 through 44, District’s psychoeducational assessment and speech and language assessments were inappropriate for the primary purposes for which they were used, to establish Student’s eligibility or lack of eligibility for special education under the categories of

autistic-like behaviors and speech and language impairment, and to evaluate his unique needs arising from the disabilities.

7. As set forth in Factual Findings 55 and 56, pursuant to Education Code section 56329, subdivision (b), Parents gave notice verbally and in writing, that they disagreed with District's assessments and requested an IEE. District did not fund an IEE and did not file for due process.

Accordingly, District shall reimburse Student for the costs of Dr. Peterson's independent evaluation in the total sum of \$6,013.20.

District shall fund a comprehensive speech and language assessment by an independent, third party qualified speech and language pathologist with experience and training in assessment of young students with autism.

ELIGIBILITY

8. Under the IDEA and state law, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code § 56026, subd. (a).) For purposes of special education eligibility, the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an "individual with exceptional needs" as a student who is identified by an IEP team as "a child with a disability" pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code § 56026, subds. (a), (b).) California Code of Regulations, title 5,

section 3030 includes a list of conditions that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.”

Autism

9. Pursuant to California Code of Regulations, title 5, section 3030, subdivision (g), a student meets the eligibility criteria for “autistic-like behaviors” if he or she exhibits any combination of the following autistic-like behaviors, including but not limited to: (1) an inability to use oral language for appropriate communication, (2) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood, (3) an obsession to maintain sameness, (4) extreme preoccupation with objects or inappropriate use of objects or both, (5) extreme resistance to controls, (6) displays peculiar motoric mannerisms and motility patterns, and (7) self-stimulating, ritualistic behavior.

If a pupil exhibits any combination of these behaviors and the autistic disorder is adversely affecting his educational performance to the extent that special education is required, the pupil meets the eligibility criteria for autism. (20 U.S.C. § 1402; 34 C.F.R. § 300.8; Cal. Code Regs., tit. 5, § 3030, subd. (g).)

Similarly, federal regulations define autism as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” (34 C.F.R. § 300.8(c)(1)(i).)

Speech or Language Impairment

10. A child who demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects his or her educational performance, which cannot be corrected without special education services, has a language or speech disorder that is eligible for special education services. (Ed. Code, § 56333.) The criteria includes: (1) Articulation disorder: the child displays reduced intelligibility or an inability to use the speech mechanism which significantly interferes with communication and attracts adverse attention; (2) Abnormal voice: a child has an abnormal voice which is characterized by persistent, defective voice quality, pitch, or loudness; (3) Fluency Disorders: a child has a fluency disorder when the flow of verbal expression including rate and rhythm adversely affects communication between the pupil and listener; (4) Language Disorder: the pupil has an expressive or receptive language disorder, in pertinent part, when he or she scores at least 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level, on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics. (Cal. Code Regs., tit. 5, § 3030, subd. (c); Ed Code, § 56333.)

Did District's determination, at the November 8, 2007 IEP meeting, that Student was not eligible for special education and related services, deny Student a FAPE?

11. As set forth in Factual Findings 22 through 37, and 57 through 65, District's November 2007 psychoeducational assessment was inappropriate. District erred in determining that Student was not eligible for special education and related services under any category, and the denial of eligibility denied him a FAPE.

Did District's determination, at the January 25, 2008 IEP meeting, that Student was eligible for special education and related services under the category of speech and language impairment, instead of autistic-like behaviors, deny Student a FAPE?

12. As set forth in Factual Findings 22 through 44, and 57 through 65, the evidence that Student had language deficits did not establish that Student had a speech and language disorder to qualify him for special education under that category. District's speech and language assessment was inappropriate for that purpose because it was not a comprehensive speech and language assessment. The language deficits assessed did not meet the statutory criteria for a speech and language impairment either by score or percentile. The variety of characteristics, deficits, and unique needs under the umbrella of autistic-like behaviors was materially distinct from the standard characteristics defining a speech and language disorder, although some similar behaviors, such as weaknesses in pragmatic communication, existed.

13. As set forth in Factual Findings 22 through 37, 57 through 65, and 72 through 78, the weight of the evidence established that Student was eligible for special education and related services under the category of autistic-like behaviors because the evidence established that he has the requisite history of developmental disability including a medical diagnosis of autism at the age of one and a half years old, and displayed a combination of "any" (e.g., at least two) of the nonexclusive factors listed in the law. Credible evidence established that Student displayed an inability to use oral language for appropriate communication with his peers (virtually none), and had a history of relating to people inappropriately, with continued impairment in social interaction from infancy through early childhood. District's failure to make this determination at the November 8, 2007 IEP meeting denied Student a FAPE, and supports orders for compensatory relief and reimbursement herein. District's failure to make this determination at the January 8, 2008, IEP meeting did not deny Student a

FAPE because, as set forth in Factual Findings 106 through 153, District's offer of placement and services addressed Student's unique needs and offered appropriate educational benefit.

CONTENTS OF THE IEP AND FAPE

14. School districts receiving federal funds under IDEA 2004 are required pursuant to 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's 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 toward meeting the annual goals 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) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and districtwide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. (Ed. Code, § 56345.)

15. There are two parts to the legal analysis of whether a local educational agency (LEA) such as a school district offered a pupil a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, at p. 207.)

PROCEDURAL VIOLATIONS

16. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (j); 20 U.S.C. § 1415(f)(3)(E)(i) & (ii).) (See also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

17. IDEA 2004's procedural mandates also require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley, supra*, at pp. 207-208.) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. §§ 300.344(a)(1) [parents are members of IEP team], 300.345 [district must ensure opportunity for parents to participate in IEP meeting]; Ed. Code, §§ 56341, subd. (b)(1) [parents are members of IEP team], 56341.5 [district must ensure opportunity for parents to participate in IEP meeting], 56342.5 [parent must be member of any group making decision on educational placement].) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Id.*)

18. A student's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment. (Ed. Code, § 56341, subd. (b); 20 U.S.C. §

1414(d)(1)(B).) The purpose of the attendance of a regular education teacher is to obtain that teacher's input and participation, so that the parents and other members of the IEP team will have accurate information upon which to base a decision, and an LEA's failure to ensure this input seriously infringes on the parents' participation in the IEP team meeting. (See *Target Range, supra* at 1484; *Amanda J. v. Clark County School Dist., supra*.) The Ninth Circuit has determined that the failure to have a general education teacher on the IEP team in these circumstances invalidates the IEP. (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634.) The general education teacher need not be the Student's present teacher. (*R.B. v. Napa Valley Sch. Dist.* (9th Cir., July 16, 2007) 2007 U.S. App. LEXIS 16840.) The IEP is invalidated either as a structural defect or under the harmless error standard. (*Ibid.*).

The law permits parents, at their discretion, to invite "other individuals who have knowledge or special expertise regarding the pupil, including related service personnel, as appropriate." (Ed. Code § 56341, subd. (b)(6).)

Did District deny Student a FAPE at the November 8, 2007 and January 25, 2008 IEP meetings by failing to ensure the participation of a general education teacher, District's speech therapist, and Student's private service providers, including Student's speech therapist, occupational therapist, and representatives of the Fine Arts Preschool?

19. As set forth in Factual Findings 80 through 86, District failed to have a general education teacher at both IEP meetings and thereby committed a material violation at each meeting. At the November 2007 meeting, District proposed that Student was not eligible for special education, and would be placed in the general education setting. At the January 2008 meeting, District proposed an integrated SDC classroom with fifty percent typically developing peers in general education and an unspecified percentage of exposure to the school's general curriculum. The violations were therefore not harmless error because the absence of material input from a general

education teacher significantly impeded Parents' opportunity to meaningfully participate in the IEP process and impeded Student's right to a FAPE. The violations therefore denied Student a FAPE.

20. As set forth in Factual Findings 38 through 44, 69 through 71, and 88 through 90, District's failure to have its speech therapist and assessor Vivian Ramstad present at the January 25, 2008 IEP meeting, while a violation, was harmless error because she did not conduct a comprehensive assessment to determine Student's eligibility as speech and language impaired. Moreover, the law does not require all assessors to attend the meeting, but requires someone there to interpret the results and the educational implications to the team, a function that Ms. Hatzke fulfilled. As set forth in Factual Findings 91 and 92, Student's claim that District should have arranged for Student's private providers to be present at the IEP meetings was unfounded, where the law provided Student and his attorney could have invited them.

Did District deny Student a FAPE at the November 2007 and January 2008 IEP meetings by making a predetermined offer and/or failing to consider a continuum of placement options?

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

develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. etc. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. (*Doyle v. Arlington County School Board, supra*, 806 F.Supp. at p. 1262.)

22. As set forth in Factual Findings 93 through 97, District did not make predetermined offers at either IEP meeting because the Parents had full opportunity for meaningful participation and discussion, were represented by counsel. District's preprinted IEP was explained to all at the meeting as a proposed draft. District's disagreement with Parents and Dr. Peterson was in good faith based on differing interpretations of the assessments. Accordingly, District did not commit a violation by predetermining placement. In addition, several options were considered and discussed and the evidence does not support a determination that District failed to consider a continuum of options.

Did District deny Student a FAPE at the November 2007 and January 2008 IEP meetings by failing to make a clear written offer of placement?

23. A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, a statement of the anticipated frequency, location and duration, designed to address Student's unique needs. The offer should contain sufficient information so that the level of the district's commitment of resources is clear, but may be stated in a range if the IEP

team determines that a range of service meets the needs of the child. (Ed. Code § 56345.)

24. As set forth in Factual 98 and 99, District did not fail to make a clear written offer for placement and services at the January 25, 3008 IEP meeting.

Did District deny Student a FAPE at the November 2007 and January 2008 IEP meetings by failing to provide prior written notice?

25. The district is required to provide written notice to the parents of the child whenever the local educational agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. (20 U.S.C. §1415(b)(3); Ed. Code §56500.4.) The notice given to the parent's of the child must meet the requirements specified in Title 20 United States Code section 1415(c)(1).

26. As set forth in Factual Findings 100 through 105, District's November 8, 2007 IEP constituted prior written notice of its determination of ineligibility for special education services. In contrast, District's January 25, 2008 IEP failed to contain or be followed by prior written notice of District's proposal to find Student eligible under the category of speech and language impaired. It failed to contain an explanation and documentation relied on as required by law. District's violation was not harmless error because it impeded Parents' ability to meaningfully participate in the decision making process, and thereby denied Student a FAPE. This denial of FAPE further supports the orders of reimbursement herein.

SUBSTANTIVE FAPE

27. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, and be reasonably calculated to provide the student with some educational benefit. (20

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

28. The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, at p. 198.) The Ninth Circuit refers to the “some educational benefit” standard of *Rowley* simply as “educational benefit.” (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or “de minimis” benefit, or at least “meaningful” benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

29. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams etc. v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative

preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

30. Where appropriate, an IEP shall include provision for transition into the regular classroom program if the pupil is to be transferred from a special day class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day. (Ed. Code, § 56345(b)(4).)

Instructional Methodology

31. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 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. v. Warwick Sch. Comm.*, 361 F.3d at p. 84 (citing *Roland M.*, 910 F.2d at pp. 992-93).)

The IDEA 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; which provides a comprehensive summary of decisions discussing the matter).) In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour-per-week Lovaas-style ABA program. The Ninth Circuit stated:

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 School District*, (9th Cir. 1987) 811 F.2d 1307, 1314).)

Did District deny Student a FAPE for the 2007-2008 school by offering inappropriate annual goals, integrated SDC placement, aide support, social skills training ,and occupational therapy services, by failing to offer ABA intervention and transition services, and by reducing Student's total hours of weekly intervention by fifty percent?¹⁹

31. As set forth in Factual Finding 16 and 20, District was not obligated by law to begin the 2007-2008 school year with an offer of educational services because

¹⁹ As set forth in Factual Finding 106 and Legal Conclusions 1 through 26, because District's violations denied Student a FAPE an evaluation of District's substantive offer need not be reached and is provided in the interests of being thorough.

Student had never enrolled in the District and had rejected District's November 2006 offer of placement and services in December 2006. The parties settled all issues with respect to the 2006-2007 school year. Subsequent to September 13, 2007, District was obligated to proceed to assess Student for his initial placement in a public school in the District, and District was entitled by law to up to a 60-day assessment period without liability.

32. District was under an obligation to make an offer of placement and services at the November 8, 2007 IEP meeting but failed to do so. For the period between November 8, 2007, and the January 25, 2008 IEP meeting, District's contention that it did not deny Student a FAPE because the parties agreed to continue the IEP meeting does not exonerate it from liability, because no competent evidence established any agreement between the parties whereby Student waived his right to claim a denial of FAPE.

33. As set forth in Factual Findings 110 through 146, District's January 2008 IEP annual goals and offers for placement and services in the special education integrated SDC preschool class, with instructional aide support, occupational therapy, and speech therapy were reasonably designed to provide Student some educational benefit, addressed his unique needs, including social skills, and provided him a FAPE, provided that the District added a transition plan to address the school transfer and gradual change in aides. As set forth in Factual Findings 147 through 153, District's offer was not required to provide 27 hours of intensive ABA intervention services to provide a FAPE, as long as a transition plan would be included as determined in Legal Conclusion 34 below.

34. Pursuant to Factual Findings 127 through 132, due to Student's unique needs, District should have included a transition plan in Student's IEP to assist him in to transfer from a regular education class in a private school to an integrated special

education class in a public school, and to change from his dedicated one-to-one aide to the District's classroom aides.

REIMBURSEMENT AND/OR COMPENSATORY EDUCATION

35. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*)

36. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14.) Factors to be considered when determining the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the

school district. (*W.G.*, supra, 960 F.2d at p. 1487; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

37. Reimbursement may be denied based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.”

38. As set forth in Factual Findings 156 through 169, Student is entitled to reimbursement for the costs of his private educational placement and services from November 8, 2007 through the date of this Decision, with the limits and conditions ordered. Due to lack of sufficient evidence, as well as Parents’ lack of diligent cooperation with the District during the 2007 assessment process, their requests for reimbursement for transportation costs are denied.

As to the prospective placements requested by Student, since a new comprehensive speech and language assessment is being ordered, it would be inappropriate to try to hold another IEP meeting before the assessment has been completed. In addition, the 2007-2008 school year will end in mid-June 2008, just two and a half months away. As set forth in Legal Conclusions 1 through 26, District’s psychoeducational and speech and language assessments were inappropriate, District erroneously denied eligibility for special education services at the November 2007 IEP meeting. In addition, District’s violations denied Student a FAPE by excluding material information from a general education teacher at both IEP meetings and not providing

written explanations and substantiation for eligibility, which thus prevented Parents from being fully informed, and undermined the IEP process. Student's unique needs and difficulties with transitions balance against a move to a new school this late in the school year, and such a move would therefore be harmful. Considering the nature of these violations and these circumstances, it is equitable to order District to continue to fund Student's placement prospectively during the speech and language assessment period ordered herein, to the end of the 2007-2008 school year in June 2008.

ORDER

1. Within 45 days of the date of this Decision, District shall reimburse Student for the costs of Dr. Peterson's 2007 independent psychoeducational/neuropsychological evaluation in the total sum of \$6,013.20.

2. District shall forthwith fund a comprehensive speech and language assessment and shall convene an IEP meeting prior to the end of the 2007-2008 school year to review the assessment, and to consider and make an offer of placement and services for the 2008-2009 school year.²⁰

The assessment shall be conducted by an independent, third party qualified speech and language pathologist with experience and training in assessment of young students with autism. Parents shall make Student reasonably available for the assessment. Within five business days of the date of this Decision, Parents may submit the names of three speech and language assessors to the District, and District shall

²⁰ Whether such an offer would include extended school year services for the 2008 summer months would depend on the District's programs and the evaluation of Student's unique needs by the IEP team.

consider Student's and its own nominees and select a qualified assessor within two business days thereafter.

3. Within 45 days of the date of this Decision, District shall reimburse Student and Parents for the following costs incurred consistent with this Decision.

- A. Fine Arts Preschool in the total sum of \$1,848, for services through February 29, 2008;
- B. Milestones ABA Services, in the total sum of \$6,379, for services through December 31, 2007.
- C. Cindy Ng, occupational therapist, in the total sum of \$630, for services through December 31, 2007.
- D. Speech Inc., Alexia Dorsa, speech and language therapist, in the total sum of \$975, for services through December 31, 2007.

4. Within 45 days of receipt of Parents' reasonable proof of payment, in the form of cancelled checks and/or invoices showing payment; District shall further reimburse Student and Parents for the costs of the above services from the end date of the reimbursement period identified in Order 3(A) through (D) above through the end of the 2007-2008 school year in June 2008, at the same rates.²¹

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided.

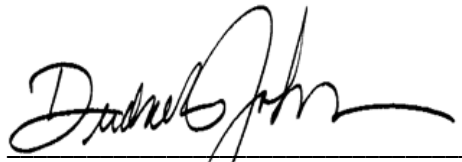
²¹ Consistent with Factual Finding 169, District is not liable for any reimbursement for speech and language services for the period from December 31, 2007, through the date of this Decision.

Student prevailed on Issues 1, 2, 3(A), and 3(D) for hearing in this case. District prevailed on Issues 3(B) and 3(C). Neither party prevailed on Issues 4(A) through (F).

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: April 1, 2008

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

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division