

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT on behalf of STUDENT,

v.

ANAHEIM CITY SCHOOL DISTRICT,

OAH CASE NO. N2007080932

---

ANAHEIM CITY SCHOOL DISTRICT,

v.

PARENT on behalf of STUDENT.

---

OAH CASE NO. N2008010260

AMENDED DECISION<sup>1</sup>

Richard M. Clark, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter from January 28 to February 8 and February 27 to 29, 2008, in Laguna Hills, California.

Attorney Maureen Graves represented Student. Student's mother (Mother) was present during the hearing. Attorney Diane Willis represented Anaheim City School District (District). Liz Peterson, program specialist for the District, was present for the majority of the hearing.

---

<sup>1</sup> This decision is amended solely to clarify the prevailing party finding at the end of the decision. No other changes have been made to the decision.

Student filed her request for due process hearing on August 29, 2007. The matter was continued on September 19, 2007. The District filed its request for due process hearing on January 7, 2008. Both matters were consolidated on January 22, 2008, and continued for hearing to January 28, 2008. Oral and documentary evidence were received during the hearing. The record remained open for the submission of written closing arguments and reply briefs by April 21, 2008, when the record was closed and the matter was submitted for decision.<sup>2</sup>

### ISSUES<sup>3</sup>

1. Did the District fail to assess Student from August 29, 2005 to August 29, 2007, by failing to conduct a functional behavioral assessment (FBA) and failing to assess audiology, behavior, and the need for Applied Behavioral Analysis (ABA) that included academic skills, appropriate instructional targets, adaptive behaviors (daily living skills, social-emotional status, self stimulating and disruptive behaviors), instructional needs in a general education setting, and skills and behavior outside the school setting?

---

<sup>2</sup> At the conclusion of the hearing, the parties agreed to submit closing and reply briefs by April 4, 2008. On March 19, 2008, the parties agreed to further continue the date until April 21, 2008.

<sup>3</sup> For clarity of decision writing, the issues have been reorganized, but are the same issues that were determined for the prehearing conference. The issues for hearing were further discussed and agreed upon at the hearing, and the parties agreed that the issues listed above were the only issues for hearing. To the extent that either party raised issues in their closing brief not listed in this decision, they are not considered.

2. Were the District's occupational therapy assessments conducted in November and December 2005, the transition report of educational assessment prepared February 22, 2007, and the cognitive and speech and language assessments conducted pursuant to the March 16, 2007 assessment plan, appropriate and designed to ascertain relevant information?

3. Were the District's October 8, 2007 psychoeducational, functional analysis assessment (FAA), and behavioral evaluations appropriate? If not, is Student entitled to independent educational evaluations (IEEs) in the areas of psychoeducational and behavior at public expense to be conducted by Carolyn Bailey?

4. Did District fail to provide Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE) between August 29, 2005 and August 29, 2007, by:

- a. Not providing placement, services and goals designed to meet Student's unique needs in academic, developmental and functional areas, speech and language (goals only), social skills, communication, occupational therapy (OT), behavior, ABA (including in-home and community settings), and limited English proficiency?
- b. Denying her parents the opportunity to participate and provide meaningful input and failing to consider their input on the issues of ABA, limited English proficiency and speech and language?
- c. Not specifying and predetermining what, if any, ABA services were part of her individualized education programs (IEPs)?
- d. Predetermining Student's placement before her IEPs?
- e. Not providing or offering a research based peer-reviewed intervention to the extent practicable in ABA, inclusion, classroom management and structure, and reading and math instruction?

## PROPOSED RESOLUTIONS

Student seeks the following resolutions for a FAPE denial by the District: ABA program for 35 hours per week of direct service, including in-home, school and community instruction, by a nonpublic agency (NPA) acceptable to the family; ABA supervision for 16 hours per month; Two hours per month of ABA clinics to be attended by tutors and, to the extent practicable, by school staff working with Student; Two hours of OT per week to focus on sensory over-reactiveness and fine motor difficulties affecting self help and handwriting, with one hour of individual and one hour of small group services; Student to attend a general education first grade for at least five hours per week; Compensatory ABA services for 1,540 hours of direct service and 154 hours of supervision; ABA teaching materials as recommended by the ABA provider at a cost not to exceed \$2,000 per year, with the materials belonging to the District once Student no longer needs them.

## CONTENTIONS OF THE PARTIES

Student contends that the District failed to properly assess and provide services to her since she began attending school. Student asserts that the District did not provide her with an ABA program that included discrete trial training (DTT) when her unique needs required a DTT program. Further, Student contends that the District's autism program is an eclectic program that was not individually designed and tailored to meet her unique needs. In addition, Student argues that she had needs that required an in-home and community-based program that were ignored by the District. Had the District adequately assessed Student and provided a program for her that addressed the needs resulting from her autism, Student contends she would be much further along developmentally and educationally and would be more likely to hold a conversation when she is older. Student also argues that the District had an opportunity to provide a

language-intensive program supported by peer-reviewed research, but wasted the precious years between age three and five with an unproven program.

Further, Student contends that she had behavioral needs that were not addressed by the District. Student claims that the District did not provide her with any behavioral goals or an FBA to address her significant tantrums and screaming behaviors that impeded her educational progress in the classroom. Student also asserts that the goals developed by the District were not measurable, were not designed to meet her unique needs, and significantly underestimated her abilities when she entered the program. Finally, Student contends that she needed an in-home program to assist her in developing her skills across settings so that she could better access her educational program at school.

The District contends that it all times provided Student with a FAPE. The District asserts that it properly assessed Student at all times and that it used those assessments to plan a program that was designed to meet her unique needs. Further, the District asserts that Student has made and continues to make substantial educational progress and that a home based program was not necessary because the school program was meeting her needs in the academic environment. Further, the District contends that errors, if any, were harmless and that Student benefited from the District's educational program. The District also contends that its autism program met Student's needs and that ABA-DTT is not the only program from which she could benefit educationally.

## FACTUAL FINDINGS

### BACKGROUND

1. Student, who was born July 18, 2001, is nearly six years, ten months old, and resides in the District with her family. She is currently in the first grade and attends Roosevelt Elementary School (Roosevelt) where she receives special education services

as a student with Autistic-Like Behaviors. Student entered the District when she was three years, eight months old, and had not received special education and related services from any agency or school district prior to entering the District.

2. Mother contacted the District on January 27, 2005, and a child find referral was generated for Student. The District referred Student to the autism team on February 11, 2005, and began assessments of Student in March 2005. Student's first IEP was agreed upon and implemented on April 18, 2005. Mother has attended all of Student's IEP meetings.

3. In April 2005, Student was placed in a non-categorical special day class (SDC) at Olive Elementary that was renamed Jefferson II Elementary School (Jefferson II). In December 2005, she remained in the Jefferson II SDC, but also attended a social skills program in the afternoon at Madison Elementary School (Madison). In April 2006, Student was moved from Jefferson II to an autism classroom at Madison and remained in the Madison social skills program as well. In August 2007, Student moved to Roosevelt and no longer attended the Madison social skills program.

#### FAILURE TO ASSESS

4. A district is required to assess a child in all areas related to a suspected disability including, if appropriate, social-emotional status. A reassessment of a student shall occur not more frequently than once a year, unless the parents and the district agree otherwise, and shall occur at least once every three years, unless the parents and the district agree in writing that it is not necessary. All referrals for special education and related services shall initiate the assessment process and shall be documented. The district must deliver an assessment plan to the parents within 15 days of the assessment request. An IEP meeting must occur within 60 days of the receipt of parental consent for the assessment.

5. Student contends that between August 29, 2005 and August 29, 2007, the District failed to conduct an FBA after a request in writing from Mother, and failed to properly assess her in the areas of audiology and behavior. Further, Student contends that the District failed to properly assess her needs for ABA that included academic skills, appropriate instructional targets, adaptive behaviors, including daily living skills, social-emotional status, self stimulating and disruptive behaviors, as well as her instructional needs in a general education setting, and skills and behaviors beyond the school setting. Student has not provided any information that the District had an obligation to specifically assess Student for ABA. The salient issue is whether the District conducted assessments sufficient to meet Student's needs in the educational setting.<sup>4</sup>

#### NEED FOR BEHAVIOR ASSESSMENT IN SEPTEMBER 2005

6. When a student's behavior impedes her learning or that of others, a school district is required to consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. The IEP team can develop a behavior support plan (BSP) to address minor behavior issues that a student's teacher or other educational providers can implement in the classroom. Student contends that the District failed to properly assess her behavioral needs.

7. Mother was interviewed during Student's initial assessment in March 2005. Mother described Student as having behavioral difficulty at home and in the community and playing with, being near or engaging other children. However, during her initial assessment, Student did not exhibit any behavioral difficulties. As discussed in Factual Findings 44 to 49, as of April 2005, the District had no reason to evaluate Student's behavior for the educational setting.

---

<sup>4</sup> A more thorough discussion of ABA occurs later in this decision.

8. On August 29, 2005, Ms. Moses, Student's teacher at Jefferson II, referred Student for an OT assessment. Ms. Moses had concerns with Student's organization, transitioning and her ability to sit quietly. Ms. Moses made the referral because Student threw herself to the ground and screamed in class and she needed one-to-one aide support for non-preferred activities.

9. In September 2005, Marcella Melton, District's autism program specialist and a school psychologist, asked Stephanie Pollard, a District speech and language pathologist (SLP) who teaches a social skills class, to observe Student's class because of Student's behavior issues, including tantruming. Ms. Pollard was asked to set-up Student's SDC as a TEACHH<sup>5</sup>-based classroom. When Ms. Pollard initially met Student in September 2005, she had behaviors typical for a student on the autism spectrum, such as time off task, tantruming, and crying and it was difficult to judge her cognitive level. Ms. Pollard and Ms. Moses were unaware of what the antecedents were for Student's behaviors. Ms. Pollard was consulting almost two hours per week for Student in the SDC at Jefferson II, but those services were not written into the IEP.

10. Mother reported that Student tantrumed, screamed and cried when she was supposed to ride on the bus to school and that she had significant tantruming and screaming at school once she arrived by bus or was dropped off by Mother. Student was sometimes late to class because Mother would need to bring Student to school as she was not able to get Student on the bus. Mother also reported that she could not take Student into the community as her behavior would force her to leave stores, church, and restaurants. Father reported that Student had difficulty playing near other children in the park.

---

<sup>5</sup> Treatment and Education of Autistic and related Communication-handicapped Children.

## NEED FOR COGNITIVE ASSESSMENT IN DECEMBER 2005

11. In December 2005, Ms. Pollard believed Student could perform better and had higher cognitive levels than she was showing. Ms. Pollard suggested moving Student to her social skills class so that she could see if it would help Student. On December 16, 2005, an IEP meeting was held and it was agreed that Student would join Ms. Pollard's social skills class at Madison. The IEP team agreed to the move without further assessment. Ms. Pollard believed, but was not sure, that Student would be able to perform some standardized tests. She did not administer any to Student, so it is not known how she would have performed.

12. Beginning in September 2005 and continuing to December 2005, the District had sufficient notice that Student's behaviors were impacting her education. Further, the District believed that Student may not have been assessed at the proper levels, but moved her to a higher functioning social skills program without a thorough review of her baselines and present levels. There was a need to have an assessment to establish baselines and present levels so that Student's goals could be adjusted if appropriate. The District failed to assess Student's behavioral needs in September 2005 and her cognitive needs in December 2005.

## FAILURE TO CONDUCT AN FBA IN SEPTEMBER 2006

13. Student contends that the District failed to conduct an FBA after Mother requested one in writing on September 25, 2006. The IEP team discussed Mother's request at an IEP meeting held on November 7, 2006 IEP. Mother told the IEP team that she had discussed Student's continued behavioral difficulties with her pediatrician, who had recently placed Student on medications. Student's pediatrician told Mother that Student needed to be assessed for services. The District staff at the November IEP meeting discussed waiting until Student's medications stabilized before deciding if an

FBA was warranted. The District took no further action regarding Mother's request for an FBA.

14. Mother established that Student's behavior was becoming increasingly difficult, particularly after Student was moved to the social skills program at Madison and then later in Ms. Attal's class at Madison. Mother was having difficulty getting Student to school or on the bus, and reported that at times it took up to 45 minutes to get Student from the car to the classroom on days she took her to school. Mother established that she was unfamiliar with the IEP process and did not know that she could look to the District for assistance in dealing with Student's behavior.

15. The District had an obligation to assess Student after Mother requested an FBA. The District's failure to do so denied Mother meaningful participation in the IEP process and denied Student a FAPE by failing to address Mother's concerns that Student's behavior at home was impacting Student's ability to access her education at school. Further, Student's behavior impeded her ability to access her education and receive educational benefit.

#### AUDIOLOGY<sup>6</sup>

16. Student contends that the District did not properly assess her audiological needs. Student's initial assessment in March 2005 included a screening test that Student passed. Mark Saenz, a registered nurse, assessed Student's hearing and did not report any hearing problems that would suggest further screening was necessary. Further, the Preschool Assessment Team did not observe any behavior or conduct that suggested Student needed a further hearing assessment.

---

<sup>6</sup> Audiology involves the study of hearing.

17. In September 2007, Mother requested a hearing evaluation. Mother reported Student had repeated inner ear infections and had tubes placed in her ears. On September 27, 2007, Mary Olander conducted an Audiology evaluation of Student. Ms. Olander is an educational audiologist and has dual Bachelor's degrees in Spanish and Communicative Disorders, as well as a Master's degree and Doctorate in Audiology. Ms. Olander determined that Student had grossly normal hearing sensitivity. She recommended re-evaluation in three to six months because of a history of middle ear infections. However, there was nothing about her examination that suggested further inquiry or examination into Student's hearing was required. Ms. Olander reported that there was nothing about Student's history or evaluations to suggest she needed an audiological evaluation prior to the current assessment. The District properly evaluated Student's audiological needs.

#### APPROPRIATENESS OF ASSESSMENTS

18. Assessments must be conducted by individuals who are both knowledgeable of the student's disability and competent to perform the assessment. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. A psychological assessment must be performed by a credentialed school psychologist. Tests and assessment materials must be validated for the specific purposes for which they are used; selected and administered so as not to be racially, culturally or sexually discriminatory; and provided and administered in the student's primary language or other mode of communication, unless this is clearly not feasible. In conducting the evaluation, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, which may assist in determining whether the child is a child with a disability, and in determining the contents of an IEP. The district may not use any

single assessment as the sole criterion for determining eligibility and must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. A district is required to use assessments that provide relevant information that directly assists persons in determining the educational needs of the child.

19. Student contends that the District did not conduct appropriate OT assessments in November and December 2005, a transition assessment in February 2007 and cognitive and speech and language assessments in March 2007.

#### OT ASSESSMENT IN NOVEMBER AND DECEMBER 2005

20. As noted in Factual Finding 8, Student's preschool teacher referred her for an OT evaluation in August 2005 because of concerns with Student's organization, transitioning and her ability to sit quietly. Mother consented to the assessment on November 3, 2005. The assessment referral requested a review of Student's needs as they relate to her ability to benefit from an SDC, and noted primary concerns in attention to task and transitioning from one activity to another.

21. Julie Bissell is an occupational therapist working for the District where she is coordinator of OT for the District. She has a Master's degree in OT. Ms. Bissell had met Student prior to the OT referral and, as part of the assessment, interviewed Mother who did not identify any sensory or motor concerns on the intake form. Ms. Bissell referred the OT evaluation to Annie Kim to observe and evaluate Student in the classroom. Ms. Kim works with students on the autism spectrum from age three to 12. She has a Bachelor's in OT and is board certified and licensed in California. She has certification in sensory integration, praxis, and interactive metronome therapy. Ms. Kim provided OT consultation to Student's class since the beginning of the school year and had known Student since August 2005. Ms. Kim consulted with the classroom teacher at Jefferson II for 30 minutes per week to assist in sensory areas and made suggestions weekly.

Student received sensory integration as part of her classroom program, as did all students in the District as part of the classroom program.

22. Ms. Kim observed Student to have behavior issues in the classroom: she was easily frustrated, threw things off the table, and screamed or cried. These observations did not create any OT concerns. In addition to her regular classroom consultation, and as part of the current evaluation, Ms. Kim observed Student two days for 45 minutes each during different parts of the day. She reviewed the initial testing and psychoeducational report. Student was able to access all areas of the playground and school environment, her gross and fine motor skills were functional, although she got frustrated at times, and she had a goal aimed at small group activities. She did not need a safety goal because she had necessary supervision at her age. Ms. Kim noted that Student used a modified tripod grasp for written work, but her teacher did not express any concerns and Student did not have any needs in that area. Based upon her assessment, Student did not have any OT need that was not being met and did not need direct OT services. She was accessing her educational program and all aspects of her day and did not require further evaluation.

23. The OT evaluation was appropriate and determined that Student did not have any additional needs to be addressed by OT.

#### TRANSITION REPORT OF FEBRUARY 22, 2007

24. On February 22, 2007, Susie Attal, Student's preschool and kindergarten teacher, prepared a transition report regarding Student's educational needs for the first grade. The report noted that Student is difficult to manage in the classroom and would probably do best in a communicatively handicapped (CH) classroom with a teacher with a lot of patience who will use visuals. Ms. Attal had been Student's teacher since April 2006 and based upon her first hand knowledge and observations, had insightful and useful information about an appropriate placement for Student. Student's transition

from kindergarten to first grade was discussed at several IEP meetings. Mother was worried about transition and requested a one-to-one aide.

25. Student generally challenged the assessment as not being appropriate, but did not identify any particular issue with the report other than Dr. Bailey indicating that a toy could be an appropriate enforcer or a distraction but it would depend on the context. The transition report was appropriate and provided relevant and useful information regarding Student's placement in first grade.

#### COGNITIVE AND SPEECH AND LANGUAGE ASSESSMENTS IN MARCH 2007

26. On March 12, 2007, Mother requested a speech and language evaluation, and she signed an assessment plan for speech and language and intellectual development assessments.

27. Stephanie Pollard has Master's and Bachelor's degrees in communicative disorders and is a licensed SLP who has worked in the District since 1989. She also has an additional credential that allows her to teach in a SDC-CH classroom. She currently teaches a social skills class for children with autism, which she has taught for the last four years. She has taken classes in TEACCH, Links to Language, DTT, and ABA. Ms. Pollard uses ABA daily in almost every activity in her class. She has assessed hundreds of students with autism and has primarily worked with children who have autism from preschool to the third grade.

28. Ms. Pollard evaluated Student and prepared a speech and language report dated April 18, 2007. Ms. Pollard performed an oral peripheral exam, and administered the Preschool Language Scale, Fourth Edition (PLS-4), the PLS-4 Spanish, the Expressive Vocabulary Test, Second Edition (EVT), the Peabody Picture Vocabulary Test, Fourth Edition (PPVT), and the Social Communication, Emotional Regulation and Transactional Support (SCERTS) profile. The PPVT measures receptive language and Student had an age equivalent of 3 years, 3 months. Ms. Pollard noted that Student's conversational

speech was 80 percent intelligible and her articulation skills were chronologically age appropriate, and did not require formal assessment. Speech fluency was informally observed to be in the average range, her voice quality was within normal limits, and she had oral motor abilities appropriate for speech. Student's language comprehension was measured on the PLS-4, which showed below average ability, and on the PPVT-4, she had an age equivalent of 3 years, 3 months. Her language expression score on the PLS-4 showed an age equivalent of 2 years, 8 months. On the EVT, her age equivalent was 3 years, 11 months. Student could not perform on the PLS-4, Spanish edition, and English was determined to be Student's dominant language. The SCERTS profile assessed Student's joint attention, symbol use, mutual regulation, and self regulation, with an overall score at the two to two and a half age level, and also reported Student to be in the language partner level, with an age range of 15 months to three and a half years.

29. Dr. Toni Brown has been a licensed school psychologist in the District for 10 years. She has a Doctorate Degree in Educational Psychology, has a Master's degree in School Psychology, and a Bachelor's degree in Behavioral Sciences. She has conducted many assessments of students on the autism spectrum and is familiar with testing for children between the ages of three and five years old. She was previously a part of the Preschool Assessment Team. On May 22, 2007, Dr. Brown conducted a cognitive assessment on Student. Dr. Brown administered the Merrill-Palmer, which is a standardized test, and Student received a score of 86, with a mental age of 56 months. Student could not respond to language questions on the test, so Dr. Brown attempted to give the Kaufman Brief Intelligence Test, Second Edition (KBIT-2) and the Raven-Coloured, because both are non-verbal tests, but Student could not understand the instructions. Raven-Coloured is a non-verbal test that involves matching, but Student started to point at the pictures. Dr. Brown did not consider using the Leiter International Performance Scale-Revised (Leiter-R) because she thought it would be similar to the

KBIT-2 and the directions would be too complicated. Dr. Brown chose the Merrill-Palmer because Student could understand the directions and was comfortable performing the tasks. Student was able to respond, and was not echolalic in her responses.

30. Dr. Brown administered an outdated copy of the Merrill-Palmer scale, which was published in 1931, when she should have utilized the Merrill-Palmer, Revised Scales of Development (Merrill-Palmer-R), which was published in 2004. According to Dr. Brown, the test results showed improvement and growth since Student started school; she thought the test results were accurate, and Student gave her best effort. The Merrill-Palmer results show low average cognitive skills and Dr. Brown did not think further assessment was warranted. Dr. Brown knew Student had a depressed score because of the language portions of the test. Dr. Brown acknowledged that once a new version of a test is available with new norms, the older version should not be used. She acknowledged that it was an error to use the Merrill-Palmer version that she did.

31. The District argues that the test results were useful and that any error related to use of the older version of the Merrill-Palmer was harmless error. However, the District needed accurate cognitive information since Student had not had any standardized testing of her cognitive abilities since she entered the District. The District should have provided an accurate, updated assessment, and committed a procedural error by failing to utilize the most recent Merrill-Palmer-R test. However, Student did not show any loss of educational benefit from the lapse. She was in a program and placement at Madison that was meeting her needs and she was working upon goals that were designed to meet her academic needs. Student had also been tested using the Brigance, which determined her present levels of performance for goal writing.

#### APPROPRIATENESS OF THE DISTRICT'S OCTOBER 8, 2007 EVALUATIONS

32. The District contends that its FAA, behavioral assessment, and psychoeducational evaluation conducted in October 2007 are appropriate and

conducted according to law. Therefore, the District contends that Student is not entitled to an IEE at public expense. Student contends that the three assessments are not appropriate and that she is entitled to reimbursement for an IEE at public expense that was conducted by Dr. Caroline Bailey.

## FAA

33. In August 2007, Mother believed that Student's behavior in school was impeding her ability to learn. Following a resolution agreement between the parties in August 2007, the parties agreed to evaluate the antecedents for Student's behaviors in order to design a program to best deal with those behaviors at school. The resolution agreement set forth the areas to be evaluated. The purpose of an FAA is to identify base levels of behaviors and antecedents of target behaviors, environmental factors, and consequences of the behavior. Following the FAA, a behavioral intervention plan (BIP) would be developed based upon the results to identify strategies to help reduce maladaptive behaviors and to increase functional skills.

34. On October 8, 2007, Heidi Dennison conducted Student's FAA.<sup>7</sup> Ms. Dennison is a licensed school psychologist working in the District. She has a Bachelor's degree in Psychology and Sociology and Master's degree in Social Work. She has attended multiple training classes in the area of behavior analysis and she is a behavior intervention case manager (BICM); she is well qualified for her position and well

---

<sup>7</sup> On February 29, 2008, during Ms. Dennison's testimony at hearing, Student stipulated that Ms. Dennison's report was prepared pursuant to California Code of Regulations, title 5, section 3052, and that the only challenge to her report was the extent that it reported the duration of behaviors, what was being seen, and specific antecedents other than time and place.

qualified to examine Student's behavior. The District's FAA was based upon direct observations of Student in a variety of school environments, daily data collection by school staff, and interviews with the special education teacher, instructional aides, bus drivers, speech and language therapists (past and present), OT, last year's school psychologist, and parent. Ms. Dennison conducted a thorough record review including Student's health and developmental records, cumulative record, IEPs and reports. Ms. Dennison directly observed Student on 11 different days, with observations that ranged in length from eight 8 minutes (bus ride) to two hours. School staff collected data about Student's behavior for the entire school day for 24 days.

35. Tantruming was the target behavior. Data revealed that Student tantrumed 125 times over 28 days, approximately four tantrums per day and 20 tantrums per week, with tantrums lasting from four minutes to one hour, with an average duration of three minutes. Mother reported Student had about 10 to 15 tantrums on school days and on a good day over the weekend, approximately 10 to 15 tantrums. Mother reported a tantrum lasted up to one and a half hours, but usually they were from two to 30 minutes. Ms. Dennison determined that the function of a tantrum was to escape from a non-preferred task. Ms. Dennison also noted that Student had fewer tantrums in her mainstream class. The proposed BIP recommended using the replacement behavior of asking for a break and provided a detailed description of the behavioral interventions to be used. She also recommended a one time per month consultation for 30 minutes in the classroom setting.

36. Ms. Dennison's report thoroughly examined Student's behavior and, pursuant to stipulation of the parties, properly followed all legal requirements to conduct and report upon the assessment. The FAA was appropriate and provided useful and relevant information.

## BEHAVIORAL ASSESSMENT REPORT

37. On October 8, 2007, Holly Walker prepared a Behavioral Assessment Report after assessing Student over a two month period. Ms. Walker is a licensed school psychologist working in the District. She has a Bachelor's degree in Psychology and a Master's degree in Education and Psychology. She is a BICM in the District and oversees the District's ABA programs.<sup>8</sup> Ms. Walker observed Student in the school setting on three separate dates for one half hour to an hour and a half. The behavioral assessment was to address Student's skill deficits, including receptive and expressive language, play skills and socialization. Ms. Walker collected information for the report through classroom and playground observations, administration of the Assessment of Basic Language and Learning Skills-Revised (ABBL-S-R) and hands-on interaction with Student using DTT and functional skills teaching methods. Student's rate of skill acquisition, learning style, and skill deficits were evaluated in an effort to obtain current skill levels so that goals could be developed and implemented at school. Ms. Dennison examined all areas required by the assessment referral and her report included a separate discussion in the area of cooperation and reinforcer effectiveness, visual performance, receptive language, imitation, vocal imitation, requesting communication, labeling, intraverbals, play skills, socialization, group instruction, classroom routines, reading, spelling, math, and fine motor. Ms. Walker conducted her assessment in English, which was Student's primary language. The tests and assessment materials were validated for the specific purposes for which they are used and were selected and administered so as not to be racially, culturally or sexually discriminatory. In conducting the evaluation, Ms.

---

<sup>8</sup> Ms. Walker previously worked as a behavior consultant for Applied Behavior Consultants, the certified NPA that Student seeks to provide any compensatory education.

Walker used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, but did not speak to Mother, and did not use any single assessment as the sole criterion for determining eligibility.

38. Ms. Walker included a plan for generalization of mastered skills. All of the recommendations identified by Ms. Walker were to be addressed in the District's ABA program. Ms. Walker advised that Student could work on her IEP goals in DTT during a daily two hour block of time. Once a skill was mastered, it would be generalized over different environments and settings. Ms. Walker established that Student's aide is qualified to assist Student and has received ABA and DTT training. Student did not need more ABA-DTT time because of the need to be in the general education classroom. Ms. Walker did not believe Student needed an in-home program as she was accessing her education at school.

39. Dr. Bailey conducted her own assessment of Student in December 2007, but there was no evidence submitted at hearing regarding the cost of Dr. Bailey's assessment report. Dr. Bailey criticized the FAA and behavioral assessments because she felt one person should have conducted both to utilize the information and observations from one in the report upon the other. Dr. Bailey noted this as a criticism of the report, but did not establish that it affected the validity of either report. Further, Dr. Bailey stated that the ABBSL-R protocols require that examiner interview the parents. In that respect, the ABBSL-R was not administered properly. The ABBSL-R is not a standardized test and was not the only manner that Student's behavior was assessed. Dr. Bailey did not establish that failure to interview Mother otherwise invalidated the behavioral report. The persuasive weight of the evidence established that the behavioral assessment was appropriate.

## PSYCHOEDUCATIONAL EVALUATION

40. On October 8, 2007, Ms. Dennison also conducted a psychoeducational evaluation of Student utilizing the Developmental Test of Visual Motor Integration, Developmental Test of Visual Perception, Developmental Test of Visual Perception-Motor Coordination, Leiter-R, Motor-Free Visual Perception Test-3, Vineland Adaptive Behavior Scales, Second Edition, Survey Interview Form, Vineland Adaptive Behavior Scales-Classroom Edition, Gilliam Autism Rating Scale-Second Edition, Conners' Parent Rating Scale Revised, Conner's Teacher Rating Scale-Revised, and a records review. Ms. Dennison tested Student over four sessions for 10 minutes to almost an hour. Due to attention issues and receptive language delays, Ms. Dennison opined that the tests results may underestimate Student's true ability level and that non-standardized assessments and observations may provide a more accurate estimate of Student's abilities. The current assessment showed Student to be in the average range of nonverbal intelligence. Her sensory motor skills are average and her motor coordination skills are below average. Visual processing is within the very low range, but it was believed she did not understand the directions of the test, which likely depressed her score. Overall adaptive behavior skills are in the low range.

41. The evidence established that Ms. Dennison conducted her assessment in English, which was Student's primary language. The tests and assessment materials were validated for the specific purposes for which they were used and were selected and administered so as not to be racially, culturally or sexually discriminatory. In conducting the evaluation, Ms. Dennison used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information and did use any single assessment as the sole criterion for determining eligibility. Student did not present any evidence to the contrary. The evidence established that the psychoeducational evaluation was conducted appropriately.

## OFFER OF FAPE

### 2005 – 2006 SCHOOL YEAR (PRESCHOOL)

42. A district is required to provide a student with an educational program that meets the student's unique needs and is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. A school district need only provide a basic floor of opportunity that consists of access to specialized instructional and related services that are individually designed to provide an educational benefit to the student. The appropriateness of the District's initial assessment is not challenged, but to the extent it formed the basis for the District's offer, including appropriate services for autism, it is relevant to this decision.

### UNIQUE NEEDS

43. A district is required to identify a student's unique educational needs and to provide special education and related services designed to meet those needs. The District began assessing Student in March 2005 and held Student's initial IEP meeting to discuss the assessments and eligibility on April 18, 2005. Student was assessed at the District's Preschool Assessment Center by an assessment team that included Dr. Carol Walston, school psychologist; Kamelia Slankard, speech and language pathologist (SLP); Edward Jeleu, preschool teacher; and Mark Saenz, registered nurse. Student was assessed in Spanish.

44. Dr. Carol Walston has a Doctor of Psychology degree, as well as a Master's degree in Educational Counseling and a Bachelor's degree in Psychology. Dr. Walston is fluent in Spanish. She has worked as a licensed school psychologist in the District since 1999 and is the current co-director of the Preschool Assessment Center in the District, which is responsible for all assessments and diagnosis of students up to five years of age as well as program planning. She has previously served as a bilingual and general

education teacher and a psychiatric aide. She is familiar with tools to assess cognitive abilities in a child with autism. She was a very credible witness and well qualified for her current position.

45. The assessment team issued a Psychoeducational Evaluation Preschool report dated April 15, 2005. During the evaluation, the team utilized the Vineland Adaptive Behavior Scales: Interview Edition (Vineland); Informal Observation/Play Assessment; Health and Developmental History; Nursing Assessment; Differential Ability Scales (DAS); Brigance Diagnostic Inventory of Early Development (Brigance); Developmental Activities Screening Inventory-II (DAIS-II); Gilliam Autism Rating Scale (GARS); and the Receptive-Expressive Emergent Language Test, Third Edition (REEL). GARS is a standardized test designed for screening and assessment for autistic disorder and other behavioral disorders. Mother was interviewed for the GARS. Student's cognitive functioning was measured on the DAIS-II, and showed her developmental age at 23 months. The Vineland measured Student's communication, daily living skills, socialization, and motor skills domains. The Vineland assessed Student's communication domain at 1 year, 5 months; daily living skills domain, at age equivalent 1 year, 9 months; socialization domain, 1 year, 10 months; motor skills, age 2 years, 3 months; and an adaptive behavior composite, 1 year, 10 months. Mother's responses placed her language comprehension skills at the 12-month age level, and her language expression skills at the 15-month age level. Mother's responses show Student at 1 year, 8 month, age level in fine motor skills and gross motor skills at 2 years, 7 months. Mother said Student was not toilet trained and that she was fearful of the toilet. The Vineland put Student at the 2 year age level in personal care. Student did not engage in reciprocal two-way play exchanges, and was aloof and isolative in her play. She did not maintain eye contact. Mother's responses on the Vineland indicated that Student is at the 2 year, 2 month age level in interpersonal relationships, and 1 year, 7 month age level in play

and leisure time. The report noted that the normative data from standardized tests may not be valid because of the difficulties with Student's attention and focus during the testing.

46. The assessment team determined Student had needs in the areas of communication, receptive and expressive language, pragmatics, daily living, socialization, play skills, motor skills, prevocation, and readiness for learning. The team determined a behavior assessment was not necessary because Student did not show any behavior difficulties during the evaluation. The assessment team found that Student displayed autistic-like behaviors because of an inability to use oral language for appropriate communication, a history of extreme withdrawal or relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood. The team found that Student should be found eligible for special education as a student with autistic like behaviors.

47. Kamelia Slankard performed a preschool speech and language test summary sheet on Student. Ms. Slankard noted that Student did not comply with a request for an oral peripheral examination, which examines the structures of the mouth necessary for speech. Ms. Slankard gave the REEL, which is appropriate for birth to age 36 months. Student was non-compliant with standardized measures, so Mother was interviewed using the REEL in order to obtain an estimate of her current level of language functioning. The receptive language test showed Student at the 12 month age, and expressive language was at 15 months.

48. Edward Jelev is a preschool teacher in the District and is part of the Preschool Assessment Team. He is fluent in Spanish. When Mr. Jelev assessed Student, he had an internship credential and Student was one of his first assessments. He administered the Brigance test to determine Student's present levels of performance. He was trained by other individuals working in the Assessment Center, but had never read

the Brigance manual himself. The Brigance measured Student's fine and gross motor skills, as well as readiness and self help, and he wrote goals for Student based upon the assessment. When Student came to the assessment, she was not focused or paying attention and he had to follow her around to attempt to get her to do any tasks. He did not interview Mother, but was present when others were talking to her. He overheard that toileting was an area of need for Student and marked the Brigance report with an asterisk indicating that might be place to write a goal.

49. Student had unique needs in the areas of communication, receptive and expressive language, pragmatics, daily living, socialization, play skills, motor skills, prevocation, and readiness. Student did not have a unique need in the areas of behavior because Student did not show any behavior difficulties during the evaluation. Student also did not have a unique need for OT.<sup>9</sup>

#### GOALS AND OBJECTIVES

50. Student contends that the District did not provide placement, goals and services to address all areas of her unique needs. Student contends that the District should have had goals, placement and services in academics, developmental and functional areas, speech and language (goals only), social skills, communication, occupational therapy (OT), behavior, ABA (including in-home and community settings), and limited English proficiency.

51. An IEP is required to include a statement of measurable annual goals and a statement of how the child's progress toward the annual goals will be measured. A district is required to write measurable goals that address a student's unique needs and

---

<sup>9</sup> Student contends that she had a unique need for ABA-DTT. A thorough discussion of ABA occurs later in this decision.

must not be de minimis or trivial. The April 2005 IEP, which was in effect in August 2005, listed goals and objectives in the area of receptive and expressive language, fine motor, readiness, prevocation, social emotional and self help.

#### GOALS IN ACADEMICS, DEVELOPMENTAL AND FUNCTIONAL AREAS, OT, AND SOCIAL SKILLS

52. Edward Jelev wrote goals for Student based upon the Brigance testing in fine motor, readiness for learning, prevocation, social emotional and self help. He drafted a goal in the area of a fine motor focus that required Student to build a block tower up to eight blocks tall by year end. The goal could be addressed in the classroom and did not require separate OT services. Student did not have any gross motor needs. The readiness goal addressed Student's ability to prepare to learn and required Student to point at six of 11 colors within one year. When Student was assessed, she could identify 11 colors, but did not point at them. Pointing was an important skill, particularly for students on the autism spectrum. Mr. Jelev wrote a prevocation goal to address attending skills in small group setting for six minutes with verbal and physical prompts within one year's time. The goal would help develop social skills. He also drafted a social emotional goal addressing Student's need to play with others. By year end, she would be able to play simple group games such as Ring-Around-the-Rosie. Mr. Jelev wrote a self help goal to address hand washing with verbal prompts within one year. Even though toileting was an area of need, he thought toileting might be too difficult for her as an initial goal since she was afraid of the toilet. As a precursor goal to toileting, he wrote a goal for hand washing, and indicated he would draft new goals if Student met the hand washing goal. Mr. Jelev did not develop a goal for play because he did not think a behavior goal was necessary. Mr. Jelev believed she could work or play simultaneously with other goals, since he did not observe any significant behaviors

during the assessment. Mr. Jelev submitted all proposed goals for Dr. Walston's review and approval.

#### GOALS IN SPEECH AND LANGUAGE AND COMMUNICATION

53. Kamelia Slankard, SLP, wrote receptive and expressive language goals. The receptive language goal measured language comprehension through a series of objectives, including following a classroom routine, pointing, and rolling a ball back and forth. The expressive language goal addressed Student's language expression ability by imitating an adult's large motor movement, vocal play and production of one word by year's end.

#### GOALS IN BEHAVIOR

54. As discussed in Factual Findings 44 to 49, Student did not have any needs in the area of behavior. There was no specific information provided by Mother during the assessment that Student had a need for behavior goals. Student did not present any behavioral issues at the assessment. Therefore, as of the initial IEP, Student did not have a need in the area of behavior that should have been addressed in a goal.

#### GOALS IN ABA

55. Student contends that she had a unique need for ABA-DTT and that the District did not draft any goals in that area. Student offered testimony and evidence that as a general matter, children on the autism spectrum have unique needs that can only be addressed by ABA-DTT. Therefore, Student contends that she, as well as any child on the spectrum, requires goals and services in the area of ABA. A more thorough discussion of this contention occurs later in this decision. Based upon the initial assessment, the District did not determine Student had a unique need that could only

be addressed by ABA, and there was no persuasive testimony or evidence to the contrary. Accordingly, the District was not required to have goal in the area of ABA.

#### GOALS IN LIMITED ENGLISH PROFICIENCY

56. Student was assessed in Spanish, but had very little functional communication at the time of the assessment. Mother established that she spoke to Student primarily in English and that Student did not appear to respond in Spanish. Further, Student was not able to perform on the PLS-4, Spanish Edition, during her initial assessment. It is unclear from the evidence and testimony during the hearing what need Student believed she had in the area of limited English proficiency that was not addressed at the IEP. The evidence showed that Student had limited functional communication during the initial assessment and that Mother was primarily speaking to Student in English at home. Student did not establish that she had a unique need in the area of limited English proficiency that required a goal.

57. The District offered the opinion of Anabelle Ng-Quik, a District SLP, regarding the appropriateness of the speech and language and readiness goals. Ms. Ng-Quik provided speech and language consultation to Student's class at Jefferson II as part of a general program for language enrichment. Student's classroom was a language intense class. Her consultation services targeted the class as a whole and not Student specifically. She has a Master's degree in speech and language therapy as well as in music. She got to know Student well and found she had issues in attention, behavior and social interactions. Ms. Ng-Quik believed that the goals written by Ms. Slankard in receptive and expressive language were appropriate for Student and could be addressed in the classroom. Student had compliance issues and Ms. Ng-Quik did not believe that Student could have engaged in standardized speech and language testing while she knew her until April 2006. Neither Ms. Slankard nor Ms. Ng-Quik did a language sample from Student, but Student had relatively strong language compared to

other students in her class and had delayed echolalia. According to Ms. Ng-Quik, Student's readiness goal was appropriate even though Student could imitate words when she entered school because it helped Student get ready to learn. The expressive language goal was also appropriate because it developed reciprocal play, which is a precursor to functional communication. Student did not have functional communication, but her speech otherwise seemed to be in tact.

58. Ms. Pollard also explained how the goals were implemented in the classroom and it was her opinion that the goals were all appropriate for Student's needs. Ms. Pollard believed that the receptive language goal was similar to a DTT goal, and had Student following a simple one-step direction (put it in the book), which was important for Student because it was the beginning of DTT and helped Student get her needs met; when Student entered the program, she could not point to get her needs met, even to get something to eat, and the goal addressed that need. The expressive language goal was appropriate because it had Student imitating vocal play, such as, "what sound does a cow make," and had Student speaking. Ms. Pollard thought the hand washing self help goal was appropriate and worked in conjunction with a picture strategy in the bathroom. The prevocation goal was appropriate and addressed socialization by attending in a small group task, and was worked upon everyday in DTT for 20 to 30 minutes. The social-emotional goal worked toward helping Student tolerate other children since she had difficulty in that area. Ms. Pollard believed the goals were appropriate and were addressed during her school program.

59. Student provided the opinions of two expert witnesses who believed that the speech and language and self help goals were not appropriate. Patricia Schneider-Zioga, who has a Doctorate and Master's and Bachelor's degrees in Linguistics, opined that the speech and language goals were not based upon speech samples that examined mean length of utterance. She opined that without a language sample, there

was no way to accurately develop goals in the speech and language area. Further, the goals revealed no clear program for language introduction, such as the use of pronouns. Because of those defects, Dr. Schneider-Zioga believed the goals were not appropriate. Dr. Schneider-Zioga's opinion is entitled to less weight than those of the District's witnesses because she has not assessed children on the autism spectrum, and had only met Student for a few hours just prior to her testimony. Dr. Schneider-Zioga has read extensively about autism methodologies, but did not make any effort to review or learn about the programs in place at the District.

60. Dr. Caroline Bailey also testified as an expert on Student's behalf. Her opinion about the inadequacy of Student's goals developed at the initial IEP is persuasive, specifically in reference to the expressive and receptive language goals, and the self help skills. She is clinical psychologist and professor with extensive experience working with autistic children, but was not a classroom teacher. She was credible and her opinion was entitled to significant weight. Regarding the expressive language goal, Dr. Bailey opined that the goal "grossly underestimated" Student's needs because it would have her learn 11 words related to colors, but would do nothing to improve her social and functional use of language. The expressive language goal required Student to point to colors; however, Student should be expected to say the color for an expressive language goal. It was the opinion of Dr. Bailey that none of the goals in the April 2005 IEP identified as expressive language goals targeted expressive language; Dr. Bailey believed that Student did not have any expressive language goals in the IEP. In addition, the self help goals that targeted hand washing for one year were not appropriate given Student's score on the Vineland. Toileting on a scheduling system would have been more appropriate given Student's age and the need to learn crucial daily living and functional skills quickly and not a precursor skill over a one year period. In addition, Student's Father established that he and Mother implemented an intensive in-home

program to teach Student toileting skills, which was successful. Father established that with intensive intervention, Student learned to use the toilet appropriately within two weeks.

61. The speech and language goals and the self help goal developed for Student were not appropriate and did not address Student's unique needs in those areas. Based upon the testimony and evidence, including the Brigance and Vineland tests, Student had a unique need for toileting that was not properly addressed by the goal that targeted hand washing. Further, Student had a unique need in the area of expressive language that was not properly addressed by the District's drafted goals. The goals were reasonably calculated to promote only marginal educational progress, which resulted in a denial of FAPE. The other goals were appropriate and addressed Student's area of unique need.

#### APPROPRIATE PLACEMENT AND SERVICES

62. A district is required to provide a placement that is designed to address the student's unique educational needs and is reasonably calculated to provide the student with educational benefit. In addition, an IEP is evaluated in light of the information available at the time it was developed; it is not judged in hindsight. The focus is on the placement offered by the school district, not the alternative preferred by the parents.

63. The IEP team recommended a non-categorical SDC at Jefferson II five days per week, with transportation door-to-door each way. A non-categorical SDC includes children with all types of disabilities, including autism, language disorders, mental retardation, and other health impairments. The class was taught by Janice Moses, a credentialed special education teacher, who had many years of experience teaching students, including those with autism. Her class had English language learners in addition to those with language delays. The class had eight to twelve students when

Student entered, and one teacher and two assistants. Ms. Moses worked on positive behavior and language development all day in the classroom. A SLP and OT consulted weekly regarding the appropriateness of services to assist the class. The IEP team determined that Student would participate in general education for recess and specially designed activities, but would be in an SDC for all preschool subjects. Student would be in a classroom that received speech therapy consultation for once a week for 30 minutes to develop adequate activities for small group instruction. Ms. Moses established that English language development is provided within the framework of the intensive language-based preschool instruction. The IEP team determined that Student's behavior did not impede learning, but she would be monitored since she had no prior school experience. In August 2005, Student's placement was three and a half hours per day, five days per week, for a total of 17.5 hours per week. Dr. Walston established that a non-categorical SDC was appropriate for Student because it was a language rich classroom in a less restrictive setting than the autism program and Student's goals could be implemented in the classroom. Student needed a small, highly structured classroom, particularly since this was her first placement. Student's goals could be worked upon in the classroom. The services and structure of the class were appropriate to meet Student's needs.

64. Ms. Pollard began working with Student in September 2005 as a result of Student's tantruming. She set up a TEACCH system and environment in the classroom and also set up a DTT program for Student in the classroom. She trained, supervised and consulted with the aide working with Student. She regularly updated the program and changed the program weekly. Once she set up the classroom at Jefferson II, she believed that Student's behaviors improved and she spent more time on task. Ms. Pollard believed that the goals from the April 2005 IEP were appropriate for Student and could be worked upon in the classroom setting. She went to the classroom to observe

and assist setting up a TEACCH system and environment at the Jefferson II classroom with visuals, color coding and setting up DTT. Ms. Pollard established that Student actually received DTT daily from her aide, with weekly oversight from Ms. Pollard, who updated the program regularly.

65. Student offered the opinion of Dr. Bailey that a non-categorical SDC was not appropriate to meet Student's needs. Dr. Bailey believed that a non-categorical classroom, similar to the classroom that Student attended when she started school in April 2005, is not appropriate for children with autism because learning tends to be rote, with over-practiced skills that could be memorized and rehearsed and do not follow appropriate developmental models. Further, for students with higher IQs, more intensive early intervention is usually proscribed to catch up and participate in age appropriate curriculum. As discussed in Factual Finding 69, Dr. Bailey's position regarding the appropriateness of the non-categorical SDC was not persuasive.

66. Based upon the testimony and evidence in the case, the SDC placement for Student at Jefferson II was appropriate to implement Student's program, including all developed goals. Any evidence to the contrary presented by Student was not persuasive. The SDC class at Jefferson II, taught by Ms. Moses, was an appropriate initial placement for Student.

#### RESEARCH BASED PEER-REVIEWED INTERVENTIONS TO EXTENT PRACTICABLE FOR ABA, INCLUSION, CLASSROOM MANAGEMENT AND STRUCTURE, AND READING AND MATH INSTRUCTION

67. Student contends she had a unique need for a ABA-DTT program rather than the eclectic program offered by the District. Student contends that because she is on the autism spectrum and given her age, only an intensive in-home program of DTT could meet her unique needs. Student offered the opinions of Dr. Joseph Morrow, who runs a certified nonpublic agency that provides

intensive DTT programs to students, and Dr. Caroline Bailey, a doctor who has extensive knowledge and experience working with and assessing students with autism. Dr. Morrow explained that an intensive DTT program is "critical" to meeting the needs of all children on the autism spectrum and that anything less than 25 to 40 hours per week would not meet those needs. Dr. Bailey expressed a similar opinion that research has shown that an intensive language based DTT program is the best means to educate a child on the autism spectrum. Dr. Bailey opined that eclectic methods do not have the same results that an intensive ABA program would produce.

68. Dr. Bailey stated that Student had echolalia, both immediate and delayed, and based upon what was known at time she entered District, should have had intensive language intervention of 25 to 40 hours per week, which works best. According to Dr. Bailey, the same intervention is not as effective after 60 months (5 years). Intensive intervention is not a new or novel procedure according to Dr. Bailey; the information has been available for many years. According to the National Research Council (NRC), a student with autism needs a program across all areas, in-home and at school, to implement the same program and reinforce learned behavior in both environments. The best practice would be to have an in-home supervision every two weeks that help parents, including a teaching component in home with parents present.

69. Dr. Bailey is a credible witness and her opinion is entitled to considerable weight. In essence, Dr. Bailey argues that all students with autism would best be served by a 25 to 40 hour per week ABA-DTT program, a position supported by considerable literature and echoed by Dr. Morrow, another credible witness. However, their opinions are not persuasive that Student had a unique need for an ABA-DTT program and that no other program could meet her needs. Dr. Morrow had met Student one time for approximately an hour and a half, and bases his opinion not on Student's unique needs per se, but on the body of literature that he believes supports the view that only an

ABA-DTT program is the most effective intervention for autism. Dr. Bailey similarly had only met Student just over one month prior to the hearing and did not observe or evaluate Student prior to that time. She did not have any knowledge of the SDC at Jefferson II that was Student's original placement in April 2005. Her opinion that a non-categorical SDC would not be best for Student is not as persuasive in light of the fact that she did not see or evaluate that program and her general opinion that DTT is the best intervention for all children age three to five on the autism spectrum.

70. Further, methodologies are not required to be part of an IEP and do not necessarily need to be discussed at the IEP meeting. Student did not offer any persuasive authority for her proposition that ABA-DTT must be assessed or included in an IEP. As stated in Legal Conclusions 17 to 22, ABA programs and methodologies are subject to vigorous debate within the educational community. There is not persuasive evidence that ABA-DTT is the only appropriate manner to educate a person on the autism spectrum and there is peer reviewed research that establishes that other ABA programs provide educational benefit to students on the autism spectrum. Here, the weight of the evidence shows that Student was receiving some educational benefit from her program, even though the District did not completely meet her needs, as stated in Factual Finding 61. The testimony revealed that Student made educational progress in the classroom in spite of her behavior and was benefiting from the interventions in place for her.

71. The District provided Student with an appropriate placement in a non-categorical SDC from April 2005 until December 2005. The District's program met her needs, but failed to properly assess her behavior and cognitive needs after December 2005 and meet her unique needs for self help and expressive language. The placement denied her a FAPE for those reasons.

## PARENTAL PARTICIPATION

72. Student contends that the District did not allow meaningful parental input at the IEP meetings concerning ABA, limited English proficiency and speech and language services. The overwhelming weight of the testimony established that Mother participated fully in all IEP team discussions and decisions. The District provided qualified and credentialed interpreters for Mother at IEP meetings who read documents and translated conversations for Mother's benefit. At one IEP meeting, Mother agreed to proceed without an interpreter. Mother stated that some of the interpreters were not very good with Spanish, but she admitted that she never told the District she could not understand or otherwise made the District aware of any problems. Mother speaks and understands some English, but prefers Spanish. There was no credible evidence that Mother was not permitted full and meaningful participation in all decisions about Student's educational program. Further, as discussed elsewhere in this decision, methodologies and instruction are within the purview of the District, and there was no evidence offered by Student that demonstrated the District had an obligation to discuss ABA or limited English proficiency at the IEP meetings, and the parties resolved all issues related to speech and language other than goals prior to hearing. It is unclear in what manner Mother believed the District denied her meaningful participation in the IEP process since the evidence established the contrary.

## PREDETERMINATION OF PLACEMENT AND ABA

73. A school district may commit a procedural violation of the IDEA if it comes to an IEP meeting without an open mind and several options to offer for discussion with all team members. A district fulfills its obligation if it discusses and considers any suggestions and concerns a parent has concerning the child's placement.

Methodologies are not required to be part of an IEP. Student contends that the District predetermined its offer of placement and ABA services before each IEP meeting.<sup>10</sup>

74. The overwhelming weight of the evidence shows that the District fully discussed placement options with Mother at each of the IEP meetings. The District provided competent translators and gave Mother the opportunity to participate in all discussions regarding Student's placement and District staff did not enter the IEP discussions with placement already decided upon. Further, Mother established that she often deferred to the District and did not ask questions or tell the District when she did not understand something. The District offered Mother the opportunity to attend training sessions on autism that were offered by the District in the evenings, and Mother attended those programs on a couple of occasions. Student did not present any persuasive evidence that the District predetermined placement or ABA services for Student.

#### SOCIAL SKILLS PROGRAM -- DECEMBER 2005

75. In December 2005, Ms. Pollard thought Student had higher cognitive skills and recommended placing her in Ms. Pollard's social skills class at Madison. At the December 16, 2005 IEP, Mother reported on Student's continued poor functioning in the home and her concerns about how Student's behavior was impacting her school work. Between September and December 2005, Ms. Pollard reported that Student's behaviors were decreasing, but Mother disagreed. The IEP team felt Student should be moved to the social skills program at Madison and taught by Ms. Pollard to help with her communication skills. Mother agreed. The IEP team did not draft any new goals based upon the move to the social skills class. From December 16, 2005 to April 15, 2006,

---

<sup>10</sup> See Factual Findings 67 to 71 for a discussion of ABA.

Student attended preschool at Jefferson II and then went by bus to her communication and social skills class at Madison, and her program increased to 31.5 hours per week: 17.5 in the SDC at Jefferson II, and 14 hours per week in the social skills class at Madison. Student was also getting OT consultation in the classroom for 30 minutes per week, and speech and language consultation in the classroom for the same amount of time. The IEP team recommended that Mother attend autism classes presented by the District's autism specialist. Student began attending the social skills in program in January 2006 following the holiday break. The program was a language rich program that involved typical peers in socially engaging activities such as pretend play. Ms. Pollard's social skills program was based upon the TEACCH methodology and incorporated Michelle Garcia-Winner's social thinking strategies. There were no other changes made to Student's program at the December 2005 IEP.

#### OT – DECEMBER 2005

76. As discussed in Factual Findings 20 to 23, an OT evaluation and report was issued and discussed at the December 2005 IEP meeting. The IEP team determined that Student did not have any additional OT needs that were not already being met in her program.

77. The District was on notice in December 2005 that the non-categorical SDC was not meeting Student's behavioral needs. Further, a new unique need had been identified for behavior and cognitive functioning, but no goals were developed to meet those needs and no assessments were proposed to further evaluate Student's baselines and present levels. Further, Mother had continually reported behavioral difficulties getting Student to school by bus and that her behavior at home was impeding her progress at school, and the District did not adequately address or assess Student's need for an in-home program. Accordingly, the District denied Student a FAPE from December 2005 until April 2006 because the program and placement was not designed

to address Student's unique needs in behavior, toileting, and speech and language, and had not properly assessed her cognitive abilities, even though the length of Student's program had increased significantly.

## LRE

78. In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom.<sup>11</sup>

79. Student's SDC at Jefferson II and the social skills program at Madison were the LRE for Student. Both programs provided her educational benefit and allowed her to work on her goals. The SDC at Jefferson had opportunities to interact with typical peers that were in other classrooms at the same school site. The testimony established that the typical peers and Student's class interacted through classroom visitation at least once per week. The social skills program at Madison involved typical peers in the class on a daily basis. Student's needs required a more structured environment than could be offered in a general education classroom, and there was no evidence offered by Student to the contrary. Student's classroom at Jefferson II and Madison were the LRE for Student.

---

<sup>11</sup> The cost of mainstreaming was not an issue listed for hearing and will not be discussed.

## 2006-2007 SCHOOL YEAR (KINDERGARTEN)

### UNIQUE NEEDS

80. At the April 18, 2006 annual IEP meeting, the IEP team reviewed Student's previous goals and talked to her service providers and teachers to determine her unique needs. Student had unique needs in the areas of preacademic, fine motor, prevocational, social-emotional, and communication skills. The IEP team developed goals in those areas to address her needs. Student also had unique needs in the area of behavior, an in-home program, and further cognitive assessment that were not addressed by the IEP team.

### GOALS AND OBJECTIVES

81. The IEP included a total of nine goals: two in the area of prevocational, two in social emotional, two in preacademics, and one each in fine motor, communication, and social skills. The first prevocational goal concerned Student remaining on task for up to 10 minutes in a small group setting by the end of one year. The second prevocational goal concerned Student showing language comprehension and expression skills during small group instruction by following a two- to three-step direction by the end of one year. The first social-emotional goal concerned impulse control with objectives requiring Student to accept delays in reinforcement, express displeasure verbally with proper intonation and words rather than screaming, and change routine with ease when alternatives are presented. The second social emotional goal concerned play skills and required Student to play near other children, then watch others play and play near them, and ultimately play with a peer for up to three minutes by rolling a ball back and forth. One preacademic goal assisted effective writing skills with the objective at the end of the year to write simple words from dictation. The other concerned understanding of up to 30 quantitative, directional, and positional concepts

by the end of the year, with teacher modeling if needed. The fine motor goal concerned Student's ability to copy forms, including a square, rectangle and triangle by the end of one year. The communication goal addressed effective receptive and expressive language skills by imitating an adult's vocal production, using two-word carrier phrases, and expanding phrase and sentence length in conversation to independently express her wants and needs using three-word phrases or with visual combination cards by the end of one year. Student met the goals by February 2007.

#### GOALS IN ACADEMICS, DEVELOPMENTAL AND FUNCTIONAL AREAS, OT, AND SOCIAL SKILLS

82. Ms. Pollard explained that the prevocational goals worked upon Student's ability to attend and complete work in the classroom, which was more demanding for her than in the previous goal. The social-emotional goal worked upon reinforcing behavior and was moving Student towards a higher skill level involving her motivation and impulse control. The second social-emotional goal was a carry over goal and was important because Student did not play with peers and needed some prerequisite skills before she could do so. The preacademic goals were designed to prepare Student for kindergarten and were based upon state standards. The other preacademic goal was based upon general knowledge and readiness skills as identified in the Brigance. The goals addressed Student's needs in the area of academics, developmental and functional areas and social skills. Student did not have a need that should have been addressed by an OT.

#### GOALS IN BEHAVIOR

83. The IEP team listed in the April 2006 IEP that behavior was not impeding her learning and that she would be monitored once she was placed in the program. However, the social-emotional and prevocational goals worked generally upon

Student's tolerance and impulse control that affected her behavior in the classroom. The IEP team did not draft specific goals directed at tantruming or screaming, the behaviors that Mother reported seeing at home and in the classroom. As determined in Factual Findings 6 to 10, Student had a need in the area of behavior that was not being addressed in the classroom or at home. The evidence established that Student's need for behavior goals continued into the 2006-2007 school year.

#### GOALS IN ABA AND LIMITED ENGLISH PROFICIENCY

84. As discussed in factual findings 55 to 56, Student did not demonstrate a need for ABA-DTT and did not demonstrate a need in the area of limited English proficiency. Further, Student was receiving ABA DTT during her daily classroom routine.

#### GOALS IN SPEECH AND LANGUAGE AND COMMUNICATION

85. Ms. Pollard drafted a prevocational goal that addressed language comprehension and a communication goal that addressed receptive and expressive language needs. The prevocational goal targeted compliance issues in a small group setting. The communication goal helped Student express her needs verbally and was designed to increase the length of utterance, but not in a complete sentence.

86. Dr. Bailey opined the goals listed in the April 2006 were difficult to understand and follow, and the means to measure success or even to determine what was being observed was too convoluted to be of assistance. Dr. Bailey explained that generally Student would have a need for prephonics and sequencing, which are important for language development and socialization and are generally addressed in prekindergarten skills. There were no goals listed for sequencing. According to Dr. Bailey, the language goals were not an effective way to teach language and would directly affect Student's ability to access her education. Dr. Bailey also opined that Student had behavioral needs in the home and classroom that should have been

addressed by a FAA, and disagreed with the IEP team notation that Student's behavior was not impeding her learning.

87. Ms. Pollard established that the goals were measurable and the objectives were sequentially designed to meet the goals. In fact, the evidence established that Student met the goals early and the annual IEP was advanced to February 2007 to draft new goals.

88. To the extent that there is a disagreement about the appropriateness of the goals for the April 2006 IEP, Dr. Bailey's opinion is not persuasive. Dr. Bailey could not understand the nature of the measurement in some of the goals and did not agree with the manner in which language was introduced. However, the evidence established that the service providers understood and implemented the goals and Student actually met the goals early. However, regarding the need for behavior goals, Dr. Bailey's opinion was persuasive and was corroborated by Dr. Walston, who agreed that Student should have had an FAA since her behavior had been identified and present for nearly six months. Dr. Walston had this view even though Ms. Pollard and the classroom teachers believed they were controlling the behavior in the classroom.

#### APPROPRIATE PLACEMENT AND SUPPORT AND SERVICES

89. At the April 2006 IEP, Student was moved to Susie Attal's class at Madison. The IEP team believed that Student needed a more structured classroom environment than could be provided at the Jefferson II SDC or in the general education. Ms. Attal has been an SDC preschool and kindergarten teacher in the District for nearly 21 years. Ms. Attal has a Bachelor's degree in English and History and has a multiple subject credential and a mild to moderate learning handicap credential. Ms. Attal's class had 11 students, three classroom assistants, with a fourth aide doing one to one services, and all had

autistic like behaviors. Her classroom is structured as part of the SUCSESS<sup>12</sup> program within the District, which is a program developed by the Orange County Office of Education in 2002. SUCSESS incorporates a variety of methodologies that have proven effective when working with children with autism. The program is based upon literature from the California Department of Education and the NRC about delivering effective programs to children with autism. The classroom was a language rich environment and also had picture schedules, structure and support in the classroom. Ms. Attal's SUCSESS classroom incorporated visual supports based upon TEACCH methodology, which allows maximum independence with color coded work stations and picture schedules. She used a variety of methodologies of which she had been trained, including in the Picture Exchange Communication System (PECS), DTT, TEACCH, Relationship Development Intervention (RDI), Links to Language, and incorporated some Pivotal Response Training (PRT). She believed her classroom structure is successful because she sees children responding and making progress, with less anxiety and less acting out behavior. She used the Houghton Mifflin curriculum for reading and math, which is a research based curriculum that incorporates all California standards into its programs. SLP and OT staff consulted with Ms. Attal on a weekly basis, but they did not specifically focus on Student. Student had excellent self help skills. Student made educational progress in her classroom.

90. Student had behavior outbursts, usually in the morning involving the bus or if another student was getting too close to her. Her outbursts always stopped at 9:30 a.m., when the music lesson began. Student would scream or throw herself to the floor once every other day. Ms. Attal thought she could manage the behavior within the

---

<sup>12</sup> Systematic Utilization of Comprehensive Strategies for Ensuring Student Success.

parameters of the general classroom behavior plan she had developed for the class and did not believe Student needed a BSP because her behaviors were no different than other students on the spectrum, did not cause problems for other students, did not impede her learning or that of others, and she was able to make progress on her goals. If necessary, Student was taken out of class for a walk; this did not occur often and was never for more than five minutes. Ms. Attal thought her goals were well written and could be worked on in her class. Student received DTT during her class where she worked on readiness, fine motor, preacademics, and language.

91. The District had an obligation to meet Student's unique needs. The SUCSESS program was structured to provide Student a language rich environment, with supporting services to allow her to access her education. As discussed in Factual Findings 67 to 71, the District was not required to offer an ABA-DTT program to Student. Student did not show that she had a need for an ABA-DTT program, and the offer to Student incorporated DTT strategies. The SUCSESS program in Ms. Attal's classroom met Student's needs, was reasonably calculated for her to make progress, and the evidence showed that she did make progress. The SUCSESS program was an appropriate placement for Student.

#### RESEARCH BASED PEER-REVIEWED INTERVENTIONS TO EXTENT PRACTICABLE FOR ABA, INCLUSION, CLASSROOM MANAGEMENT AND STRUCTURE, AND READING AND MATH INSTRUCTION

92. As discussed in Factual Findings 67 to 71, the District utilized peer reviewed interventions to the extent practicable for ABA, reading and math instruction. Ms. Attal's class used Houghton-Mifflin for reading and math instruction, which are state approved curriculums. The District's SUCSESS program incorporated TEACHH, ABA, DTT, PECS, and RDI, all of which are peer-reviewed as discussed in Legal Conclusions 17 to 22. In addition, both Ms. Attal and Ms. Pollard regularly attend training on educating

children with autism. The District utilized research based peer-reviewed interventions to the extent practicable.

#### PARENTAL PARTICIPATION

93. As discussed in Factual Finding 72, the District provided Mother every opportunity to participate in the IEP meetings and planning for Student's educational program. Student did not present any contrary evidence. There was no change in the way the District conducted itself and handled meetings during the 2005-2006 to the 2006-2007 school years.

#### PREDETERMINATION OF PLACEMENT AND ABA

94. As discussed in Factual Findings 73 to 74, there was no persuasive evidence presented that the District predetermined an offer of placement or ABA services prior to discussion at IEP meetings that included Mother. There was no persuasive evidence to the contrary offered by Student.

#### LRE

95. Student's needs required a more structured environment than could be offered in a general education classroom. Student required a language rich and intensive program that could not be properly met in the general education environment, and there was no evidence offered by Student to the contrary. Ms. Attal's classroom at Madison and the social skills program with Ms. Pollard provided the appropriate level of structure and supervision to engage Student. The classrooms were designed to meet Student's unique needs and were reasonably calculated to help her make progress. The evidence established that Student did make progress in those classrooms.

## OT -- AUGUST 2006

96. At the April 2006 IEP meeting, Annie Kim recommended an OT consultation for parent, which concluded in August 2006. On August 30, 2006, the IEP team met to discuss recommendations following the OT consultation. Mother had expressed continuing concerns that Student had poor attention and attending skills. Ms. Kim proposed two new goals for sensory processing and attending behaviors that would be worked upon in the OT clinic. According to Ms. Kim, Mother understood the reason for the new goals and agreed to them. The IEP team agreed that Student would go to OT two times per week for 30 minutes. The IEP team provided mother suggestions for in home routines during breaks from school. There were no other changes made to Student's placement or services during the August 2006 IEP meeting.

## BEHAVIOR -- NOVEMBER 2006

97. As stated in Factual Findings 13 to 15, Mother requested a FBA in writing in September 2006. Mother had continuing concerns about Student's behaviors in the home and in school and was worried how the behaviors were impacting her education. The District did not complete the FBA and did not hold an IEP meeting to discuss the request until November 7, 2006. At that meeting, Mother discussed medications that Student was taking for anxiety and wanted language therapy to assist Student with therapy. The IEP team discussed Student's high pitched screaming behavior and suggested meeting again after Student's medications had stabilized to develop a BSP if necessary.

98. At the same meeting, the IEP suggested strategies that Mother could use in the community when Student's behavior was difficult, including using earphones (such as an Ipod) to avoid loud or disturbing noises. Mother expressed concern that Student would become dependent on the earphones to function.

99. As discussed in Factual Findings 13 to 15, Mother had been expressing concerns about Student's behaviors at home and in the classroom for more than one year. The behaviors were observed by District staff, but the District failed to perform an FBA and did not meet Student's behavioral needs. The District did not meet Student's unique needs in the area of behavior and for an in home program to assist with those behaviors as it impacted her school program. There were no changes made to Student's program or services at the November 2006 IEP.

#### FEBRUARY 2007 ANNUAL IEP

100. Student had met most of the goals written in the April 2006 IEP, so the parties agreed to advance her annual IEP to February 2007 and draft new goals.

#### UNIQUE NEEDS

101. As discussed in Factual Finding 80, Student's unique needs remained those as listed in her April 2006 IEP. In addition, Student had identified a need for an OT consultation for attending behaviors that was addressed in an IEP goal. The IEP team did not address any behavioral needs and did not address the need for an in-home program.

#### GOALS AND OBJECTIVES

102. The February 22, 2007 IEP listed nine goals: two in the areas of preacademics, and a fine and gross motor, receptive and expressive language, social adaptation, prevocation, and social skills goal. The goals were written after reviewing progress with her aide, teachers and support providers and after assessing her present levels on the Brigance. Ms. Attal and Ms. Pollard drafted the goals after testing Student on the Brigance and reviewing her progress with the aides who worked with her.

## GOALS IN ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL AREAS, OT AND SOCIAL SKILLS

103. Student's first preacademic goal concerned demonstrating developmentally appropriate skills in a small group setting by first sounding out three letter words, then writing down three letter words, and finally answering questions such as, "What do you do when you are hungry?" The goal targeted specific skill deficits identified on the Brigance. The second preacademic goal was a math goal based upon kindergarten level skills identified on the Brigance. The goal sought to have Student demonstrate developmentally appropriate skills in mathematics by writing numbers from dictation, counting from one to 50, and telling time to the nearest hour by the end of one year.

104. Ms. Attal drafted the gross and fine motor goals based upon the results of the Brigance. Ms. Attal believed the goals could be addressed appropriately in the classroom and did not require OT. The fine motor goal required Student to write within the lines, write her first and last name, then cut out a paper doll by the end of one year. Objectives one and three were part of the California curriculum standards. The gross motor goal required Student to bounce and catch a ball twice in a small group setting, hop three times on a preferred foot, and skip on both feet by the end of one year.

105. Ms. Attal drafted the social adaptation based upon the Brigance. The social adaptation goal required Student to play within two feet of another child during free play for at least 10 minutes, then initiate a social greeting in a small group setting, and share a toy by the end of one year.

106. Ms. Pollard drafted the prevocation goal in consultation with Ms. Attal, and was based upon observation of Student in the classroom setting. The goal required Student to clean up toys when requested, find a way to calm herself down when

agitated so that she did not scream, and participate quietly during indoor school activities by the end of one year.

107. Ms. Pollard drafted the social skills goal that was primarily aimed at pragmatics. Her social skills goal concerned common focus during play and required her to establish joint attention with up to three peers, engage in joint action with up to three peers, and engage in mutual imitation with up to three peers in a small group setting with minimal assistance with one year time. The goal worked upon nonverbal communication and perspective taking, which are essential to appropriate communication with others.

108. The IEP continued the OT goal drafted by Ms. Kim and adopted at the August 2006 addendum IEP. The goal originally was implemented in the clinic setting, but was transitioned to the classroom in February 2007 so Student could generalize the skills. The goal required Student to engage in a sensorimotor task five times in 15 minutes over a two-week period. Student then would follow direction and engage in and complete a simple fine motor task for five minutes, engage in a two-step obstacle course with tactile, movement and auditory components, and ultimately demonstrate the ability to sit in circle time for 15 minutes with modifications as needed.

#### GOALS FOR SPEECH AND LANGUAGE AND COMMUNICATION

109. Ms. Pollard and Ms. Attal collaborated in drafting the expressive and receptive language goals based upon the Brigance and in consultation with each other. The receptive language goal required Student to show understanding of 10 qualitative concepts in a small group setting, show an understanding of prepositions, and follow a two-step direction at her level in a small group setting by the end of one year. The expressive language goal required Student to use prepositions in her speech, answer "when" questions to the nearest hour, and tell about something that just happened at her level in a small group setting by the end of one year. The goals were not based

directly upon California standards, but were in line with age appropriate skills identified on the Brigance.

#### GOALS FOR BEHAVIOR

110. As stated in Factual Findings 6 to 10 and 54, the IEP team did not specifically address Student's tantruming and screaming behaviors in the classroom or at home. Some of the goals indirectly targeted appropriate behaviors, but there were no goals drafted specifically targeting Student's screaming and tantruming behavior in the classroom.

#### GOALS FOR ABA AND LIMITED ENGLISH PROFICIENCY

111. As stated in Factual Findings 55, 56 and 84, Student did not offer persuasive testimony that Student had a need in the area of ABA or limited English proficiency that should have been addressed in her IEP. Student's primary language was English and she was placed in a language rich classroom.

112. As discussed in Factual Findings 86 to 88, Dr. Bailey generally challenged the sufficiency of the goals because there was no way to measure success. The speech and language goals also did not focus on what others were saying and the language skills needed to be more complete so that Student would develop a "full range" of language skills. Also, Dr. Bailey believed that the skills were being introduced at too slow of a pace, which did not make sense to her. Language skills, such as pronouns are introduced quickly and systematically not over a one year period.

113. The weight of the testimony established that the goals were measurable and appropriate based upon Student's present skill levels and Brigance testing. Dr. Bailey's criticism of the goals was not persuasive when compared to the testimony of Ms. Pollard and Ms. Attal who worked directly with Student on a daily basis. The goals

were appropriate to address all areas of need and Student made progress in her program.

#### APPROPRIATE PLACEMENT AND SUPPORT AND SERVICES

114. As discussed in Factual Findings 89 to 92, Student's program and placement continued to be the SUCSESS SDC and Ms. Pollard's social skills class, which had been renamed the Intensive Behavioral Intervention (IBI) program. IBI would end in June 29, 2007. The IBI program was ending in June because Student was going into the first grade where a social skills curriculum was covered in the first grade class. The IEP team agreed to meet again for a transition IEP with a member of the proposed first grade classroom present to discuss the program. As determined in Factual Findings 89 to 92, Student's placement was sufficient to meet Student's needs and she was able to make educational progress within the program.

115. On May 23, 2007, the IEP team met to discuss Student's transition from kindergarten to first grade. The team determined that from May 23 to June 28, 2007, Student would remain in her current program, including her IBI program and then transition to a first grade class at Roosevelt. Mother was concerned about Student moving to another school and expressed concerns that Student's program was being cut (IBI was ending), which would cause Student to fall further behind. Ms. Dennison attended the meeting and discussed the differences between a learning handicapped and a CH classroom and expressed the opinion that Student would be better served in a CH classroom because it is a language rich program that is individually tailored to each student's unique needs. The CH classroom was also a less restrictive environment than a learning handicapped classroom. The IEP team suggested Mother visit Roosevelt before the next IEP meeting.

116. Penny Arnold is a program specialist with the District. She attended the May 23, 2007 IEP meeting to discuss transitioning Student from kindergarten to first

grade. Ms. Arnold believed that a CH classroom was best for Student because it placed an emphasis on language and communication skills, provided smaller group activities, and worked on breaking tasks down to use language rather than gestures to communicate. The CH class was recommended based upon Student's autism diagnosis, her social and communication skills, and language abilities.

117. On June 21, 2007, the IEP team met again to discuss Student's classroom placement for the first grade. Mother had reviewed the proposed SDC-CH class at Roosevelt. The IEP team discussed that the proposed classroom would not have third graders the following school year, but would be limited to first and second graders. The proposed classroom offered a language rich learning environment and was very structured, which was needed by Student. The goal of the SDC-CH class was to work towards student independence, and offered the classroom structure and support, including small group and one-to-one interventions to meet that goal.

118. On June 21, 2007, the IEP team also reviewed an OT progress summary report prepared by Jessica Peng, a licensed OT working in the District for the past seven years. Ms. Peng has a Master's degree in OT and a Bachelor's degree in Anthropology. Ms. Peng did not conduct a new evaluation, but was only reporting upon progress by Student in her weekly OT sessions. Ms. Peng recommended continued OT consultation in the natural learning environment and made recommendations for accommodations and modifications to the classroom. Ms. Peng did not believe Student had any specific OT concerns that needed additional goals and also had the opinion that Student's behaviors were not sensory related. The IEP team recommended that from June 21, 2007 to February 22, 2008, Student receive 25 sessions of OT for 30 minutes each. There were no other changes recommended to Student's IEP. The goals and services would continue at the Roosevelt SDC-CH classroom.

119. The program, services and placement offered by the District during the 2006-2007 school year until August 2007 were appropriate and designed to meet Student's unique needs, except in the area of behavior discussed above. Student was benefiting from the educational program and was making educational progress.

#### CURRENT PLACEMENT

120. Angela Juarez is currently Student's SDC-CH teacher at Roosevelt Elementary School. She has an internship credential and will enroll in a Master's curriculum in late February, and has met the requirements for a clear credential. Ms. Juarez worked as a special education assistant prior to becoming a teacher. She is supervised by a Master teacher, who observes her one time per week for 30 minutes. She is working towards a preliminary level I mild-moderate credential, and was finishing up her credential within a couple days of testimony. Her class currently has nine students, six with autism, and three with speech and language impairment. All of her students are verbal and six to seven speak in full sentences, including Student who speaks in full sentences when prompted and with nonverbal cues. She has three instructional assistants in her class, including Student's aide. Four students are at second grade level, five at first grade, and all are at least at a first grade level of work. Student reads as well as the other students in her class. Student has a visual schedule in class and needs modeling and assistance. Student receives DTT in class from her aide, one hour before lunch and one hour after lunch.

121. Student is currently mainstreamed into a general education first grade classroom at Roosevelt taught by Sara Beth Macmillan. Ms. Macmillan has taught in the District for 18 years and taught all elementary grades other than fourth. She has 22 students in her class. Student has attended her class since the October 2007 IEP meeting for one hour each day and has been disruptive five times. The intensity of the disruption is bothersome, not the duration. She has high pitched screams, but she has not been

removed or evacuated from class. She is currently at a beginning first grade level in math and written language, and is reading at a first grade level, but not first grade second semester. Ms. Macmillan does not believe Student is ready to be mainstreamed for more time than she currently has.

122. Holly Walker is a school psychologist in the District who works with Student at her current placement at Roosevelt. She has a Bachelor's in Psychology and a Master's in Education, with an emphasis in school psychology, and the parties stipulated that Ms. Walker was an expert in ABA. She oversees the ABA program and became involved with Student in August 2007. Ms. Walker oversees Student's ABA program at Roosevelt and ensures that Student is receiving two hours per day of ABA. Ms. Walker would not recommend DTT for lost educational time for a six year old in the first grade. Ms. Walker believes that Student's current program for ABA is sufficient. According to Ms. Walker, Student does not need an in-home program presently because her school program is addressing her educational needs and she is benefiting from the program educationally.

#### COMPENSATORY EDUCATION

123. 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. The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

124. The District denied Student a FAPE during the 2005-2006 and 2006-2007 school years by failing to adequately assess Student's behavioral and cognitive needs,

failing to offer an in-home program when Student's behavioral needs at home were interfering with and impeding her access to the educational environment, and by failing to provide adequate goals in self help skills and speech and language from August 2005 to April 2006.

125. Student provided overwhelming evidence that she could benefit from an ABA-DTT program to remedy the lost educational opportunity caused by the District's failure to provide her a FAPE. Dr. Bailey and Dr. Morrow both established persuasively that while an intensive ABA-DTT program works best between the ages of three to five, there is still significant benefit to be gained by offering a DTT program now. Student could benefit from additional assistance to make up for lost educational opportunities that should enhance her current program. Dr. Morrow runs a company called Applied Behavior Consultants, which could provide in-home behavior program and services to Student so that she could generalize behaviors in classroom and home.

126. Further, Student offered persuasive testimony that, at the time of the hearing, she was benefiting from a privately funded ABA-DTT in the home. During the holiday break in December 2007 and January 2008, Kyla Doyle provided in-home ABA services to Student. Ms. Doyle was qualified to provide those services, but was not a licensed practitioner and did not work through an NPA. Mother expended \$1325 providing private ABA to remedy the lack of behavioral services offered by the District and \$336 purchasing educational materials to better understand the disability and better assist Student in light of the District's failure to do so. Student is seeking reimbursement for both amounts that total \$1661.

127. The evidence also showed that Student was receiving educational benefit in her current program at Roosevelt that included mainstreaming in the general education classroom for math and language arts for five hours per week. Student is currently accessing her education, reading, and has shown dramatic improvements in

language since December 2007. Student was also receiving DTT as part of her current school program and had received limited DTT during the 2005-2006 and 2006-2007 school years. Student no longer wanted an intensive ABA in home program full time as the educational benefits at school and in the general education classrooms were affecting Student positively and the developmental benefits of being around typical peers outweighed an intensive in-home program that required Student to be removed from school. Student did not establish that she had a need for OT services that were not otherwise met by the District's program, nor did she establish that she was entitled to reimbursement for the cost of Dr. Bailey's report. Further, Student did not establish that a fund for purposes of educational materials was necessary or required.

## APPLICABLE LAW

### BURDEN OF PROOF

1. The party who filed the request for due process has the burden of persuasion at the due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student filed for a due process hearing as to Issues 1, 2 and 4, and bears the burden of persuasion. The District filed as to Issue 3 and bears the burden of persuasion on that issue.

### GENERAL PRINCIPLES

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) Related services are transportation and other developmental, corrective and supportive services required to assist the child in

benefiting from special education. (20 U.S.C. § 1401(a)(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) 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. (*Id.* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. Procedural errors in the IEP process do not automatically require a finding of a FAPE denial. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE. (20 U.S.C. § 1415(f)(3)(E); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.).)

5. An IEP is evaluated in light of the information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195

F.3d 1141, 1149.)<sup>13</sup> It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The evidence must establish an objective indication that the child is likely to make progress. The evidence of progress, or lack thereof, must be viewed in light of the limitations imposed by the child's disability. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.) De minimis benefit or trivial advancement, however is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Id.*) Rather, a child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3 1114, 1121.)

## THE IEP

6. An IEP must contain a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the "extent ... to which" a child will not participate in a regular classroom with nondisabled children; a statement of the special education and related services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345, subs. (a)(1), (2), (3).)

---

<sup>13</sup> Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeal applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County Off. of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212.) Further, District Courts within the Ninth Circuit have applied its analysis to IEPs. (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

## REQUIRED MEASURABLE ANNUAL GOALS FOR A PRESCHOOL STUDENT

7. The IEP for special education students, including preschool students, must include measurable annual goals designed to meet the student's needs that result from the disability to enable the student to be involved in and make progress in the general education curriculum and meet the student's other educational needs that result from the disability. The IEP must include a description of how the student's progress towards meeting such goals will be measured and when periodic reports will be provided. (20 U.S.C. § 1414(d)(1)(A), Ed. Code, § 56345, subds. (a)(2), (3).) For preschool children, the IEP must include, where appropriate, the manner in which the student's disability affects his or her involvement and progress in appropriate activities for preschoolers. (20 U.S.C. § 1414(d)(1)(A)(I)(bb), Ed. Code, § 56345, subd. (a)(1)(B).)

8. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

## LRE

9. A special education student must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i))

& (ii.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption," but mainstreaming is not required in every case. (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also 20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento Unified School District v. Holland* (9th Cir. 1994) 14 F.3d 1398, 1403.)

## BEHAVIORAL SUPPORTS

10. When a child's behavior "impedes the child's learning or that of others," a school district must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i).) An FAA is a detailed assessment of a child's behavior, which includes, among other things, systematic observation of the occurrence of the targeted behaviors, systematic observation of immediate antecedent events associated with the behavior and the consequences of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)

## GENERAL PRINCIPLES OF ASSESSMENT<sup>14</sup>

11. A child must be assessed by a school district in all areas related to the suspected disability including, if appropriate, social-emotional status; no single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.532(g); Ed. Code, § 56320, subd. (f).) A reassessment of a student shall occur if the local educational agency (LEA) determines that the educational or related services needs, including improved academic achievement and functional performance, warrant a reassessment, or if the parents or teacher request a reassessment. (Ed. Code, § 56381, subd. (a)(1).) A reassessment of a student shall occur not more frequently than once a year, unless the parents and LEA agree otherwise, and shall occur at least once every three years, unless the parents and LEA agree in writing that it is not necessary. (Ed. Code, § 56381, subd. (a)(2).) Parental consent must be obtained before an assessment is undertaken. (Ed. Code, § 56321.)

12. 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." (Ed. Code, §§ 56320, subd. (g), 56322; see 20 U.S.C. § 1414(b)(3)(A)(iv).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(2), (3); Ed. Code, § 56320, subds. (a), (b).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purposes for which they are

---

<sup>14</sup> An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication, unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subd. (a).)

13. In conducting the evaluation, a District must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability, and in determining the contents of an IEP. (20 U.S.C. § 1414(b)(2)(A); Ed. Code, § 56320.) The District may not use any single assessment as the sole criterion for determining eligibility and must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(B), (b)(2)(C); Ed. Code, § 56320.) A district is required to use assessments that provide relevant information that directly assists persons in determining the educational needs of the child. (20 U.S.C. § 1414(b)(3)(D); 34 C.F.R. § 300.304(c)(7).)

### IEEs

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

disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

15. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) The public agency may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).)

#### PREDETERMINATION OF OFFER

16. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (34 C.F.R. § 300.501(a), (c); Ed. Code, §§ 56304, 56342.5.) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP meeting; that does not constitute predetermination of the IEP. (*A.E. v. Westport Bd. of Educ.* (D. Conn. 2006) 463 F.Supp.2d 208, 216-217; *affd.* (2d. Cir. October 18, 2007) 2007 U.S.App. LEXIS 24472 .) However, when a school district has predetermined the child's program and did not consider the parents' requests with an open mind, the school district denied the parents their right to participate in the IEP process. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2005) 392 F.3d 840, 858.) Parents do not have a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement; their resort is to a due process hearing. (*DOE v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1489.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA

does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.)

## METHODOLOGY

17. The *Rowley* decision established that, as long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley*, 458 U.S. at p. 208.) The choice of methodologies applies to educating children with autism. (See, e.g., *Adams, etc. v. Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Ore. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84 (citing *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992-93).) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M., supra*, at p. 992 (citing *Rowley, supra*, 458 U.S. at pp. 202.)

18. In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour per week ABA/DTT program modeled after the research of Dr. O. Ivar Lovaas, the Ninth Circuit Court of Appeal explained:

Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings

before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children. *See, e.g.*, E.R. Tab 9; Dawson & Osterling (reviewing eight effective model programs). IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child. (*Adams v. State of Oregon*, 195 F.3d at pp. 1149-1150 (citing *Gregory K. v. Longview Sch. Dist.*, (9th Cir. 1987) 811 F.2d 1307, 1314).)

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

20. IEPs shall include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable. (34 C.F.R. § 300.320(a)(4).) The language “to the extent practicable” regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program. As to “peer reviewed research,” the United States Department of Education’s (USDOE) commentary to the new federal regulations implementing the reauthorized IDEA stated, “We decline to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome.” (71 Fed.Reg. 46663 (August 14, 2006).) The USDOE also noted, “[T]here is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child’s IEP Team based on the child’s individual needs.” (71 Fed.Reg. 46665 (August 14, 2006).)

21. The District’s comprehensive SUCSESS program incorporates ABA, DTT, TEACCH, Pivotal Response Training (PRT), and Picture Exchange Communication System (PECS). All of these programs except PECS were among the 10 comprehensive model programs selected by the NRC in its book, “Educating Children with Autism.” In discussing the comprehensive programs, the NRC noted that, while the “differing conceptual frameworks influence the intervention models in substantial ways, there is also considerable overlap between and across the various models,” and that “gaps in practice appear to be narrowing.” The book includes a section entitled “Intervention Studies” that discusses studies of each program that have been completed, some of

which were peer-reviewed. However, the Council stated, "There is no outcome study published in a peer-reviewed journal that supports comparative statements of the superiority of one model or approach over another." (*Student v. Pajaro Valley Unified School District* (May 11, 2007) OAH Case No. 2006110472; *Rocklin Unified School District v. Student* (May 25, 2007) OAH Case No. 2006110278; *Student v. San Juan Unified School District* (June 18, 2007) OAH Case No. 2006120636; *Student v. Fremont Unified School District* (November 9, 2007) OAH Case No. 2006110101; *Student v. Long Beach Unified School District* (February 5, 2008) OAH Case No. 2007040442.)

22. The scientific research regarding the various methodologies to teach autistic children is still emerging and inconclusive at best. ABA is an intensive behavioral intervention which employs behavior modification treatment. The component parts of early intervention through the use of ABA techniques include the intensity of a 40-hour week, primarily involving one-on-one repetitive drills, or DTT, by a therapist trained in this methodology, and detailed daily data collection to monitor skill acquisition. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, p. 10, fn. 2.) TEACCH uses a mixture of approaches and methods, including several techniques in combination.

The premise of TEACCH is to utilize the typical strengths of children with autism, including visual learning, visual cues and visual scheduling, to develop other related skills that are generally more challenging. The program emphasizes a variety of communication skill and socialization all aimed at helping the child "generalize" skills that are fostered in her educational environment. TEACCH also employs behavioral intervention, incidental teaching through various structured activities, and the Picture Exchange Communication System.

*(Pitchford v. Salem-Keizer School District* (W.D.Or. 2001) 155 F.Supp.2d. 1213, 1217.) TEACCH, using the PECS methodology, is a widely accepted method for the treatment of autism. PRT was an ABA-analytic treatment that has been published in journals and peer-reviewed. PECS is a program designed to develop early nonverbal communication through the use of icons, pictures or photographs to facilitate communication. (*Id.* at p. 1217, n.2) The NRC noted that PECS was one of the communication systems taught to autistic children in several of the programs, including TEACCH. (*Student v. Pajaro Valley Unified School District* (May 11, 2007) OAH Case No. 2006110472; *Rocklin Unified School. District. v. Student* (May 25, 2007) OAH Case No. 2006110278; *Student v. San Juan Unified School District* (June 18, 2007) OAH Case No. 2006120636; *Student v. Fremont Unified School District* (November 9, 2007) OAH Case No. 2006110101; *Student v. Long Beach Unified School District* (February 5, 2008) OAH Case No. 2007040442.)

## IN-HOME PROGRAMS

23. An early education program for individuals with exceptional needs between the ages of three and five, inclusive, shall include specially designed services to meet the unique needs of preschool children and their families. To meet this purpose, the program focus is on the young child and his or her family and shall include both individual and small group services which shall be available in a variety of typical age-appropriate environments for young children, including the home, and shall include opportunities for active parent involvement. (Ed. Code, § 56441.2.) Further, early education services for preschool children may be provided to individuals or small groups and shall include interacting and consulting with the family members, regular preschool teachers, and other service providers, as needed, to demonstrate developmentally appropriate activities necessary to implement the child's IEP in the appropriate setting and may include parent counseling and training to help parents

understand the special needs of their child and their child's development. (Ed. Code, §§ 56441.3, 56441.4.)

#### REIMBURSEMENT AND/OR COMPENSATORY EDUCATION

24. 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 Education* (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.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. 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.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties. 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. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

## DETERMINATION OF ISSUES

DID THE DISTRICT FAIL TO ASSESS STUDENT FROM AUGUST 29, 2005 TO AUGUST 29, 2007, IN THE AREAS OF FUNCTIONAL BEHAVIORAL ASSESSMENT, AUDIOLOGY, BEHAVIOR, AND THE NEED FOR ABA THAT INCLUDED ACADEMIC, APPROPRIATE INSTRUCTIONAL TARGETS, ADAPTIVE BEHAVIORS (DAILY LIVING SKILLS, SOCIAL-EMOTIONAL STATUS, SELF STIMULATING AND DISRUPTIVE BEHAVIORS), INSTRUCTIONAL NEEDS IN A GENERAL EDUCATION SETTING, AND SKILLS AND BEHAVIOR BEYOND THE SCHOOL SETTING?

1. As determined in Factual Findings 6 to 10 and Applicable Law sections 10 to 13, the District failed to assess Student's behavioral needs during the 2005-2006 school year. Student developed a unique need in the area of behavior that was not addressed by the District. The District had notice that Student had behavioral needs when Ms. Moses, Student's preschool teacher, requested assistance to help with Student's behavior. Mother had also told the District that she was having significant difficulty getting Student to school because of her behavior. The District should have assessed Student's behavior at that point, as well as and her need for an in-home program because her in-home behaviors were affecting her access to the educational setting. Student lost educational benefit as a result of the District's failure to properly assess her needs. Accordingly, the District denied Student a FAPE from August 2005 until the annual IEP in April 2006.

2. As determined in Factual Findings 13 to 15 and Applicable Law sections 10 to 13, the District failed to conduct an FBA of Student when requested by Mother in September 2006. Student's behavior continued to be problematic at home and in school. The District did not act upon Mother's request for an FBA. Further, the District had notice of Student's on going tantruming and screaming and did not assess or otherwise address this need directly, and significantly underestimated her behavioral

needs. Accordingly, the District denied Student a FAPE during the 2006-2007 school year by failing to adequately address Student's behavioral needs.

3. As determined in Factual Findings 11 and 12 and Applicable Law sections 10 to 13, in December 2005, the District believed Student was higher functioning than it had previously thought. The District moved Student to a higher functioning social skills program in December 2005 without assessment to determine her baselines, knowing that standardized measures had not been utilized to evaluate Student when she entered the District. The District denied Student a FAPE from December 2005 until April 2006 by failing to adequately assess her cognitive needs. Student's goals and progress were updated at the April 2006 IEP using the Brigance and she was continuing to attend the social skills program.

4. As determined in Factual Findings 16 and 17 and Applicable Law sections 10 to 13, the District appropriately and properly assessed Student's audiologic needs.

5. As determined in Factual Findings 4 and 5 and 67 to 71 and Applicable Law sections 10 to 13 and 17 to 22, the District was not obligated to assess Student for ABA-DTT.

WERE THE DISTRICT'S OCCUPATIONAL THERAPY ASSESSMENT CONDUCTED IN NOVEMBER AND DECEMBER 2005, THE TRANSITION REPORT OF EDUCATIONAL ASSESSMENT PREPARED FEBRUARY 22, 2007, AND THE COGNITIVE AND SPEECH AND LANGUAGE ASSESSMENTS CONDUCTED PURSUANT TO THE MARCH 16, 2007 ASSESSMENT PLAN, APPROPRIATE AND DESIGNED TO ASCERTAIN RELEVANT INFORMATION?

6. As determined in Factual Findings 20 to 23 and Applicable Law sections 10 to 13, the District's occupational therapy assessment in November and December 2005 was appropriate and designed to produce relevant, useful information.

7. As determined in Factual Findings 24 and 25 and Applicable Law sections 10 to 13, the District's transition report evaluation prepared on February 22, 2007, was appropriate and designed to produce relevant, useful information.

8. As determined in Factual Findings 26 to 28 and Applicable Law sections 10 to 13, the District's speech and language assessment from February 22, 2007, was appropriate and designed to produce relevant, useful information.

9. As determined in Factual Findings 29 to 31 and Applicable Law sections 10 to 13, the District's psychoeducational assessment from February 22, 2007, was not appropriate because the examiner utilized an outdated assessment instrument. However, the error was harmless because Student did not lose any educational benefit from the error and had a program in place that was addressing her academic and educational needs. Further, the District has corrected the error by providing a legal sufficient psychoeducational report in October 2007 as determined in Factual Findings 40 and 41. Student did not demonstrate any loss of educational benefit between February 2007 and October 2007 when the District remedied the problem with a new cognitive assessment.

WERE THE DISTRICT'S OCTOBER 8, 2007 PSYCHOEDUCATIONAL, FAA, AND BEHAVIORAL EVALUATIONS APPROPRIATE? IF NOT, IS STUDENT ENTITLED TO IEE IN THE AREAS OF PSYCHOEDUCATIONAL AND BEHAVIOR AT PUBLIC EXPENSE TO BE CONDUCTED BY CAROLYN BAILEY?

10. As determined in Factual Findings 32 to 41 and Applicable Law sections 11 to 15, the District's psychoeducational, FAA and behavioral assessments from October 8, 2007, were appropriate. Accordingly, Student is not entitled to an IEE at public expense in those areas.

DID DISTRICT FAIL TO PROVIDE STUDENT WITH FAPE IN THE LRE BETWEEN AUGUST 29, 2005 AND AUGUST 29, 2007, BY NOT PROVIDING PLACEMENT, SERVICES AND GOALS DESIGNED TO MEET STUDENT'S UNIQUE NEEDS IN ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL AREAS, SPEECH AND LANGUAGE (GOALS ONLY), SOCIAL SKILLS, COMMUNICATION, OT, BEHAVIOR, ABA (INCLUDING IN-HOME AND COMMUNITY SETTINGS), AND LIMITED ENGLISH PROFICIENCY?

11. As determined in Factual Findings 42 to 71, 75 and 78 to 79 and Applicable Law sections 1 to 9, the District provided appropriate placement, services and goals to meet Student's unique needs in academics, functional and developmental skills, social skills, communication, occupational therapy and limited English proficiency during the time periods alleged.

12. As determined in Factual Findings 52 to 53 and 57 to 61 and Applicable Law sections 2 to 8, the District did not offer an appropriate expressive language goal and self help goal for hand washing seriously underestimated her need for self help skills during from April 2005 to April 2006.

13. As determined in Factual Findings 55 and 84 and Applicable Law sections 2 to 8 and 17 to 19, the District was not required to offer goals, placement or services in the area of ABA. The District's programs and methodologies met Student's needs and were not required to be listed in her IEP.

14. As determined in Factual Findings 54, 75, 80, 83 and 110 to 113 and Applicable Law sections 2 to 10 and 23, the District did not offer Student any appropriate behavioral goals, even though this was an area of need. Further, the District did not offer Student an in-home program when it became apparent that Student's in home behavior was impeding her progress at school.

15. As determined in Factual Findings 56 and 84 and Applicable Law sections 2 to 10, Student did not demonstrate that Student had a need for a goal in the area of limited English proficiency.

16. As determined in Factual Findings 111 to 113 and 120 to 123 Applicable Law section 24, Student is entitled to compensatory education to remedy the lost educational benefit by the District's failure to properly assess her behavioral, in-home and cognitive needs, as well as having inadequate self help and speech and language goals during the 2005-2006 school year. The evidence demonstrated that the District has failed to address Student's needs in spite of repeated and continual attempts by Mother to get help for her daughter. Student's behavior first became problematic in September 2005 and continued until the FAA was completed in October 2007. Student is entitled to compensatory education sufficient to remedy the lost educational opportunity and lost educational benefit from the District's failure. Because it is an equitable remedy, the conduct of the parties must be considered. While the District did not appropriately respond to Mother's pleas for assistance, Student was in a program with properly trained and qualified staff to assist her. Student was making educational progress in her program in spite of the District's failure. Weighing all the evidence and considering all the equitable factors, the District is required to compensate Student for behavior, speech and language, and self help skills that she may have had if an appropriate program had been in place.

17. For the lost educational benefit and opportunity, the District shall provide Student 750 hours to be used for intensive behavioral services in the home, at school or as deemed appropriate by the family. The District must contract with Applied Behavior Consultants or another certified nonpublic agency if ABC is unavailable to provide intensive in home behavioral services. The hours must be used no later than August 31, 2010.

18. As determined in Factual Finding 126, Student expended \$1325 out of pocket to provide private in-home behavioral services during the time frame the District did not properly meet her needs. Within 45-days of the date of this decision, the District must reimburse Mother in that amount. In addition, Student expended \$336 purchasing materials to help her learn about behavior and autism to better meet her needs in the home environment. The District must reimburse Mother in the amount of \$336 within 45-days of this decision. The total reimbursement to Mother is \$1661.

19. As determined in Factual Finding 127, Student did not establish that she was entitled to additional OT services or an IEE at public expense. Further, she did not establish a need for educational materials and was already being mainstreamed five hours per week.

DID DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE IN THE LRE BETWEEN AUGUST 29, 2005 AND AUGUST 29, 2007, BY DENYING HER PARENTS THE OPPORTUNITY TO PARTICIPATE, PROVIDE MEANINGFUL INPUT AND CONSIDERATION OF THEIR INPUT ON THE ISSUES OF ABA, LIMITED ENGLISH PROFICIENCY AND SPEECH AND LANGUAGE?

20. As determined in Factual Findings 56 to 66, 72 to 74, 84, and 93 to 94 and Applicable Law sections 2 to 5 and 16 to 23, the District did not deny Student's parents the opportunity to participate and provide meaningful input into the educational program for Student. The overwhelming weight of the evidence demonstrated that Mother fully participated in the IEP process. Further, the District offered translator services that were appropriate to allow Mother, who speaks some English, but prefers Spanish, to participate fully in the IEP process.

DID DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE IN THE LRE BETWEEN AUGUST 29, 2005 AND AUGUST 29, 2007, BY NOT SPECIFYING AND PREDETERMINING WHAT, IF ANY, ABA SERVICES WERE PART OF HER IEPs?

21. As determined in Factual Findings 62 to 71, 73 to 74, 89 to 92 and 111 to 119 and Applicable Law sections 17 to 22, the District did not predetermine any IEP offers and was under no obligation to include ABA services in Student's IEPs.

DID DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE IN THE LRE BETWEEN AUGUST 29, 2005 AND AUGUST 29, 2007, BY PREDETERMINING STUDENT'S PLACEMENT BEFORE HER IEPs?

22. As determined in Factual Finding 94 and 73 to 74 and Applicable Law section 16, the District did not predetermine any offer of placement. Mother fully participated in all IEP discussions and the District considered the position of Mother when it was offered.

DID DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE IN THE LRE BETWEEN AUGUST 29, 2005 AND AUGUST 29, 2007, BY NOT PROVIDING OR OFFERING A RESEARCH BASED PEER-REVIEWED INTERVENTION TO THE EXTENT PRACTICABLE IN ABA, INCLUSION, CLASSROOM MANAGEMENT AND STRUCTURE, AND READING AND MATH INSTRUCTION?

23. As determined in Factual Findings 67 to 71 and 89 to 92 Applicable Law sections 17 to 22, the District offered appropriate peer reviewed programs for Student to the extent practicable in all areas of ABA, inclusion, classroom management and structure and reading and math instruction. Student did not offer any persuasive evidence that the District's SUCSESS or non-categorical SDC was inappropriate to meet Student's needs or that the District's chosen methodologies were not appropriate to address Student's needs.

## ORDER

1. The District shall provide 750 hours of ABA prior to August 31, 2010, as compensatory education for in-home and school based services related to behavior. The hours shall include direct services at school and in-home, including supervision and consultation among the various service providers. The District shall contract with Applied Behavior Consultants, a certified NPA, unless it is unable or unwilling to provide the services. If so, the District shall provide another qualified, certified NPA to provide those services. The ABA services may be during school and non-school hours. The time of delivery of services shall be coordinated between Student's parents, the ABA provider and the District, including consultation and training if necessary. The District shall contract with the NPA within 30 days of this decision.

2. Within 45 days of the date of this decision, the District shall reimburse Mother \$1661 for costs of in-home ABA services through the date of the hearing, which includes the cost of educational materials.

3. The District is not required to pay for an IEE at public expense.

4. All other requests for relief are denied.

## 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. Student partially prevailed on Issues 1 and 4(a), which were major issues in the hearing and significantly affected the services for Student. The District partially prevailed on minor issues in Issues 1 and 4(a). The District prevailed on Issues 2, 3, 4(b), 4(c), 4(d), and 4(e).

## RIGHT TO APPEAL THIS DECISION

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

DATED: July 22, 2008

A handwritten signature in black ink that reads "Richard M. Clark". The signature is written in a cursive style and is positioned above a horizontal line.

RICHARD M. CLARK

Administrative Law Judge

Office of Administrative Hearings