

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

SAN MIGUEL JOINT UNION SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2008010224

PARENTS ON BEHALF OF STUDENT,

v.

SAN MIGUEL JOINT UNION SCHOOL
DISTRICT.

OAH CASE NO. 2008030743

AMENDED DECISION¹

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter on May 20 and 21, 2008 in San Miguel, and on June 3, 4, and 9 through 13, 2008, in Paso Robles, California.

Stacy Inman, Attorney at Law, Schools Legal Service, represented the San Miguel Joint Union School District (District). Dean Smith, Superintendent and Principal of the District was present during some of the hearing, and Carla Morris, District's Coordinator of Special Education, was present on behalf of the District during most of the hearing.

Andréa Marcus, Attorney at Law, represented Student and his mother and father

¹ Page 46 of the Legal Conclusions has been amended to correct a clerical error that had resulted in the insertion of duplicate sentences before Paragraph 8.

(Mother, Father, and collectively, Parents). Educational advocate and Ms. Marcus's paralegal, Anne Zachry, was present throughout the hearing. Mother was present during the entire hearing. Father was present during part of the hearing. Student was not present.

On January 3, 2008, the District filed a request for a due process hearing (complaint) in OAH Case No. 2008010224. On January 22, 2008, OAH granted a continuance of the hearing in that case. On March 18, 2008, Student and Parents filed a complaint in OAH Case No. 2008030743. On March 26, 2008, OAH ordered consolidation of both cases for hearing, with the statutory timelines in Case No. 2008010224 to control the proceedings.

At hearing, sworn testimony and documentary evidence were received.² The record remained open until July 3, 2008, for the submission of written closing arguments, at which time the record was closed and the matter was submitted.

ISSUES³

The issues for hearing, as separately identified by party, are as follows:

Issue 1 (Student) Did the District fail to provide Student a free appropriate public education (FAPE) from May 23, 2006 through February 11, 2008, because it failed to implement and materially deviated from the May 2006 settlement agreement between the parties by:

- A. Failing to develop an IEP to supplement the settlement agreement with present levels of performance and annual goals, and failing to hold IEP meetings;

² On Monday June 9, 2008, after arguments of the parties, the ALJ excluded Student's exhibit numbers J, K, JJ, and NN, and they were not marked for identification, because they were sealed in a civil action between the parties.

³ The ALJ reorganized both Student's and District's issues during the Prehearing Conference, and has again reframed and reorganized the issues for purposes of accuracy and clarity in this Decision.

- B. Failing to conduct a functional analysis and develop behavioral interventions;
- C. Failing to develop and operate an interim intensive, home ABA- based program for seven hours each school day, with trained aides and parental training; and
- D. Offering materially different placements and services in District's November and December 2007, and January 2008 IEPs?

Issue 2 (District): Did the District's November 16, 2007 individualized education program (IEP) offer constitute a FAPE by:

- A. Scheduling the IEP meeting at a mutually agreed upon time, including providing notice to the Parents;
- B. Including all IEP team members required by law to participate in the IEP meeting;
- C. Offering an assessment plan;⁴ and
- D. Offering an appropriate special education placement and related services?

Issue 3 (District): Did the District's December 18, 2007 IEP offer constitute a FAPE by:

- A. Scheduling the IEP meeting at a mutually agreed upon time, including providing notice to the Parents;
- B. Offering an assessment plan; and
- C. Offering an appropriate special education placement and related services?

Issue 4 (District): Did the District's January 29, 2008 IEP offer for Student's transfer to the Paso Robles Public Schools District in ninth grade, effective February 29,

⁴ During the hearing, the parties represented that Parents consented to District's November and December 2007 assessment plans. Therefore, District's right-to-assess issues were dismissed as moot. However, because the District contended that its assessment offers on both dates were integral components of its November and December 2007 IEP offers, the assessment offers were added to the FAPE issues for those IEPs.

2008, constitute a FAPE, such that the District was no longer obligated to provide educational services beyond that date?

Issue 5 (Student): Did District deny Student a FAPE by failing to provide appropriate funding for family visits with Student at Heartspring School in Kansas, either as part of stay put or pursuant to its January 29, 2008 IEP offer, as amended on February 4, 2008?

REQUESTED REMEDIES

District requests orders that the November and December 2007 IEP meetings were noticed and scheduled according to law, and that the November 2007 IEP team was constituted as required by law. District asks for a determination that the November and December 2007 IEPs, and the January 2008 IEP, as amended on February 4, 2008, offered Student a FAPE.

Student requests compensatory education based upon District's denials of a FAPE from May 2006 to February 11, 2008, when Student was placed at Heartspring School. He requests an order that the District fund Student's continued placement at Heartspring for 20 months from the date of the Decision. In the alternative, he asks for a monetary award to be deposited into an education trust account. He asks for an order directing the District to memorialize the Heartspring placement in an IEP within 30 days of the Decision. In addition, he requests an order providing for an alternative residential placement in the event that Heartspring becomes unavailable, and an educational trust account if Student no longer requires a residential placement to receive a FAPE before the 20 months expires.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. At the time of the hearing, Student was over 14 and a half years old. Parents reside in the town of San Miguel, California, within the geographical boundaries of the

District. Student is eligible for special education and related services under the primary category of Autistic-Like Behaviors, accompanied by mild Mental Retardation. He has received services from the District and the San Luis Obispo County Office of Education (SLOCOE) since the age of three. The District serves children through eighth grade, and does not have a high school. Student is severely handicapped and has challenging behavioral problems.

2. In February 2004, Parents unilaterally removed Student from his educational placement at Lillian Larson Elementary School (Lillian Larson) in the District. In November 2004, Parents filed a request for due process with the predecessor to OAH, the California Special Education Hearing Office (SEHO). The Parents' SEHO action was transferred to OAH after July 1, 2005, and in November 2005, District filed a request for hearing with OAH.

3. On May 23, 2006, in connection with both cases, bearing OAH Case Nos. N2005110614 and N2005110534, Student, District, and SLOCOE entered into a settlement agreement to resolve "all differences, disputes, and controversies" between the parties through the date of the agreement (the settlement agreement). The San Luis Obispo County Special Education Local Plan Area (SLOSELPA) was also a party to the settlement.

PLACEMENT AND SERVICES PURSUANT TO THE SETTLEMENT AGREEMENT

4. Student contends that the District denied him a FAPE between May 2006 and February 11, 2008, by failing to implement and materially deviating from the terms of the settlement agreement to provide an interim, intensive program based on applied behavior analysis (ABA) to address Student's needs until he was accepted for placement into a residential education program. District contends that the settlement agreement offered Student a FAPE; however, the appropriateness of the offer is not an issue in this case. District argues that it relied on Eric Carlson, Ph.D., a psychologist and Board Certified Behavior Analyst (BCBA), to provide the intensive home program and that it funded Dr. Carlson's program for Student through July 2007. District concedes that Student did not

receive the intensive home program services continually, but contends that Student received about nine months of appropriate services.

5. Generally, the jurisdiction of OAH is limited and includes disputes regarding the educational placement or the provision of a FAPE to a child. This limited jurisdiction does not include a claim alleging that a school district has failed to implement or comply with a settlement agreement. A claim that a school district failed to implement or comply with the terms of a settlement agreement must be pursued through a separate compliance complaint procedure with the California Department of Education (CDE). OAH does have jurisdiction to adjudicate a claim alleging the denial of a FAPE as a result of violation of a settlement agreement.

6. A student's placement set forth in a settlement agreement reached by the parties may constitute the student's educational placement, and thus stand in the place of an IEP. A failure to implement any provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material. A material deviation from an IEP occurs when the program or services provided to the student fall significantly short of those required by his or her IEP. A student is not required to demonstrate that he or she suffered educational harm in order to prevail.

7. In the settlement agreement, the parties agreed that provisions for both an interim placement (Paragraph 3) and a compensatory residential placement (Paragraphs 3(f) and 4) provided Student with a FAPE. The terms of the settlement agreement constituted the operative, agreed upon placement for Student through February 28, 2008, unless otherwise modified or superseded.

8. Paragraph 3 of the agreement provided for an interim educational placement as follows:

Interim⁵ Placement: The District will fund Dr. Eric Carlson to create an intensive researched-based [sic] ABA program for [Student] that includes, but is not limited to, intensive functional analysis and intervention for [Student's] self-injurious, aggressive and other maladaptive behaviors. Such program will include intensive training in functional communication skills using a consistent approach by all staff working with [Student], including staff coming into contact with [Student] in the residential setting, and his parents. Communication and pragmatic language training will pervade all of [Student's] programming, and everyone who works with him will be trained to use the same methods to help him learn and practice communication skills in a variety of structured and naturally occurring situations. Intensive training shall include, but not be limited to personal safety, self-care, self-regulation, and domestic skills, with the long-term goal of enabling [Student] to live independently or semi-independently as a young adult....

Subsections (a) through (e) of Paragraph 3 of the agreement provided details of the interim placement, including that Dr. Carlson would oversee a seven-hour school day in the intensive program for 220 days per school year, conduct training for Parents, hire and train aides to work with Student, and provide weekly supervision of the aides. The agreement further provided that if Dr. Carlson became unavailable, the District would hire

⁵ The agreement provided in a footnote that "Interim Placement" referred to the placement to be utilized before Student was accepted into a residential facility.

another mutually agreed upon BCBA in his place.

9. Paragraphs 3(f) and 4 of the agreement provided that the District would fund a compensatory residential placement for Student at the New England Center for Children, in Southborough, Massachusetts; or with Melmark, Inc., at either its Pennsylvania or Massachusetts campus. The agreement did not contain any timetable or limitation on the duration of the interim home services until admission into a residential placement. Once placed residentially, District agreed to fund up to four family visits annually to visit Student in the residential facility. The agreement provided for a termination of District's jurisdiction when Student turned 14 and a half in February 2008, when he would matriculate into his high school district. The parties expressly agreed that the interim intensive services and the compensatory residential placement provided Student with a FAPE.

10. In connection with the settlement agreement, Parents had recommended Dr. Carlson to the District as their service provider of choice to implement the program. The District made arrangements to hire Dr. Carlson's company, Applied Learning Systems, as an independent contractor, and to fund the program. Applied Learning Systems was a nonpublic agency (NPA) certified by the California Department of Education. On July 1, 2006, the District contracted with Dr. Carlson to provide the interim intensive home program required by the settlement agreement.

DISTRICT'S IMPLEMENTATION OF THE INTENSIVE HOME PROGRAM

11. A student eligible for special education and related services is legally entitled to a FAPE that consists of special education and related services that are available to the child at no charge to the parent, meet the state educational standards, and materially conform to the child's IEP. A material failure to implement an IEP occurs when the services provided to the student fall significantly short of those required by his or her IEP.

Home Program May 23, 2006 to July 1, 2006

12. Student contends that the District denied him a FAPE from May 23, 2006 to July 1, 2006, because it failed to provide any intensive, home ABA program, which materially deviated from the operative services in the settlement agreement and resulted in a loss of educational benefit.

13. A school district must generally provide interim services to a new or transferring special needs student from another school district during the first 30 days while it develops an IEP. The law does not expressly address a school district's obligations where a student transfers back into it from a unilateral parental placement without an IEP.

14. Student's unilateral parental placement from February 2004 to May 23, 2006, involved unknown private services in addition to services from Dr. Carlson funded by Tri-Counties Regional Center (Tri-Counties). Even if the District was required to implement the settlement agreement by immediately providing an interim placement, the District did not have the capacity to immediately offer an interim 30-day placement because the new intensive home placement agreed upon on May 23, 2006, was again to be in Student's home, and needed to be developed by Dr. Carlson.

15. The settlement agreement did not contain any set timelines to begin the intensive home program and there was no agreed upon start date in the settlement agreement. District and Dr. Carlson took a few weeks to make the arrangements and enter into a contract, with an agreed upon start date of July 1, 2006. There was no evidence that the District should have begun Student's educational program immediately after the settlement agreement was signed. Student did not establish that the length of time the District took to develop the contract and start Dr. Carlson's services was unreasonable. Based on all of the foregoing, District did not fail to implement or materially deviate from the settlement agreement, and did not deny Student a FAPE during the month of June 2006.

Failure to Hold IEP Meetings, Levels of Performance, and Annual Goals

16. Student contends that the District should have convened an IEP meeting immediately after May 23, 2006, to implement the terms of the settlement agreement, to identify his then-present levels of academic achievement and functional performance, and to create annual goals. He asserts that the District should have held annual IEP meetings thereafter, prior to an IEP meeting on November 16, 2007. Student claims that the failures to hold IEP meetings and develop his IEP significantly impeded Parents' rights to participate in the decision making process, and deprived him of educational benefit.

17. District concedes there "was not an IEP process" during that time period, but denies that any procedural violation occurred because Student and Parents were represented by counsel, Parents fully participated in negotiating the interim intensive home program, and therefore Student was not denied a FAPE.

PROCEDURAL IEP VIOLATIONS

18. The law requires that an IEP team meeting shall occur at least annually to review the student's special education program and progress, and shall also be convened at the request of a parent or teacher to develop, review, or revise the IEP. Failure to convene an IEP meeting required by law may constitute a procedural violation of law. A nonsubstantive procedural violation may result in a denial of a FAPE if it impeded the child's right to a FAPE, significantly impeded the Parent's opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits.

19. The law requires that an IEP for each child with a disability must include a statement regarding the child's present levels of academic achievement and functional performance, measurable annual goals designed to meet the child's educational needs and enable the child to make progress, and a statement of the special education placement and related or supplementary aids and services to be provided, among other information.

Failure to develop all of the components of a student's IEP may constitute a procedural violation. In addition, it may constitute a substantive denial of FAPE where a student suffers a loss of educational benefit because of the deficiencies in the IEP.

20. After the execution of the settlement agreement, District did not convene an IEP meeting to implement the agreement by incorporating it into an IEP. District should have scheduled an IEP meeting in June 2006 because the settlement agreement could not stand in the place of an IEP. The agreement developed a new program for Student's re-entry into the District but did not contain all of the required components of an IEP. It did not contain any agreed upon present levels of Student's academic achievement and functional performance, did not contain any annual goals, and did not state how progress toward the goals would be measured, as required by law. District was therefore required to hold an IEP meeting to implement the IEP by establishing, through IEP team consensus, a baseline for Student's levels of academic and functional performance at the start of the interim intensive home program, accompanied by annual goals designed to measure his progress in the new program.

21. In the summer and fall of 2006, Mother informed Dr. Carlson several times that she wanted an IEP meeting, and was concerned about having annual goals in place for Student. Dr. Carlson was a behavior specialist and did not hold a special education teaching credential. Although he had attended IEP meetings and drafted behavior goals in the past, he was unaware of the legal requirements for IEP goals. In September 2006, Dr. Carlson emailed Mother a draft of some language goals, and promised her he would have remaining goals in the areas of math, reading, social skills, and behavioral self-management in the near future. There was no evidence that they were ever completed or delivered. The following year, on June 4, 2007, Mother sent him an email asking for information about Student's "present levels" from him in order to have a productive IEP meeting.

22. Dr. Carlson never reported to the District that Mother wanted an IEP meeting scheduled. He never asked the District to schedule an IEP meeting. There was no evidence that he ever completed any annual IEP goals for the 2006-2007 school year or presented them to Parents or the District. However, no one at the District ever contacted Dr. Carlson to set up an IEP meeting, to obtain any information about Student's levels of performance, or to review any annual goals or reports of progress.

23. District had the legal responsibility to oversee the program and comply with the requirements of the IDEA. For the 2006-2007 school year, which began in late August 2006, there was no IEP in place, aside from the home-based placement in the settlement agreement. The District did not convene an annual IEP meeting to review Student's program and progress at any time during that school year, and did not convene any IEP to make an offer of placement and services for the 2007-2008 school year. At no time from July 1, 2006 to November 16, 2007, when the first IEP meeting was held, did the District develop an IEP with any written levels of performance or annual measurable goals to address his needs, which constituted procedural violations in the IEP process.

24. The above procedural violations significantly impeded the rights of Parents to have had the opportunity to participate in the IEP decision making process because the District abrogated any responsibility for convening required IEP meetings. Parents were left to work with Dr. Carlson in isolation for over a year.⁶ Parents were thus deprived of any opportunity to meet with members of the IEP team, other than Dr. Carlson, and to have the team's evaluation and input in the development of the home program, Student's baseline

⁶ It is nevertheless disconcerting that Mother never contacted her attorney, her advocate, or the District to request an IEP meeting, as she had many prior years of experience with IEP meetings, and demonstrated that she knew it was important to hold one. The fact that the relationship between the family and the District was acrimonious does not justify her silence.

levels of performance, his progress, and his annual goals. The violations therefore constituted a denial of FAPE. In addition, these procedural violations impeded Student's right to a FAPE as he was deprived of objective means to work toward specific educational goals and measure his progress, which constituted a denial of FAPE.

25. Based on the foregoing, District procedurally denied Student a FAPE by failing to hold any IEP meetings between May 23, 2006 and November 16, 2007, and by failing to develop an IEP that included his present levels of performance and annual measurable goals to address his unique needs arising from his disability, in addition to the placement and services outlined in the settlement agreement.

SUBSTANTIVE IEP VIOLATIONS

26. The next question is whether the failure to develop Student's levels of academic achievement and functional performance and annual goals to address his needs in an IEP after May 23, 2006, constituted a substantive violation of FAPE. Student contends that the lack of written annual goals and present levels of performance in an IEP after May 23, 2006, denied him educational benefit, resulting in a denial of FAPE.

27. Student also contends that the District should have assessed Student's then-present levels of academic and functional performance at the beginning of the home program. This contention is without merit. The settlement agreement did not require reassessment of Student's cognitive, academic, and functional performance levels. He did not identify a problem about a 2006 "failure to assess" as an issue in his complaint, but only denial of FAPE based on failure to implement and material deviation from the settlement agreement, and is therefore prohibited by law from raising a new issue during the hearing.

28. District contends that the lack of a written IEP with Student's performance levels in the spring of 2006 did not substantively deny a FAPE because the District and Dr. Carlson had sufficient information about his levels of performance to begin the program.

District's January 2006 Triennial IEP

29. In May 2006, both the District and Dr. Carlson had information about Student's cognitive, academic and functional performance levels from a triennial assessment in 2005 that was reviewed at an IEP meeting on January 9, 2006, when the District made an offer of educational placement and services for Student to return to the District. Dr. Carlson was present at that IEP meeting. District's psychologist, Dr. Mary Nafpaktitis, reported to the team the results of her 2005 psychoeducational and academic assessment of Student. Her assessment was conducted in July, August, and September 2005, when he was 12 years old. At that time, Student was in Parents' unilateral home-based program that included about 15 hours a week of behavioral services focused on daily living skills, funded by Tri-Counties and supervised by Dr. Carlson, 10 hours per month of Dr. Carlson's behavioral consultation, and additional unknown services for 10 to 15 hours a week funded by Parents. Dr. Nafpaktitis's assessment was completed within one year of the settlement agreement. The evidence established that the assessment was comprehensive and provided the District and Dr. Carlson with detailed information about Student's cognitive, academic, and functional performance. District therefore had recent information about his performance levels at the beginning of Dr. Carlson's home program less than one year later, in May 2006.

Dr. Green's March 2006 Behavioral Assessment

30. District and Dr. Carlson also had information in May 2006 from a private behavioral evaluation conducted in March 2006 by Gina Green, Ph.D., a psychologist and BCBA with extensive experience. She conducted a behavioral evaluation of Student at Parents' request, when he was 12 years, 8 months old. Dr. Green reviewed his historical records, interviewed the family, observed Student for over five hours, and issued an "Expert Witness Report" dated April 19, 2006. Dr. Carlson was present when Dr. Green assessed Student in the home on March 23, 2006. Dr. Green interviewed Dr. Carlson and his Tri-

Counties aide regarding their services. Dr. Green did not administer any assessment test tools besides observation to analyze Student's behaviors.

31. Dr. Green issued a comprehensive report that described Student's deficits and functional levels of performance. She concluded that Student had not received effective interventions to address his autistic behaviors in his earlier years. Dr. Green established that, given Student's low levels of functioning,⁷ his learning difficulties, size, and strength, and the fact that his self-injurious and aggressive behaviors put him and others around him at "serious risk of harm," Student should be placed in a residential program with an ABA educational program for children with autism. She recommended a functional analysis and intervention for his maladaptive behaviors, and intensive training in functional communication skills, personal safety, self-care, and domestic skills, with the long-term goal to enable him to live at least semi-independently as an adult. Many of her recommendations were incorporated into the settlement agreement.

32. Based on all of the foregoing, by May 2006, both the District and Dr. Carlson had recent assessment and evaluative information to use in determining Student's levels of performance and functioning. Therefore, the evidence does not support a finding that District's failure to have an IEP which stated Student's levels of cognitive, academic, and functional performance after May 2006 resulted in depriving Student of substantive educational benefit due to lack of knowledge or information about his cognitive and skill levels.

33. However, the evidence established that Dr. Carlson and the District never developed written annual IEP goals that addressed Student's unique needs related to his academic and functional skill levels at any time after May 23, 2006. The lack of an IEP with

⁷ Dr. Green concurred with prior assessment results that found Student's communication and daily living skills to be those of about a four-year-old child, and social skills that of a child about three years old.

measurable annual goals deprived Student of specific goals to work toward, and deprived him of an objective means to measure his progress toward those goals that targeted his unique needs. Student lost educational benefit thereby, and was denied a FAPE.

Dr. Carlson's Intensive Home Program

HOME PROGRAM JULY TO OCTOBER 2006

34. Student contends that, beginning immediately upon execution of the settlement agreement, the District failed to provide the intensive ABA program as agreed upon in Paragraph 3 of the agreement, and that the deviation from the agreed upon placement was material. District contends that Dr. Carlson's program provided Student with a FAPE for some period of time even if it did not fully address everything agreed to in Paragraph 3 of the agreement.

35. Dr. Carlson is a professional BCBA who obtained a Ph.D. in psychology in 1991, has many years of experience with children with developmental delays, including autism, and has consulted with Tri-Counties since 2001. Dr. Carlson had been providing Student a home behavioral program with consultation and direct aide services through an arrangement with Tri-Counties since 2004. Tri-Counties paid him to train and supervise an aide who provided Student up to 15 hours a week of direct in-home behavioral services. After an aide that had been funded by Tri-Counties quit in March or April 2006, Dr. Carlson hired Mother's son-in-law, Jason to be the aide, based on Mother's recommendation. Jason was then living with Student and Parents, along with Jason's wife and two children.

36. Jason began working with Dr. Carlson as Student's aide in about April or May under the arrangement with Tri-Counties. Dr. Carlson trained him to provide behavioral aide or tutor services to Student prior to entering into the contract with the District. The extent of that training is unknown. Jason could not recall when he began receiving pay and training from Dr. Carlson under the District's program. The evidence established that Dr. Carlson only billed the District for 15 hours of consultation in July 2006. Dr. Carlson's July

2006 invoice did not itemize any "training" or "consultation" at his hourly rate, and it did not bill for any direct aide services at the agreed-upon hourly aide rate. It is therefore impossible to determine whether Dr. Carlson conducted any training in that month or if the aide provided any direct daily instructional services. Even if Student received services for some of those 15 hours, he did not receive nearly the seven hours of daily services required by the settlement agreement. Thus, there was a significant shortfall in educational services. This shortfall in direct behavior intervention and tutor services was a material deviation from the intensive seven hour-a-school-day intervention program agreed upon in the settlement agreement, and therefore denied Student a FAPE for that month.

37. For the month of August 2006, Dr. Carlson billed the District for 161 hours of "consultation" with Jason, without any breakdown as to how many hours were for training and how many hours were for direct services to Student. Over a four-week period, Jason worked over 42 hours a week including training and providing direct services. In addition, Dr. Carlson performed 29 hours of consultation in designing the program and working with Mother and Student. Neither Dr. Carlson nor the District has a record of his invoice for services for the month of September 2006, after which Jason stopped working as Student's aide and moved out of the home. Jason credibly established that he worked a similar full schedule in September.

38. Dr. Carlson utilized the Assessment of Basic Language and Learning Skills (ABLLS) as a skills assessment tool and as a curriculum guide to select from about 500 goals or objectives for Student, addressing different areas of his needs. The ABLLS skill sets were criterion referenced and based on skills that a typical seven year old child would be able to do. In addition, he used the DISTAR instruction materials, which also had goals in the areas of reading, writing and mathematics.⁸ Dr. Carlson credibly testified that he

⁸ This was the same program that Dr. Carlson had been using with Student under his more limited contract with Tri-Counties Regional Center.

drafted a daily schedule for Student. He rejected the District's January 2006 proposed goals as inappropriate because they did not reflect Student's current skill levels. Dr. Carlson did not develop any annual IEP goals.

39. Jason worked as Dr. Carlson's aide for the District's intensive home program until the beginning of October 2006. He went to Dr. Carlson's office three times, for a total of about five hours of training there, and also received supervision and training when Dr. Carlson came to the home to oversee the services. Jason worked with Student from about 8:00 or 8:30 a.m. to 2:00 or 3:00 p.m., or about six to seven hours a day, in the areas of self-care, eating, math, reading, writing, social interaction in the community, social turn taking and board games with children, language, pragmatic communication, self-regulation (behavior), and riding in a car. Dr. Carlson trained him how to take data on data sheets and administer timed trials in the academic areas and put the data in Student's program folders. Jason credibly testified that he used techniques learned from Dr. Carlson, such as using rewards and other reinforcements for positive behaviors. In the late afternoons, he also provided another one and a half hours of daily living skills work with Student funded by Tri-Counties. Dr. Carlson supervised him and reviewed the notes and data.

40. The evidence established that, by the beginning of October 2006, when Jason and his wife moved away, Student had received some educational benefit from the intensive in-home program. Dr. Carlson credibly testified that Student had made progress in DISTAR mathematics and had mixed success in reading. Student had reached what Dr. Carlson described as a learning "plateau," and Dr. Carlson and Mother agreed to reduce the academic focus of the daily schedule and focus more on functional communication and daily living skills. Jason credibly testified that Student's self-injurious behaviors, such as biting his hand, screaming and tantruming had diminished somewhat; his communication skills had increased to the extent that he was able to use words more, including "please" and "excuse me," instead of pushing or grunting; he had moved from simple addition and

subtraction to multiplication in math, increased his reading of stories, and overcame a fear of riding in a car. Student progressed from significant fear and aversion of riding in a vehicle, and being able to sit in a car for only about five minutes, to being able to go on trips of 35 to 40 minutes duration, and completed about 30 car trips with Jason.

41. Student's contention that he did not make any progress while Jason was his aide was based solely on Mother's testimony. The evidence does not support her claim. Mother recommended Jason to Dr. Carlson to work with Student under both the Tri-Counties contract and the District's settlement agreement. Mother claimed at hearing that Jason's testimony was not credible for various reasons. In late September 2006, Mother had a "falling out" with Jason and his wife, and they moved out. There is no evidence that Mother ever complained to Dr. Carlson, her advocate, her attorney, or the District that Jason was not an appropriate aide for Student. Jason received monetary compensation indirectly from Tri-Counties (by its reimbursement of Mother's payments to him), and directly from Dr. Carlson (through invoice to the District), and Mother charged Jason rent from his income in order to live in her home. Jason testified by telephone on short notice, and was credible in his descriptions of the services he provided, Student's levels of functioning, the program records, and his recognition and description of the few program data sheets in evidence. To his credit, Jason wanted more training from Dr. Carlson. Student did not present any evidence as to how much training a behavioral aide or tutor should receive and did not establish that Jason was untrained or incompetent. To the extent there is a discrepancy between Mother and Jason, Jason was a more credible witness. Evidence revealed bias on the part of Mother and her views were not consistent with the evidence. Jason's testimony was credible and was corroborated by other evidence in the case.

42. Student did not meet his burden to establish that the program Dr. Carlson designed for the period from July through September 2006 was not an "intensive ABA-

based program” as required in the settlement agreement. There was no evidence about what an “intensive ABA-based program” was or what it should include. Neither party questioned Dr. Carlson or Dr. Green about substantive elements of such a program, aside from Dr. Green’s insistence that any good behavioral program must begin with a functional analysis. Dr. Carlson was a qualified BCBA with training and experience in various behavior methodologies including ABA. He was already using the DISTAR instructional tools with Student under his Tri-Counties contract, Mother had purchased some of the materials, and Dr. Carlson and she collaborated on his program. DISTAR utilized ABA therapy in the learning environment. In addition, Dr. Carlson taught the aide to take data on Student’s progress and behaviors. Mother’s testimony that Dr. Carlson did not take data in working with Student was also inaccurate. Although the DISTAR goals were built into the program and did not require data, the ABLLS functional skills did utilize data. Both Dr. Carlson and Jason recognized a data sheet that Mother had found as an ABLLS data sheet for Student’s receptive language. Jason worked with Student for six to seven hours a day in substantial compliance with the agreement.

43. Thus, based on the testimony of both Dr. Carlson and Jason, Student received educational benefit in August and September 2006, even though there were no measurable annual IEP goals or progress reports. Even if Jason should have received more training, the evidence did not establish that such a deviation from the agreed upon services in the settlement agreement was material. Despite the fact Dr. Carlson’s data records for Student are missing, the evidence established that his progress was more than de minimis. Based on the foregoing, Student was not denied a FAPE during the months of August and September 2006.

HOME PROGRAM OCTOBER 2006 THROUGH JANUARY 2007

44. The evidence established that, subsequent to Jason’s departure, Dr. Carlson changed the program, had problems hiring aides, and was not able to fulfill his obligations

to the District and to Student for a variety of reasons. He hired several additional aides who worked unsuccessfully with Student from October 2006 through January 2007. Rochelle and Jess were hired in October 2006; Jess, who had a previous back injury, worked through November 2006, when she re-injured her back while working with Student and quit. Rochelle worked as an aide from about mid-October 2006 through January 2007, when she also quit.

45. The record is unclear how much training the new aides received because Dr. Carlson's invoices did not itemize. For the month of October 2006, he only billed the District for six and a half hours of consultation, and only billed 31 hours of direct instructional aide time. Thus, if there was no training, Student only received direct services for about seven hours a week in October, instead of seven hours a day. If some of the aide hours were for training, he received less. This was a substantial decline in services which constituted a material deviation from the intensive, seven hours a day, ABA-based behavioral intervention services agreed upon in the settlement agreement.

46. In November, Student received almost 131 hours of direct aide services from both Jess in the morning, and Rochelle in the afternoon, or an average of about 32 hours a week. Dr. Carlson's bills finally began itemizing training, and showed that in November, he spent 38 consultation hours on the program, most of which was training the two aides. For December 2006, after Jess quit, Student received only 77 hours of aide services all month, and Dr. Carlson spent less than three hours on the program. This was another significant decline in services. On January 14, 2007, Mother sent an email to Dr. Carlson expressing her concerns that no daily educational plan or "work book" was in place for the aides to use to provide consistent services. In January 2007, Student received 130 hours of direct services and Dr. Carlson billed for about 16 or so hours, including one training session.

47. From October 2006 through January 2007, Student's maladaptive behaviors regressed. The evidence did not establish what services the aides provided, because Dr.

Carlson had significantly modified the program to reduce or eliminate the emphasis on DISTAR and ABLLS. The District did not demonstrate at hearing that any coherent, intensive program was in place on a daily basis after September 2006, or whether it involved ABA methodologies.

48. By the end of January 2007, Dr. Carlson had great difficulties providing services in Student's home. He again could not find aides to work with Student. In addition to Student's siblings, there were many extended family members living in the household, that varied from time to time, including eight or more adults and children, and there was a lot of distraction.⁹ Dr. Carlson found it difficult, if not impossible, to maintain any consistency with the behavioral interventions and positive reinforcers in the chaotic and confined home environment. In addition, Student was isolated. Lack of consistency led to increased aggression. Student's aggression was directed at the aides as well as the family members, including Mother. Dr. Carlson had commitments to other students, and medical illness in his family, which took considerable time. Dr. Carlson testified that by the end of January 2007, it was his opinion that the home program was not effective or useful. He did not report this to the District. Based on all of the foregoing, the evidence showed that Student did not receive even a "basic floor" of educational opportunity from October 2006 through January 2007.

HOME PROGRAM FEBRUARY 2007 THROUGH AUGUST 2007

49. From February to June 2007, Dr. Carlson did not hire any further aides to provide services to Student and direct instructional services ceased. Mother placed

⁹ In March 2006, Parent admitted to Dr. Green that the additional family members either living in the home or on extended visits made it difficult for Student's home therapy sessions, and that she was very stressed and fatigued. There is no evidence that the District was aware of those problems when the parties agreed to the home program in May 2006.

advertisements, but neither she nor Dr. Carlson found anyone to hire as an aide. Dr. Carlson billed the District each month for minimal hours of consultation with the family.

50. Dr. Carlson did not notify the District that he could not find an aide and did not ask them to assist him in finding someone. His testimony that he did not understand that it was his responsibility to notify the District that the program was not working was not credible, and his failure to do so reflected faulty professional judgment.

51. In June 2007, Dr. Carlson tried to "resuscitate" the program by moving the program to his office and training an aide named Tammy. He decided that it was no longer feasible to provide services to Student in the home environment. He informed Parents that they would need to bring Student to his office in Los Osos, about fifty miles south of San Miguel, in order to receive services. Dr. Carlson and Mother attended a meeting at Tri-Counties, where he indicated that due to the on going challenges of finding and training staff, the geographical distance which impeded his ability to supervise, and the home environment with its "highly variable social contingencies," he needed to move both the District's educational program and the Tri-Counties home program to his office. Mother agreed to try the change of location. Neither Mother nor Dr. Carlson notified the District that he was changing the location of the home program from the family home in San Miguel to his office. Tammy changed her mind and did not tutor Student.

52. In reliance on Mother's agreement to bring Student to his office, Dr. Carlson hired several people as aides in Los Osos and began training them in July 2007 to work with Student. He inexplicably billed the District for about 56 hours of tutor training in that month and about 86 hours of "tutor support" but the evidence did not show that the aides ever worked with Student. Mother brought Student to the office only once to see where it was and to see if Student could safely endure the trip. In late July or early August 2007, when trained aides were ready to start direct services, Mother changed her mind and decided it would be too difficult to try to transport Student to Los Osos. The drive took

almost an hour each way, and Student's tolerance of riding in a car had not developed further. Dr. Carlson suspended further training and services. He did not notify the District that Mother had withdrawn Student from the program at his office.

53. In late August 2007, Mr. Smith, the District superintendent, contacted Dr. Carlson, who finally informed Mr. Smith that he was terminating Student's home program and could no longer provide the services. Mother contacted her advocate at that time. Mother explained at hearing that she had not complained in spite of the failed program because Dr. Carlson was a good person and she did not see that there were any other options.

54. Based on all of the foregoing, the last direct aide or tutor services Student received in Dr. Carlson's program were in January 2007. However, as set forth in Factual Findings 44 through 48, those aides were insufficiently trained, and there is no evidence of what type of program or services Dr. Carlson had in place for Student after September 2006. He still had not developed any annual IEP goals. Based on Dr. Carlson's own testimony and professional opinion, beginning in October 2006, the program was inconsistent and ineffective. The failure to provide a daily intensive ABA-based program constituted a material deviation from the agreed upon placement and services, and therefore denied Student a FAPE.

55. Dr. Carlson was the District's agent for the delivery of the home program. The District retained the legal obligation to provide the educational placement and services agreed upon in the settlement agreement. Dr. Carlson's failure to fully deliver the intensive home program services to Student on all school days between October 2006 and August 31, 2007, when he resigned, must therefore be imputed to the District.

FUNCTIONAL ANALYSIS AND INTERVENTIONS

56. The agreed upon services in the settlement agreement also included a provision that Dr. Carlson's intensive behavioral program would include a functional

analysis of Student's behaviors and the development of behavioral interventions as part of his program. Student contends that Dr. Carlson, and, hence, the District, should have conducted a functional analysis of his behaviors at the outset of the program in May/July 2006, and should have developed behavior interventions based on that data.

57. Paragraph 3 of the settlement agreement, as set forth in Factual Finding 8, required the intensive home program to include a "functional analysis and intervention." The language in Paragraph 3 of the agreement was ambiguous because it did not define the terms and did not clarify whether the reference was to a functional behavioral analysis or assessment (FBA) under the Individuals with Disabilities Education Improvement Act (IDEA), or a functional analysis assessment (FAA) specifically required under California law for a "serious behavior problem." The agreement did not expressly require Dr. Carlson to "conduct" a functional analysis at the beginning of his program; it merely provided that his program should "include" one. While "intervention" was also not defined, the evidence established that a behavior intervention plan is a written plan with measurable objectives and strategies to reinforce positive behaviors and reduce negative behaviors. Dr. Carlson understood he was obligated to conduct an in-depth functional analysis of Student's behaviors as he initially developed the home program because Dr. Green had recommended it in her report, Dr. Carlson agreed with her report, and it was a significant provision of the settlement agreement.

58. The District did not fund, and Dr. Carlson did not conduct an FBA, an FAA, or any formal behavioral assessment of Student and did not develop behavioral interventions based on data from such an assessment in 2006 or 2007, as required in the settlement agreement. Dr. Carlson never developed a written behavior intervention plan or program based on detailed analysis, and the aides did not have such program to work with. Dr. Carlson did not explain why he did not conduct an FBA, an FAA or any other targeted behavioral assessment, or why he did not develop a written behavior intervention plan

based on the data.

59. Dr. Green persuasively established that a functional analysis should have been used to determine what the antecedent triggers of Student's maladaptive behaviors were, what functions his behaviors served, and what the consequences were, and that the data derived from the analysis should have been used to design a behavior intervention plan that specifically targeted those areas. The lack of a functional analysis deprived Student and Parents, as well as Dr. Carlson, with the detailed, skilled analysis of Student's behaviors which would have gleaned valuable data upon which an effective behavior intervention plan could have been built.

60. Based on the foregoing, the evidence established that District's failure to fund, and Dr. Carlson's failure to conduct a detailed behavioral assessment prior to or during the beginning stages of his home program, along with the failure to devise behavioral intervention plans or strategies based on that data, constituted a significant deviation from the behavior intervention services that went to the heart of the intensive program agreed upon by the parties in the settlement agreement. Based on all of the foregoing, District's material deviation from the agreed upon placement resulted a denial of FAPE.

PARENTAL TRAINING

61. Dr. Carlson candidly conceded at hearing that he did not provide Parents with any "formal" training during the course of his intensive program in their home, as required by Paragraph 3 of the settlement agreement. He had already been working with Mother since 2004 while providing home-based behavioral services through Tri-Counties. Despite the absence of formal training in District's program, Dr. Carlson worked with Mother continually throughout the early months of the development of the home program. Mother collaborated with Dr. Carlson regularly and oversaw the daily delivery of services to Student; Mother video-taped Student's receipt of direct services from Dr.

Carlson's aides on a daily basis. She received informal training during Dr. Carlson's visits on behavior interventions and positive reinforcers. Father was not available during the week for training due to his job. Mother did not notify the District that Parents were not receiving any parental training.

62. If the District and Dr. Carlson had provided competent behavioral services in a consistent program, there would have been concrete interventions and approaches in working with Student, in which Parents could have been trained. The evidence therefore supports a finding that the lack of any formal parental training was a material deviation from the agreed upon service of parental training, which therefore denied Student a FAPE.

DISTRICT'S LACK OF OVERSIGHT OF THE INTENSIVE HOME PROGRAM

63. District's July 2006 contract with Dr. Carlson required him to keep records, and provided that the District had the right to monitor the home program, observe Student at work, observe the instructional setting, and review and audit his records. There is no evidence that the District conducted any oversight or supervision of the District-funded home program. District did not communicate with Dr. Carlson at all. It did not hold IEP meetings, or ask for any present levels of performance, annual goals, or progress reports. It did not monitor or observe the program in operation. When the contract expired at the end of June 2007, the District did not contact Dr. Carlson for an annual review or to renew the contract. It did not request any review of Dr. Carlson's records until November 2007, when Dr. Carlson could not locate his records of Student's home program.

64. In the spring of 2007, a District staff person in the accounting office noticed that Dr. Carlson's monthly billings were significantly lower and called him. Dr. Carlson indicated he had a staffing problem. Mr. Smith oversaw Dr. Carlson's invoices but made no inquiry. Thus, the District was on notice by virtue of the reduced billings that the full daily program was not being delivered to Student.

65. Based on the foregoing, the evidence establishes that the District abrogated

its responsibility to oversee the intensive home program. As set forth in Factual Finding 55, Dr. Carlson's conduct in operating the intensive home program must be imputed to the District. There is no evidence that the District diligently attempted to oversee the program or took timely action to correct or terminate Dr. Carlson as the service provider, such that it should equitably be relieved from liability.

HOME PROGRAM AUGUST 2007 TO THE NOVEMBER 2007 IEP

66. In late August 2007, Mr. Smith learned that Dr. Carlson was not providing services to Student any longer. Mr. Smith called Dr. Carlson and finally spoke with him. Dr. Carlson explained that he had moved the services to his office in Los Osos in June 2007, trained aides in July, and that Mother had then changed her mind and declined to bring Student to his office. Dr. Carlson sent Mr. Smith and Student's advocate, Ms. Zachry, an email message on August 31, 2007, in which he confirmed that he was unable to continue providing behavioral services and effectively resigned.

67. From the end of August to November 2007, the District attempted to find another behavior specialist to provide the interim intensive program as agreed upon in the settlement agreement. Paragraph 3 of the agreement provided that if Dr. Carlson was unavailable, the District would fund another mutually agreed upon BCBA. Dr. Carlson recommended that the parties consider retaining Jeffery Hayden, another BCBA in the area, to provide the services to Student. District at first refused to consider Mr. Hayden and then had problems communicating with him. Mr. Hayden credibly established that he informed the District he was willing to consider the position, but would need to review Student's records and conduct a behavioral assessment. District did not follow through.

68. Student did not receive any behavioral services or educational program from the District after Dr. Carlson resigned on August 31, 2007. District delayed in making an effort to implement the substitution clause in the settlement agreement. The months of September and October were spent in correspondence instead of action. Instead of

moving swiftly to hire another BCBA, the District moved slowly and finally decided to hold an IEP meeting in November 2007. The District deviated from the substitution provision of the settlement agreement. The evidence established that the District denied Student a FAPE by substantially failing to implement and materially deviating from the agreement. As a consequence, Student did not receive any further educational services from September 2007 to at least December 18, 2008, which resulted in a loss educational benefit, and denied Student a FAPE.¹⁰

DISTRICT'S NOVEMBER 16, 2007 IEP MEETING AND OFFER

69. A student eligible for special education and related services is legally entitled to a FAPE that consists of special education and related services that are available to the child at no charge to the parent, meet the state educational standards, and materially conform to the child's IEP. To determine whether the District offered Student a FAPE in the November 2007 IEP, the IEP must meet both the procedural and substantive requirements of the IDEA. The first question is whether District complied with the procedural requirements of the law.

Notice and Scheduling the November 2007 IEP Meeting

70. District contends that it complied with the legal requirements for providing Parents with notice of the November 2007 IEP meeting and with arranging a mutually agreed upon meeting date. Student contends that the District did not provide Parents and his advocate sufficient advance notice of the IEP meeting on November 16, 2007, and failed to arrange a mutually agreed upon date for the meeting.

¹⁰ Although District's December 2007 IEP offered a FAPE as to Dr. Carlson's intensive services (Factual Findings 121 - 133), that IEP otherwise denied Student a FAPE due to the lack of a residential placement and other deficiencies (Factual Findings 120, 134 - 139).

71. The school district must provide the parent adequate advance notice of an IEP team meeting to ensure that at least one parent is present at the IEP meeting or has been afforded an opportunity to participate. The IDEA emphasizes that parents are important members of the IEP team. An IEP meeting may be conducted without a parent in attendance if the local educational agency (LEA) is unable to convince the parent to attend, provided it maintains records of attempts to arrange a mutually agreed upon time and place.

72. On November 5, 2007, Mr. Smith prepared and sent a letter to Parents in which the District requested an IEP meeting to discuss a program and placement for Student because of Dr. Carlson's inability to provide services. He proposed the dates of either November 13 or November 16, 2007. The letter showed courtesy copies to various people, including Jill Heuer, Director of Special Education for the Paso Robles Public Schools District (Paso Robles District), but not to Student's advocate, Ms. Zachry. In addition, Mr. Smith left a telephone message for Mother explaining that Ms. Heuer would be there to assist with Student's transfer into Paso Robles District in February 2008.

73. On Monday, November 12, 2007, Ms. Zachry responded to Mr. Smith in a letter in which she asserted that an IEP meeting was not necessary to enforce the settlement agreement and that Student's transfer to Paso Robles District in February 2008 was not a matter of immediate concern. She also stated that the matter of Student's interim home services was "not an IEP issue." She informed Mr. Smith that she was ill and could not attend on November 13, and that Mother wanted her presence for any meeting with the District. She also requested a proposed agenda.

74. Mr. Smith did not recall seeing Ms. Zachry's letter of November 12 prior to the IEP meeting, and the record is unclear whether he did not timely receive the letter from his staff or overlooked it. In any event, District believed there was no response regarding the proposed IEP meeting dates. However, at no time between November 5 and

November 15, 2007, did the District or its attorney attempt to contact Ms. Zachry or Parents to request a response and try to negotiate a mutually agreeable meeting date. District was obligated by law to make more than one attempt to set a mutually agreeable date and did not do so. On November 15, 2007, the District hand-delivered a letter to Parents, saying that because they had not responded to the November 5 letter, it would proceed to hold the IEP meeting on the following day, November 16, 2007.

75. On November 15, 2007, Mother saw Mr. Smith at Lillian Larson when she attended an IEP meeting for her grandson. She attempted to show Mr. Smith a copy of Ms. Zachry's November 12 letter to prove to him that they did respond. Mother and Mr. Smith had a brief, heated exchange.¹¹ Mr. Smith testified that Mother wanted him to sign for receipt of whatever it was she was handing him, and he refused. Mr. Smith informed Mother that the District intended to proceed with the IEP meeting on November 16, 2007. Mother notified Ms. Zachry of the District's intent to proceed on November 16, but Ms. Zachry did not communicate with Mr. Smith or Ms. Inman, and did not attend the meeting. Mother did not attend the November 16, 2007 IEP meeting without Ms. Zachry.

76. District provided Parents adequate advance notice on November 5, 2007 when it proposed two dates for the IEP meeting and stated the purpose of the meeting. Ms. Zachry gave notice that she was ill and unable to attend the meeting on November 13. Stopping just short of refusing to come, she asked for an agenda, but the law does not require a school district to serve an agenda in advance of an IEP meeting, merely notice of the purpose of the meeting. Ms. Zachry's position that no IEP meeting was necessary was ironic since the District had failed to hold an IEP meeting for over a year, and was legally obligated to hold one.

¹¹ The relationship between the District and Parents was so antagonistic that District's communication with Parents and Ms. Zachry was primarily done either in writing or through its legal counsel.

77. District's letter of November 15, 2007, which selected the actual IEP meeting date in the absence of mutual agreement, only provided one day's notice for the meeting and was patently inadequate. District proceeded with the IEP meeting on November 16, 2007, believing that Parents and their advocate refused to attend, and based on a notice that said they did not respond. The November 2007 IEP meeting notes also contained a statement that Parents failed to respond, which was untrue, because their representative Ms. Zachry, had timely responded on their behalf. To remedy any possible notice violation, District decided during the November IEP meeting to reschedule another IEP meeting in December 2007.

78. District did not make the types of concerted efforts to communicate with Parents and their advocate to attend the November 2007 IEP meeting and to arrange a mutually agreeable date that are contemplated by law. First, District should have served a copy of the November IEP meeting request on Ms. Zachry, as Parents' and Student's advocate of record, since she had been corresponding with the District since the beginning of September 2007. Secondly, District did not explain why Mr. Smith did not timely receive and review Ms. Zachry's letter of November 12. When he learned about that response, whether on November 15 or earlier, he or the attorney for the District should have called or emailed Ms. Zachry to encourage her to come to the meeting, or to reschedule it. Moreover, having been given notice that she was ill, they should have inquired whether she was physically able to come. District only provided one day's notice of the meeting date it unilaterally selected. Finally, District made no effort to arrange for Mother or Ms. Zachry to participate in the meeting telephonically. District held the IEP meeting on November 16, 2007, without the participation of Parents or their advocate.

79. Based on all of the foregoing, District committed a procedural violation by failing to provide adequate notice, and failing to use sufficient efforts to arrive at a mutually agreeable date for the November 2007 IEP meeting. This violation significantly

impeded Parents' participation in the IEP decision making process because the November IEP meeting was held without their participation. Therefore, the violation resulted in a denial of FAPE. The violation was not harmless error because Student was losing educational services every month. As found above, the District remedied this violation by immediately rescheduling another IEP meeting in December 2007.

Other Necessary IEP Team Members

80. Student contends that the District was required by law to have a general education teacher and a special education teacher at the November 2007 IEP meeting, and did not do so. District contends that no general education teacher was necessary because there was no possibility that Student's program would involve participation in the regular education environment, and that Carla Morris was a special education teacher.

81. A student's IEP team shall include specified participants, including not less than one regular education teacher of the student, if the student is, or may be, participating in the regular education curriculum and not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student.

82. The November 16, 2007 IEP meeting was attended in person by Mr. Smith, superintendent, and Nancy Hulbert, school psychologist. In addition, Ms. Heuer, Paso Robles District's special education director, and Carla Morris, the District's part-time special education coordinator and a special education resource teacher, attended the meeting by telephone. Mr. Smith was a credentialed regular education teacher as well as the superintendent. In addition, Ms. Inman was present as the attorney for the District, and typed the IEP in District's computerized software program.

83. The District members of the November 2007 IEP team considered a continuum of placements that only briefly considered having Student come back in to the District with participation in any regular education curriculum. It was quickly eliminated as

a viable option based on Student's last known academic and functional levels of performance. The team offered an interim placement, pending assessment, at Dr. Carlson's office, not in a public school. The IEP offered zero percent of the time to be spent participating in any regular education environment. Hence, at this meeting, there was no possibility that the offer contemplated exposure to regular education, and no general education teacher was required to be present at the meeting.

84. Student contends that Carla Morris did not qualify as a special education teacher for purposes of the IEP meeting because the special education teacher must be one who has taught him. Student and Parents stipulated in the settlement agreement in 2006 that his program would be taught by Dr. Carlson, a BCBA, and therapeutic aides. Thus, there was no special education teacher in the District in November 2007 who had worked with Student since 2003 or early 2004. Student's claim would have required the District to produce someone who taught him in elementary school and who therefore knew only outdated information about his then-present levels, which would have defeated the intent of the law. Instead, the law provides, in the alternative, for the attendance of his special education "provider." Dr. Carlson was Student's most recent special education provider, and was proposed to again become his provider. Hence, the District should have arranged for Dr. Carlson to attend the meeting.

85. District's failure to have Dr. Carlson attend the meeting was a procedural violation. The violation deprived the IEP team and the Parents of his knowledge and input about Student's academic and functional levels of performance. If Dr. Carlson had been at the meeting, he could have made material contributions to the team's evaluation and offers, including whether Student could successfully make a daily trip to his office for services and whether an aide would be necessary to support his transportation. More importantly, he could have offered information about why his program previously failed, whether he thought it could succeed again, either in the home or in a school setting, how

long it might take him to start another program, what components would be necessary to make it work, and whether he would need assistance in hiring aides to work with Student. That information would then have been included in the meeting notes, and would have communicated the details of District's offer to Parents so they could make an informed decision. Based on the foregoing, this violation significantly impeded Parents' rights to participate knowledgeably in the IEP process, which therefore denied Student a FAPE.

District's November 2007 Offer

86. The second test in evaluating District's offer is whether the November 2007 IEP offer was substantively appropriate. In order to meet this standard, the offer must have been designed to address Student's unique educational needs, reasonably calculated to provide Student with educational benefit, and comported with his IEP or operative, agreed upon placement.

87. A district must make a formal written offer in the IEP that clearly identifies the proposed program. An IEP for each child with a disability must include a statement of the special education and related or supplementary aids and services to be provided, as well as other information, including the anticipated frequency, location, and duration of the services. Offers are to be evaluated as of the time the IEP team designed them, as part of the IEP, in light of the information available at the time the offers were made, and are not to be judged in hindsight.

88. The November 2007 IEP offered Student special education and placement in ninth grade in an unspecified daily program at Dr. Carlson's office, and annual goals that had been developed in 2006, along with speech and language therapy, occupational therapy (OT), and adaptive physical education (APE) at an unspecified district facility, pending the results of assessments.

89. District contends that the November 2007 IEP substantively offered Student a FAPE. Student contends that District's November 2007 offer was inappropriate because

he was in seventh grade, it offered placement and services before any assessment of his current levels of academic and functional performance had been conducted, and it offered services that materially deviated from the agreed upon placement in the settlement agreement.

NOVEMBER 2007 ASSESSMENT PLAN

90. The November 2007 IEP team decided it would be necessary to reassess Student's cognitive, academic, and functional levels of performance because District had not assessed Student since 2005, and therefore proposed an assessment plan. District contends that its November 2007 assessment plan, by which it offered to assess Student's cognitive, academic, and functional levels of performance, was an "integral part" of the November 2007 IEP offer. District did not provide any legal authority for that position. Student contends that the assessment plan was inappropriate because it did not propose a functional analysis of his behaviors.

91. However, the District did not need to call an IEP meeting in order to propose assessments. The legal requirements for assessment plans are distinct from the requirements for an IEP. During the hearing, the parties represented that Parents consented to the November 2007 assessment plan. It is thus not necessary to analyze whether the assessment plan complied with the law because the issue is moot. The November 2007 assessment plan was relevant to explain the context in which District's IEP offer was made but is not subject to a FAPE analysis.

NOVEMBER 2007 UNIQUE NEEDS AND ANNUAL GOALS

92. The unique needs of a child as a result of his or her disability are determined by the IEP team based on the results of assessments and information from the parents, teachers, and services providers of the child. A student's IEP must contain measurable annual goals designed to meet the child's unique needs and enable him or her to make

progress, and a statement about how progress toward those goals will be measured.

93. Student contends the November 2007 IEP denied him a FAPE because it offered outdated annual goals that were not designed to meet his unique needs. District contends that the January 2006 goals were appropriate because they were based on the District's last psychoeducational and academic assessments in 2005.

94. In addition to not having current information about Student's levels of cognitive, academic, and functional performance in November 2007, the District also did not have current information about Student's unique needs as a result of his disabilities. The November 2007 IEP team members were aware that there would be no current annual goals until the assessments were completed. Instead, they agreed to propose to use the District's January 2006 annual goals as interim goals pending the outcome of the assessments, without knowing whether those goals addressed Student's unique needs.

95. As set forth in Factual Findings 16 through 33, and 54, District had previously failed to develop annual goals with Dr. Carlson, and that ongoing denial of FAPE from July 2006 forward carried over into the November 2007 IEP. The District did not invite Dr. Carlson to the November 2007 IEP and there is no evidence that any school personnel met with him or otherwise tried to obtain information from him about Student's more recent levels of performance, unique needs, or what annual goals would be appropriate to address those needs. Parents never consented to the January 2006 goals, the goals were outdated, and they were not designed to meet Student's unique needs as a result of his disability as of November 2007. The lack of current information about Student's unique needs and the offer of outdated annual goals in the November 2007 IEP were not reasonably calculated to enable Student to receive educational benefit, which therefore denied him a FAPE.

OFFER OF PLACEMENT AND SERVICES

96. District contends that the offer of placement and services in the November

2007 IEP constituted a FAPE. Student contends that the offer was not reasonably calculated to enable him to receive educational benefit because it artificially put him in ninth grade, eliminated his intensive home program, reduced the daily instructional hours, proposed transporting him to and from Dr. Carlson's office without aide support, eliminated the residential placement, and offered inappropriate DIS therapy and transportation.

NINTH GRADE

97. District's November 2007 IEP offer placed Student in the ninth grade. Student contends that he was in seventh grade for the 2007-2008 school year. Pursuant to Factual Findings 142 through 150, the evidence supports a finding that Student was appropriately in ninth grade for the 2007-2008 school year.

DR. CARLSON'S NOVEMBER 2007 OFFICE-BASED PROGRAM

98. Placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school. In California, placement includes the unique combination of "facilities, personnel, location or equipment" necessary to provide educational services.

99. The IEP team offered educational services with Dr. Carlson as the service provider at his "service provider location," at his office in Los Osos, and intended it to be for a full school day. Instead, "300 minutes" was inserted in the IEP offer, equal to five hours daily. Ms. Morris clarified at hearing that the number of "300 minutes" in the offer was incorrect because that constituted just the "instructional" minutes instead of the full school day, which would also include lunch, recess, breaks, and any aide time for transportation before and after school, and would add up to total six and a half or seven hours of school time. Thus, the stated daily duration of services in the offer was erroneous and District did not make a clear written offer of placement. The lack of a clear written offer as to the duration of Dr. Carlson's services in the November 2007 IEP was a

procedural violation which significantly impeded Parents' rights to participate in the IEP process because they believed it constituted a two hour reduction in Student's school day. The violation therefore denied Student a FAPE.

100. The evidence did not establish that Student was substantively denied a FAPE due to a shortened school day. The offer did not impede Student's right to a FAPE because when the additional minutes of non-instructional time were added, the duration of the school day was substantially similar to the seven-hour school day in Student's intensive home program and did not result in a material deviation from the last agreed upon services. Moreover, the duration of the school day was calculated to provide Student with some educational benefit, and therefore did not deny Student a FAPE.

101. The November 2007 IEP offer of Dr. Carlson's services was not accompanied by any written description of the nature of his services, other than "other special education/related services." Parents were unable to determine from the IEP what services Dr. Carlson would provide, and it was impossible to tell whether the change in location from Student's home to Dr. Carlson's office would involve merely a change in location or a change in educational placement, other than adding two hours of transportation to each school day. Therefore, the offer of Dr. Carlson's services was not a clear written offer, which was a procedural violation. The violation significantly impeded Parents' rights to participate in the IEP process because the IEP deprived them of information about what services were being offered, which denied Student a FAPE.

102. Compared to the intensive services which were agreed to be provided in Student's home in Paragraph 3 of the settlement agreement, the November 2007 IEP offer of Dr. Carlson's services did not offer an "intensive research-based ABA program." It did not offer any instructional or therapeutic aide to support Student, or any "intensive training in functional communication skills" and did not offer training for Parents or an aide. District's failure to include all of Dr. Carlson's intensive services in the offer, therefore,

materially deviated from the operative placement in the settlement agreement and denied Student a FAPE.

103. In addition, the offer of Dr. Carlson's daily services in his office was not based on the IEP team members' informed consensus about his ability to provide the program. Mr. Smith did not disclose to Ms. Hulbert or Ms. Heuer at the IEP meeting that Parents wanted Mr. Hayden to conduct a behavioral assessment, or that they had asked the CDE to order the District to hire him. District persuaded the IEP team to offer Dr. Carlson's services because, having communicated badly with Mr. Hayden, they thought Dr. Carlson was the only BCBA available. The team did not have any information about how or why Dr. Carlson's home program had failed, and offered Dr. Carlson's services without weighing his competence to administer the program, and hire and train aides at his remote office. Based on all of the foregoing, District's offer of Dr. Carlson's services was not reasonably calculated to enable Student to receive educational benefit, and thus denied Student a FAPE.

104. As written, the IEP offer for Dr. Carlson's services was for only slightly more than one month, from the date of the IEP meeting on November 16, to December 20, 2007. Ms. Morris credibly testified that she did not know why the date of December 20, 2007 was placed in the IEP and she speculated that it was an error. However, the attorney for the District, Ms. Inman, typed the date in. As set forth in Factual Findings 77 and 116, District offered Parents another IEP meeting and proposed four dates in December 2007, the last of which was December 20, 2007. Therefore, the evidence supports a finding that the offer's termination date of December 20, 2007, was intentional. This termination date was inappropriate for several reasons. The law allows the District 60 days from receipt of parental consent to complete assessments. Assuming the District could have quickly completed the assessments and had reports ready for an IEP meeting on December 20, 2007, the team had no information about how long it would take Dr. Carlson to re-

establish the intensive program in his office and train aides to work with Student, and had no idea if Parents were available for an IEP meeting in December. If there were no IEP meeting to make a new offer on or before December 20, 2007, the services would terminate. Therefore, the stated duration of Dr. Carlson's program services for just over one month was unreasonably short and unrealistic, and denied Student a FAPE.

LACK OF RESIDENTIAL PLACEMENT IN NOVEMBER 2007 OFFER

105. The next question in evaluating whether District's November 2007 IEP offered Student a FAPE is whether there is any legal significance to its lack of an offer for a residential placement. Student contends that the absence of a provision for a residential placement was in effect an offer to eliminate the agreed upon provision in the settlement agreement to provide one, and thus denied a FAPE because it materially deviated from the agreement. District contends that the November 2007 IEP did not intend to eliminate the agreed upon residential placement, but merely offered interim services to restart Dr. Carlson's program pending assessments, and therefore offered a FAPE.

106. The November 2007 IEP made no mention of the agreed upon residential placement, and it was not offered. Ms. Morris and Mr. Smith each testified that it was not their intent to eliminate the residential placement provision in Paragraphs 3(f) and 4 of the settlement agreement. While it is difficult to weigh the credibility of their claims, the evidence supports a finding that their testimony was not credible. First, the District was represented by legal counsel and therefore knew or should have known that Parents' consent to the November 2007 IEP would have modified or superseded the settlement agreement and become the most recent agreed upon special education placement and services that the District would be obligated to provide. Second, by way of comparison, even though the November 2007 IEP offer did not contain an express provision for Student's transfer into his high school district in February 2008, as provided for in Paragraph 5 of the settlement agreement, the IEP did provide that he was in ninth grade,

referred to his transition from the District, and had the Paso Robles District's representative, Ms. Heuer, present at the IEP meeting in order to begin the transition to Paso Robles High School. In contrast, the IEP made no reference to the residential placement anywhere in the document, and its silence on this provision was notable.

107. Third, the evidence established that Mr. Smith and Ms. Morris did not inform the other members of the IEP team about the residential placement agreement.¹² Ms. Hulbert credibly established that, as a member of the IEP team, she was not informed of Dr. Green's 2006 behavioral evaluation that described the severe degree of Student's maladaptive behaviors and which recommended a residential placement, and she was not informed that the District had agreed to a residential placement for Student when an opening occurred. Ms. Heuer also established that she, and therefore Paso Robles District, was not made aware of the residential placement agreement until February 2008.

108. In May 2006, District had agreed to fund the residential placement as a compensatory placement due to Student's prior complaint, and in November 2007, this compensatory placement was still owed because Student was on waiting lists for an opening in a residential facility.¹³ If the November 2007 IEP offer had been accepted, the

¹² Since the law required Paso Robles to attend an IEP meeting at the District in order to transition Student to high school (Legal Conclusion 42), Ms. Heuer should have been informed of the residential placement in the same manner in which she was informed about the agreement to transfer him to Paso Robles in February 2008. The fact that the settlement agreement was confidential did not prevent disclosure of material information in it to necessary parties in order to implement or enforce it, as expressly provided for in the agreement.

¹³ There was no evidence that either party delayed in making arrangements for the residential placement; rather, Student was on long waiting lists for several residential facilities.

residential provision would have been eliminated and replaced by a new IEP. Therefore, District's failure to offer the continuation of the residential placement provision in the November 2007 IEP constituted a material deviation from the agreed upon placement in the settlement agreement and denied Student a FAPE.

109. The November 2007 IEP team may not have been legally required to offer a residential placement as a prospective placement if they did not believe it was appropriate to provide Student with a FAPE. However, the IEP team had no information upon which to base a decision to eliminate the provision for residential placement. They had proposed to assess Student before making an offer that would involve any material change in his program. Moreover, both Dr. Green and Dr. Carlson compellingly testified that Student needed to be moved out of his home environment and placed in a residential facility for intensive behavioral and daily living skills intervention. Thus, the lack of a residential placement in the November 2007 IEP did not address Student's unique needs and was not reasonably calculated to provide educational benefit. Based on all of the foregoing, the failure to offer a residential placement therefore denied Student a FAPE.

NOVEMBER 2007 DESIGNATED INSTRUCTIONAL SERVICES

110. "Related services" under the IDEA are called designated instruction and services (DIS) in California, and include transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. The November 2007 IEP offered DIS in the areas of speech and language therapy, occupational therapy (OT), adaptive physical education (APE), and transportation.

111. The November 2007 IEP offered 30 minutes of speech and language from the District twice a week in a separate classroom in a "public integrated facility." It offered OT for 30 minutes once a week, and APE for 30 minutes once a week at "any other location or setting," provided by staff from the SLOCOE. However, the offer for speech and language was only until December 20, 2007; and the OT and APE offers were only from

November 16, 2007 to November 16, 2007 (in other words, only on the day of the offers). The discrepancies in the durations of the offered services were not adequately explained. Ms. Morris speculated that they were typographical errors. The duration of the speech and language therapy was unreasonably short because, as with the same duration of the offer for Dr. Carlson's services (Factual Findings 104), the IEP team did not know how long it would take to complete the assessments and did not know when Parents were next available for an IEP meeting.

112. The durations of the OT and APE offers were incapable of performance. Even if the dates of duration of the OT and APE services were clerical errors, the District did not submit a corrected IEP to Parents or send them a letter of explanation. Based on the foregoing, District did not make a clear written offer of the OT and APE services, and committed a procedural violation. This violation significantly impeded Parents' rights to participate in the decision making process because they had no idea what duration of services the District was offering. Student was therefore denied a FAPE.

113. The offers of the above DIS were not substantively based on the agreed upon placement in the settlement agreement, which had no DIS therapy services, and constituted a material deviation from it. Ms. Morris candidly explained that they were based on Student's IEPs prior to May 2006, when District had provided such services, and on what services the District typically offered students with autism. District wanted to get some services in place as an interim placement pending the assessments. There was no evidence that any District personnel consulted with Dr. Carlson about Student's speech and language, OT, and APE needs, or asked what he would recommend in regard to such needs, and Dr. Carlson was not invited to the IEP meeting. The team members had no information about whether Student could be transported to and from his home or from Dr. Carlson's office, four times a week, to receive therapy from three different therapists, and there was no offer for an aide to accompany him due to his safety and maladaptive

behavior issues. In addition, there was no offer for the behavior specialist to consult with the therapists to ensure consistency across all settings in addressing Student's aggressive and maladaptive behaviors. For these reasons, the evidence established that the November 2007 IEP offers of DIS services materially deviated from the services in the settlement agreement, which denied Student a FAPE. In addition, based on the foregoing, the offers were not designed to meet Student's unique needs or reasonably calculated to lead to educational benefit, and constituted a denial of FAPE.

114. In addition, the November 2007 IEP offered Student transportation "for special education." It stated that he had special behavioral needs that required door-to-door transportation. The offer did not provide for an aide on the bus or van with him even though the settlement agreement provided for direct aide services on a daily basis. In addition, the evidence established that Student needed support in order to ride in a car because of his fears and maladaptive behaviors. (Factual Findings 34-43.) The IEP team members had no information that he could travel safely without an aide. The settlement agreement did not require District to transport Student, but it did require daily aide support. Even if the offer of transportation is viewed as a minor deviation from the agreed upon services, the DIS transportation offer nevertheless materially deviated from the agreed upon services by not offering aide support, which constituted a denial of FAPE. In addition, it was not designed to meet Student's unique needs for aide support in a vehicle, which denied Student a FAPE.

DISTRICT'S DECEMBER 18, 2007 IEP MEETING AND OFFER

Notice and Scheduling the December 2007 IEP Meeting

115. District contends that it complied with the legal requirements for providing Parents with notice of the December 2007 IEP meeting and with arranging a mutually agreed upon meeting date. Student contends that District should have rescheduled the

meeting because there was a storm that day and Parent's advocate was unable to safely travel.

116. On November 16, 2007, Mr. Smith sent Parents the November 2007 IEP offer and the proposed assessment plan. He informed them that the team discussed that Student had been out of an educational placement "for approximately four to five months," and that the team recommended a full assessment and placement back with Dr. Carlson. He indicated the District wanted to schedule another IEP meeting to discuss the offer and obtain their input, and proposed the dates of December 17, 18, 19, or 20, 2007. On December 12, 2007, Mr. Smith again wrote to Parents, informing them that, not having heard from them, there were only two dates available to hold the IEP meeting, either December 18, or 21, 2007. On December 13, 2007, Ms. Zachry sent a letter to Ms. Inman, informing her that December 18, 2007 was a mutually agreeable date for the IEP meeting.

117. On December 18, 2007, the IEP meeting was scheduled for 3:00 p.m. At about 10:42 a.m., Ms. Zachry faxed Mr. Smith a letter regarding the inclement weather that day, with a courtesy copy to Ms. Inman, Parents, and CDE. She credibly established that there was a severe rainstorm on December 18, 2007, and that, as stated in her letter, she did not believe she could safely drive to San Miguel, a three-hour trip each way. She acknowledged that the CDE had ordered the District to hold an IEP meeting by December 21, 2007, and assured the District that Parents were willing to agree to an extension of the CDE deadline within which to hold an IEP meeting.¹⁴ She requested that the IEP meeting

¹⁴ On December 3, 2007, in response to a complaint filed by Parents in October 2007, the CDE issued a Compliance Complaint Report containing the results of its investigation. CDE ordered the District to provide evidence of compliance with nine listed corrective actions on or before December 21, 2007. Among them, District was ordered to submit evidence to CDE that it convened an IEP meeting by that date in which the mandatory obligations of the settlement agreement were incorporated into an IEP. The

be rescheduled to a date not later than January 11, 2008. When Ms. Zachry requested a brief continuance of the IEP meeting due to a severe storm, the meeting date was no longer mutually agreeable. While the parties dispute how severe the storm was, there was no evidence that Ms. Zachry intentionally tried to delay the IEP meeting. Parents lived a short distance from the school where the IEP meeting was going to be held, but would not participate in the IEP meeting without Ms. Zachry's presence.

118. District did not take reasonable steps to arrange an alternative to again going forward to hold an IEP meeting without Parents' participation. Dr. Carlson did not personally drive from Los Osos to attend the IEP meeting, but participated by telephone. Mr. Smith called Mother to try to have her participate by telephone, but did not reach her. However, Mr. Smith and Ms. Inman made no attempt to contact Ms. Zachry by telephone to see if she could participate telephonically. Accordingly, the phone calls to only Mother, and not to Ms. Zachry, were inadequate. District's refusal to arrange a brief continuance of the IEP meeting deprived the Parents of the opportunity to participate in the decision making process and consequently denied Student a FAPE.

December 2007 Assessment Plan

119. During the hearing, the parties represented that Parents consented to District's December 2007 assessment plan. As set forth in Factual Findings 90 and 91, the issue of whether the assessment plan complied with the law was moot and is therefore not an issue in this proceeding. District's December 2007 assessment plan is not subject to a FAPE analysis. It was relevant to explain the context in which District's December 2007 IEP offer was made.

CDE order is not binding in this case. In late December 2007, the District filed a civil action regarding the CDE order in San Luis Obispo County Superior Court. That action has been ordered sealed by the court, and was still pending during the hearing.

Student's Unique Needs and Annual Goals

120. The December 2007 IEP team was aware that there would be no current annual goals until they assessed Student. They agreed to wait to develop annual goals after the assessments were completed, which was an appropriate decision consistent with the District's legal obligation to draft goals designed to meet Student's unique needs. As set forth in Factual Findings 16 through 33, 54 and 95, District had previously failed to develop annual goals with Dr. Carlson, and that ongoing denial of FAPE from July 2006 forward carried over into the December 2007 IEP. Based on the foregoing, District's continued absence of current annual goals did not address Student's unique needs, deprived him of educational benefit, and therefore denied him a FAPE.

December 2007 Placement and Services

121. District contends that the December 2007 IEP offered Student a FAPE. Student contends that the December 2007 IEP denied him a FAPE because the offer changed the placement of Dr. Carlson's behavioral services from his office to Lillian Larson, there were no goals, no residential placement provision, and the DIS therapy and transportation offers were inappropriate.

122. The IEP team at the meeting on December 18, 2007, consisted of Mr. Smith, Ms. Inman, regular education teacher Paul DiMatteo, Dr. Carlson (who participated by telephone), and Ms. Morris. Mr. DiMatteo taught seventh and eighth grade in the District. On the same date, Mr. Smith wrote a letter to Parents, in which he informed them of the results of the meeting, enclosed a copy of the December 2007 IEP offer and assessment plan, and invited them to contact Ms. Morris if they had any questions about the IEP offer for Dr. Carlson's services. He also asked them to submit dates if they wanted another IEP meeting.

123. At the December 2007 IEP, District offered an educational placement of "intensive individual instruction" with Dr. Carlson in a separate classroom in a "public

integrated facility," identified in the IEP meeting notes as Lillian Larson, beginning on December 20, 2007, and ending on February 29, 2008, for "300 minutes" daily. The IEP team intended to offer a full school day of services, and the "300 minutes" were instructional minutes which erroneously excluded nonacademic time such as lunch, breaks, and recess. (See Factual Findings 99 and 100.) However, the IEP meeting notes stated that one or more aides, trained by Dr. Carlson, would provide seven hours of direct services each school day.

124. The offer of Dr. Carlson's services for five hours a day was therefore clarified to be for seven hours a day in the notes, and was thus not a reduction from the seven hour school day in the previous home program. Accordingly, the December 2007 placement offer was a clear written offer and there was no procedural violation. The duration of the offer was the same as that in the agreed-upon intensive home program, and did not materially deviate from the settlement agreement. Finally, the duration of the services was reasonably calculated to enable Student to receive substantive educational benefit.

LOCATION OF EDUCATIONAL SERVICES

125. District contends that the December 2007 IEP offer for Dr. Carlson's services to be provided at Lillian Larson offered Student a FAPE. Student contends that the change of location from his home or Dr. Carlson's office to the school campus constituted a denial of FAPE because it was a change of placement that materially deviated from the settlement agreement, and Lillian Larson could not provide Student educational benefit.

126. Lillian Larson provides educational services to children from kindergarten through eighth grade. The December 2007 IEP specified that Student would spend zero time in the regular education environment. However, the meeting notes page indicated that Dr. Carlson recommended that Student be given "opportunities to be exposed to nondisabled peers through participation in a lunch group, recess and/or extracurricular activities," along with one-to-one supervision.

127. The agreed upon placement in the settlement agreement was an intensive program located in Student's home. Student had attended Lillian Larson for many years. Parents had removed Student from Lillian Larson in February 2004. In an IEP meeting on June 3, 2004, the District had expressly acknowledged that Student's placement at Lillian Larson could not meet his needs at that time. District had offered compensatory services that ultimately were resolved as part of the settlement agreement.

128. Dr. Carlson was aware that Parents did not want Student to attend Lillian Larson. Lillian Larson was located in San Miguel, where Student lived, and, as set forth in Factual Findings 51 and 52, in June 2007, Dr. Carlson had already determined that the geographical distance from his office to San Miguel was problematic. The November 2007 IEP had offered Dr. Carlson's services to be implemented at his office in Los Osos. Dr. Carlson testified that he told the December 2007 IEP team he could not provide Student's services at Lillian Larson on a daily basis. Ms. Morris credibly testified that Dr. Carlson agreed to help by operating the intensive program at Lillian Larson "for the short term." He would train the aides who would provide the daily services, and the services were only to last until February 29, 2008. The evidence supports a finding that Dr. Carlson acquiesced in the IEP team's decision to offer Lillian Larson because he believed Parents would not accept it and there was little risk of actually having to provide the services there. Even if Parents did accept it, his initial obligation to train aides was limited and Student was going to transfer into another school district in February 2008.

129. As set forth in Factual Findings 131-133, the services proposed to be provided at Lillian Larson in the December 2007 IEP were the same intensive services in the settlement agreement, to be provided by Dr. Carlson. The offer therefore did not constitute a change in Student's agreed upon educational placement but was a change of location for the delivery of the same services. Student was exposed to nondisabled children in the home environment, and would also have that opportunity at school. He would still be

educated on a one-to-one basis. Based on the foregoing, the change in location did not constitute a material deviation from that agreed to in the settlement agreement, and did not deny Student a FAPE.

130. The IEP team was not legally required to offer another home-based program if it did not believe such a location would provide Student a FAPE due to changed circumstances. The evidence established that the home location was severely limiting, impeded the ability to provide any consistent behavioral services, involved a chaotic home environment with eight or more adults and children, was isolating for Student, and contributed to deny him a FAPE. The change to a school location would provide an environment in which his program could be provided with consistency and oversight. Therefore, the change to Lillian Larson was reasonably calculated to provide Student educational benefit, and did not deny him a FAPE.

DR. CARLSON'S DECEMBER 2007 SCHOOL-BASED PROGRAM

131. The meeting notes section of the December 2007 IEP offered all of the components set forth in Paragraph 3 of the settlement agreement for Dr. Carlson's interim intensive program. It offered an intensive research-based ABA program, including a functional analysis and intervention for Student's behaviors, intensive training in functional communication skills, and addressed all of Student's areas of need as specified in the agreement. It included Dr. Carlson's supervision and training of aides, and for the aides to provide seven hours of direct services to Student on each school day. It also included parental training.

132. In addition to changing the location from Student's home to Lillian Larson, there were a few other deviations from the intensive services agreed to in the settlement agreement. Most importantly, the offer provided that the District, not Dr. Carlson, would hire the aides and pay them directly. Dr. Carlson would be available to train aides beginning in January. The effective date of the IEP on December 20, 2007, was thus not

when Student would actually begin receiving services because the school would be closed for the winter holidays. The offer provided that Dr. Carlson would initially provide two six-hour training sessions for the aides, and then provide ongoing supervision and training. He would also train District staff, as appropriate, for Student's exposure to nondisabled peers. District would provide a space at the school where he would receive daily services.

133. The above deviations in the provision of Dr. Carlson's services were not material deviations from the agreed upon interim placement in the settlement agreement, and did not thereby deny Student a FAPE. They involved changes in the functional operation of the program. Given the significant concerns about Dr. Carlson's ability to run the program, District's December 2007 offer would result in on going daily supervision of the delivery of Student's services by school staff at Lillian Larson. District would have direct control over the hiring of the aides, and immediate oversight of the delivery of Dr. Carlson's training and consultation. In addition, District would keep records of the aides' services and Student's progress. The District had funded Dr. Carlson's aides under the prior program but he had difficulties hiring aides or running the program on his own. The changes gave District more direct control over the aides and daily oversight of the services. Based on the foregoing and despite the concerns about his ability to develop a cohesive program, the offer of Dr. Carlson's services was reasonably calculated to offer educational benefit and offered a FAPE.

DECEMBER 2007 LACK OF RESIDENTIAL PLACEMENT OFFER

134. The December 2007 IEP did not offer a residential placement for Student when an opening occurred, as agreed upon in the settlement agreement. The next question in evaluating whether District's December 2007 IEP offered Student a FAPE is whether there is any legal significance to its lack of an offer for a residential placement.

135. As set forth in Factual Findings 105-109, District's contention that it did not intend to eliminate the residential placement in the November 2007 IEP was not supported

by the evidence. The same reasoning is applicable here. In addition, it is notable that the December 2007 IEP meeting notes directly quoted the settlement agreement's Paragraph 3 language to insert Dr. Carlson's full intensive program into the offer, except for changes such as the location. However, the meeting notes omitted to use the language of Paragraph 4 to insert the residential placement provision into the offer. Instead, the meeting notes referenced the residential placement only minimally, and in carefully chosen words that did not constitute making any offer. Immediately after a short recital of past discussions about a residential placement, the notes then stated that the District was offering to provide Dr. Carlson's intensive program. Given the compelling evidence of the importance of a residential placement, the lack of a residential placement in the December 2007 IEP materially deviated from the settlement agreement, thereby denying Student a FAPE.

136. There is no evidence that Dr. Carlson or Mr. DiMatteo understood the legal ramifications of not having a residential placement provision in the IEP, or that their consensus could result in its elimination. Dr. Carlson was skeptical about any placement other than a residential setting, and would not have agreed with the offer had he known. District's assertion that they could not make an offer of placement at a residential facility because there were no openings at a residential facility then-available is disingenuous. The fact that there were no openings did not prevent the District from agreeing to a residential placement as Student's compensatory placement in May 2006, when it entered into the settlement agreement and agreed that the placement would constitute a FAPE. As found with respect to the November 2007 IEP, the team's elimination of the residential placement did not address Student's unique needs and was not reasonably calculated to provide educational benefit. Based on all of the foregoing, the failure to offer a residential placement therefore denied Student a FAPE.

DECEMBER 2007 DIS SERVICES

137. The IEP also offered 30 minutes of speech and language once a week, occupational therapy for 20 minutes once a week, and APE for 20 minutes once a week in “a separate classroom in a public integrated facility,” from December 20, 2007 to February 29, 2008. This offer reduced the DIS services offered in November, which had offered speech and language for 30 minutes twice a week, and had offered the OT and APE for 30 minutes once a week. The December reductions in services were as arbitrary as were the offers themselves.

138. As set forth in Factual Findings 111-113, the offers of DIS therapies in November 2007 were not based on the settlement agreement but were based on Student’s IEPs prior to May 2006, when District had provided such services, and on what services the District typically offered students with autism. The same analysis applies to the December DIS offer. Although Dr. Carlson was present at the December IEP by telephone, the notes page does not reflect that DIS services were discussed at the meeting. Dr. Carlson did not sign the IEP and there is no evidence he was aware the services were offered. The team members had no information about whether Student could handle receiving therapy from three different therapists. In addition, there was no offer for the behavior specialist to consult with the therapists to ensure consistency across all settings. For these reasons, the evidence established that the December 2007 IEP offers of DIS services materially deviated from the services in the settlement agreement, which denied Student a FAPE. In addition, based on the foregoing, the offers were not reasonably related to Student’s unique needs, and, pending assessment of what those needs were, the offers were not reasonably calculated to provide educational benefit. For these reasons, the offers of DIS in the December 2007 IEP constituted a substantive denial of FAPE.

DECEMBER 2007 TRANSPORTATION

139. The December 2007 IEP offered Student door-to-door transportation to

attend school, but suffered the same deficiencies as the transportation offer in the November 2007 IEP. As set forth in Factual Finding 114, even if District's transportation offer is viewed as a minor deviation from the operative services, it nevertheless materially deviated from the services in the settlement agreement by not offering aide support, which constituted a denial of FAPE. In addition, the offer was not adequate to address Student's unique needs for aide support and constituted a denial of FAPE.

DISTRICT'S IEP OFFER OF JANUARY 29, 2008

140. District contends that the IEP of January 29, 2008, which included a transfer of Student's educational services to the Paso Robles District in the ninth grade commencing February 29, 2008, offered a FAPE. District argues that it was no longer obligated to provide educational services beyond that date based on the settlement agreement. District contends that Student was in seventh grade at the time of the settlement agreement, and that he therefore progressed from grade to grade such that, as of the 2007-2008 school year, he was in ninth grade and eligible to be transferred to high school.

141. Student contends that the offer denied him a FAPE because he was in seventh grade for the 2007-2008 school year, District artificially advanced him into ninth grade, and OAH does not have jurisdiction to order the promotion of a student to the next grade or matriculate him into high school. He asserts that the provision in the settlement agreement for him to transfer into his "high school district" in February 2008 did not mean that he would go to high school. Student also contends that because the January 2008 IEP offer terminated on February 29, 2008, it was designed to leave him without an existing IEP, which would prevent his transfer into the Paso Robles District.

142. In January 2008, the parties learned of an opening for Student at Heartspring School in Wichita, Kansas. Heartspring is a nonpublic residential school that is a certified NPS in California. It teaches fundamental daily living skills to children with disabilities to

help them become more independent and move to a less restrictive environment.

143. The District convened an IEP meeting on January 29, 2008, in order to make an offer of a residential placement for Student at Heartspring. Consistent with the November and December 2007 IEPs, the January 2008 IEP stated that Student was in ninth grade. The IEP offered a residential placement at Heartspring from February 11 to February 28, 2008. The team agreed that Heartspring has a residential educational program that was comparable to the other residential schools the parties had agreed to in May 2006. The Heartspring placement is not at issue in this proceeding.

144. The January 2008 IEP provided that "Student will matriculate into his high school district when he turns 14 – 1/2 on February 28, 2008." The IEP meeting notes further provided that the District would not be responsible for transporting Student at Heartspring's two school breaks in June and December 2008 because "[Student's] high school district may be responsible for this transportation ... however they are not present at this IEP meeting." District did not invite any representative from Paso Robles District to the meeting because of the various legal proceedings pending between the parties.

145. Parents did not consent to the January 2008 IEP at the meeting. On January 30, 2008, Ms. Zachry emailed Ms. Inman with their concerns, which included disagreement with ninth grade and the termination date, and she later submitted a written list of proposed changes signed by Mother. The parties entered into an amendment without a meeting on February 1, 2008, which contained a detailed agreement for District's funding of travel and lodging expenses for Parents to drive Student to Heartspring and for Parents' return trip, between February 5 and 13, 2008. Parents consented to the Heartspring placement and initial transportation funding but did not consent to Student's grade level or transfer on February 29, 2008, into his high school district.

Paragraph 5 of the Settlement Agreement

146. Student contends that the January 2008 IEP denied him a FAPE because it

constituted a material deviation from the settlement agreement. District contends that it did not materially deviate from the agreement, and that the offer was otherwise reasonably calculated to enable Student to receive educational benefit. Paragraph 5 of the settlement agreement provided as follows:

The Parents agree that the District will be responsible for [Student's] program under paragraphs 3 and/or 4 up to, and including, the date [Student] turns 14 & 1/2 in February 2008, at which time [Student] will matriculate into his high school district. The parents agree that although the placements described in paragraphs 3 and 4 will be subject to "stay- put," for the purpose of this Agreement, the District is only agreeing to fund such programs for up to the date [Student] turns 14 & 1/2 in February of 2008.

147. Students in middle school in the District who progress to ninth grade in high school are referred to the Paso Robles District. Paso Robles District serves students from kindergarten through high school. Eighth graders from the District normally matriculate or progress to ninth grade at Paso Robles High School in Paso Robles District. Paso Robles District is thus referred to as the "high school district" for District's middle school students. Based on the foregoing, the phrase "high school district" in the settlement agreement referred to Paso Robles District because it was the school district that would provide Student with a high school education.

Grade Level

148. The parties did not specify Student's grade level in the settlement agreement in May 2006. District's records for Student's early elementary school years were problematic. The grade levels for first and second grade appeared to repeat in certain

years, suggesting that the District retained Student in the same grade several times. However, the IEPs did not state he had been retained, and there was no evidence of parental notification of any intent to retain Student.

149. It is unnecessary to decide whether District's records of Student's elementary grade levels contained errors, because Parents later settled all prior claims in May 2006, which included a dispute about his grade level. As of May 23, 2006, Student was in seventh grade for the 2005-2006 school year.¹⁵ It follows from the natural progression of grade to grade, absent evidence of retention in any grade, that he was promoted to eighth grade for the 2006-2007 school year, and that he progressed to ninth grade for the 2007-2008 school year. As set forth in Factual Findings 16-25, District failed to hold an IEP meeting for the 2006-2007 school year, which would have reflected his eighth grade level that year.

150. Even if Student's grade level for the 2005-2006 school year remained in dispute, the District did not materially deviate from Paragraph 5 of the settlement agreement to place Student in ninth grade for the 2007-2008 school year, in order for him to transfer to Paso Robles High School in February 2008. Thus, the District's 2007 and January 2008 IEPs consistently stated that Student is in ninth grade.¹⁶ District therefore did not artificially "promote" Student to ninth grade for the 2007-2008 school year. Moreover, the evidence established that grade level for a special education student is appropriately determined by the IEP team, and that, based on Student's chronological age, ninth grade was the appropriate grade level for him. The January 2008 IEP team's offer was therefore reasonably calculated to provide Student with educational benefit, and did not deny him a FAPE. District did not arrange to transfer Student to Paso Robles District in the fall of 2007, at the beginning of his 2007-2008 school year in ninth grade because it agreed in the

¹⁵ District's January 9, 2006, IEP stated that Student was in seventh grade.

¹⁶ Mother testified credibly that she no longer disputes Student's placement in ninth grade, but did not like the way the District handled the matter.

settlement agreement to wait to do so until February 29, 2008.

Transfer to Paso Robles District

151. When a student is to transfer from an elementary school district to a high school district, the elementary school district shall invite the high school district to an IEP meeting prior to the last scheduled review, and the IEP shall specify the appropriate high school placement. If a representative of the high school district has not participated in the IEP development prior to transfer from the elementary program, the elementary school district shall notify the high school district of the transfer. When a student who has an IEP transfers from one school district to another district within the same SELPA within the same academic year, the new district shall continue, without delay, to provide services comparable to those described in the "existing, approved IEP" unless the parties agree otherwise.

152. The District invited Ms. Heuer, the director of special education for Paso Robles District, to attend the November 2007 IEP in order to begin Student's transition to high school. District did not invite her or another representative of Paso Robles District to attend the December 2007 or the January 2008 IEP. District therefore did not follow through on Student's transition and Paso Robles District did not participate in the development of his IEP. However, District did not commit a procedural violation because the law provides an alternative, which is notification. District notified Paso Robles District of Student's impending transfer by letter on February 6, 2008.

153. The law also requires that the last IEP from the elementary school district must state the student's high school placement. The January 2008 IEP, as amended, stated in several places that Student's "high school district" would be responsible for his educational program after February 28, 2008. While the name of the high school district was not typed in, there was no dispute that Paso Robles District is Student's high school district. The placement stated in the IEP was the residential placement at Heartspring.

154. Student contends that if he did not have an “existing IEP” on February 29, 2008, he would not have an IEP placement to take to Paso Robles District. This argument is not persuasive. By virtue of Parents’ partial consent to the January 2008 IEP, as amended, the parties have agreed that Student’s appropriate educational placement is in a residential school, Heartspring. Despite disagreement with the termination date which would end the District’s legal responsibility to fund that placement, that IEP is nevertheless Student’s most recent agreed upon IEP placement prior to transferring to a new school district. The January 2008 IEP, as amended, did not state that the District was offering to terminate Student’s residential placement after February 28, 2008, because it was no longer appropriate to provide him a FAPE, and there is no evidence that the IEP team intended to or did make such a determination. Instead, the date of February 28, 2008, merely related to District’s educational jurisdiction, and intended to terminate its responsibility to fund the educational placement of a ninth grader. Since the parties agreed that a residential placement was appropriate, the January 2008 IEP was the operative IEP Student would take into his high school district.

155. Based on all of the foregoing, the January 2008 IEP offer for placement in ninth grade and transfer to Paso Robles District on February 29, 2008, did not deviate materially from the agreed upon placement in the settlement agreement but was consistent with it. In addition, because Student was the appropriate age to be in ninth grade, the offer was otherwise reasonably calculated to provide educational benefit by transferring him to his high school district, and did not deny Student a FAPE.

JANUARY 2008 FUNDING FOR FAMILY VISITATION

January/February 2008 IEP

156. Student contends that the January 2008 IEP offer, as amended on February 4, 2008, materially deviated from the agreed upon services because it failed to offer funding

for Parents to make four visits per year to see Student at Heartspring, as provided for in the settlement agreement. He contends that, after February 29, 2008, the District failed to fund visitation pursuant to either the January 2008 IEP, as amended, or pursuant to an OAH stay put order, which denied him a FAPE. District contends that it was not obligated to offer funding for more than the initial trip because its jurisdiction would end on February 28, 2008.

157. DIS services include transportation and other supportive services as are required to assist a child with a disability to benefit from special education. Transportation may, when educationally appropriate, include transportation costs and expenses related to family visits to a distant residential placement.

158. Paragraph 4 of the settlement agreement provided that the District would fund "up to" four visits per year during Student's residential placement, including the cost of transportation and lodging for two adults to visit him at the residential facility. The January 2008 IEP offer did not contain a provision for funding anything other than Student's one-way transportation to Heartspring, and Parents' round-trip to deliver him there by car in February 2008. District offered an amendment dated February 1, 2008, which provided details of the transportation, lodging, and per diem expenses of the trip. Parents accepted the amendment on February 4, 2008, subject to their objections about the termination date of the offer. The January 2008 offer, as amended, therefore deviated from the family visit provision in the agreed upon services in the settlement agreement, which was the operative placement for Student through February 28, 2008.

159. The above deviation from the agreed upon visitation services was not material at the time the January 2008 offer was made, because the District offered placement at Heartspring under its funding for only a two-week period, from February 11, to February 29, 2008. Thereafter, it contemplated Student's transfer to Paso Robles District in conformance with the settlement agreement, and the new district would then be

obligated to provide funding for Heartspring or a comparable placement. Consequently, District's failure to offer visitation over such a short time period did not fail to comport with the agreed upon placement in the settlement agreement. In addition, the offer was reasonably calculated to provide Student with educational benefit and did not thereby deny him a FAPE.

Stay Put Order

160. On February 29, 2008, the ALJ granted Student's motion for stay put in this case. The Order Granting Motion for Stay Put provided that "Student's educational placement for purposes of stay put, during the pendency of this proceeding, shall be that set forth in Paragraph 4 of the settlement agreement." Under the stay put order, compliance with Paragraph 4 included District's obligation to fund up to four visits per year to visit Student at the residential facility.

161. On March 7, 2008, Mother wrote to Mr. Smith indicating that the family was planning its first visit with Student at Heartspring over the spring break, and requested travel arrangements and funding by March 14, 2008. On March 14, 2008, Mr. Smith replied in writing and denied the family's request for funds to visit Student at that time. Mr. Smith reasoned that the January 2008 IEP did not contain funding for family visits, and that Student should request funding from the Paso Robles District. He indicated that the District intended to obey the stay put order, but denied the funding request. The District has since funded a family visit to Heartspring in May 2008.

162. In March 2008, Student had only been at Heartspring for about a month. There was no evidence whether Heartspring recommended the visit.¹⁷ District had just

¹⁷ Heartspring sent a letter to Parents describing its family contacts policy. It uses family visits as part of the child's educational program to maintain the family bond, for the family to observe the program, and to learn alternative ways of working with the child by

funded the travel and lodging for the family to go to Heartspring in February. Heartspring itself did not require more than two family visits to the school over the period of a year, although it encouraged more. There was no evidence that Student required a visit from his family in March 2008 to receive educational benefit. He therefore did not establish that the denial of a family visit to Heartspring in March 2008 failed to meet his unique needs. Accordingly, District's denial of the March visitation request did not deny him a FAPE. Based on the foregoing, the evidence did not establish that District's denial of the March 2008 visitation request violated the stay put order. Even if the District's denial of funding for a family visit denied Student a FAPE, and violated the stay put order, it was immediately remedied when District funded the May 2008 visit.

REMEDIES AND COMPENSATORY EDUCATION

163. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." There is no obligation to provide a day-for-day compensation for time missed. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. A hearing officer may reduce or deny a parental request for reimbursement for private services upon a judicial finding of unreasonableness with respect to actions taken by the parents.

164. As set forth in Factual Findings 12 through 159, District denied Student a FAPE by failing to implement and materially deviating from the agreed upon interim intensive ABA-based home program in July 2006, and from October 2006 to February 11, 2008. Student was effectively denied the intensive daily functional and behavioral education and interventions that were designed to provide him a FAPE pending his

watching staff manage difficult situations. Thus, the visits have educational benefit.

placement in a residential facility. District's failure to implement the settlement agreement included both procedural and substantive violations which denied Student a FAPE. It then made IEP offers in November and December 2007 that materially deviated from the parties' agreed upon placement because the November IEP did not offer either a comparable interim intensive program or a residential placement, and the December 2007 IEP did not offer a comparable residential placement. District committed further procedural violations that significantly impeded Parents' rights to participate in the IEP process, and denied Student a FAPE by failing to provide adequate notice of the November 2007 IEP meeting and failing to have Student's special education provider attend, and by unreasonably refusing to continue the December 2007 IEP meeting when the family's advocate could not safely attend. Moreover, important components of both the November and December 2007 IEP offers did not address Student's unique needs and were not calculated to provide Student with educational benefit, and thereby denied him a FAPE.

165. The law does not require Student to establish educational harm as a result of the material deviation from the agreed upon placement. However, loss of educational benefit has been found as a result of the numerous violations in this case. The evidence showed that Student's maladaptive behaviors significantly regressed after September 2006. Student needed intensive and consistent behavioral intervention and functional training on a daily basis. As of February 11, 2008, when he was placed at Heartspring, Student had only received educational benefit for about two months in 2006, and had lost over 17 months of services. District's contention that, at most, Student lost services for about 125 school days, significantly less than one year, is therefore not supported by the evidence.

166. In fashioning a remedy, equitable consideration is given to the Parents' silence about the problems with the home program from July 2006 through August 2007. (Factual Findings 20-25, 36-54, 61.) Mother had attended many IEP meetings over the

years and knew how to speak up for her son when she believed something was wrong.¹⁸ Parents negotiated the terms of the 2006 settlement agreement with the assistance of an educational advocate and an attorney. Mother did not speak up and ask for assistance at any time to have the District (not Dr. Carlson) hold an IEP meeting, or to intervene after the direct-services program floundered beginning in October 2006, and lapsed at the end of January 2007, until Dr. Carlson emailed his resignation at the end of August.

167. There is no question that the District should have monitored Dr. Carlson's provision of services, and should have seen that something was amiss in his billing invoices. However, it was also reasonable for the District to assume that things were operating well in the absence of any complaint from the family. If Parents had spoken up in February 2007, if not October 2006, and informed the District that Dr. Carlson did not have any trained aide providing daily services, the District could have stepped in much earlier, called an IEP meeting, worked with Dr. Carlson to salvage the situation, or terminated his services under the ISA replaced him with another BCBA. Based on Mother's years of experience in special education, including her representation by counsel and prior due process matters, the evidence supports a finding that Parents' failure to report any problems with Dr. Carlson's program to the District was unreasonable. Such silence did a disservice to both Student and the District.

168. Student did not present any evidence of a current professional opinion about what services he should have to make up for the loss of educational benefit. Student contends that he lost 20 months of educational benefit and should be compensated by

¹⁸The evidence established that there were at least 24 IEP meetings for Student from June 1999 to January 2008. In addition, in October 1999, in connection with SEHO Case No. SN1060-99, Parents entered into a settlement agreement with District, and SLOCOE to resolve disputes regarding the provision of FAPE to Student for the 1996-1997, 1997-1998, and 1998-1999 school years.

District's funding of his residential placement for 20 months, a compensation equal to the time he missed. In the alternative, he asks for a monetary award of \$180,051, based on the value of Dr. Carlson's failed home program, to be placed in an education trust account.

169. District has been funding Student's residential placement at Heartspring since February 29, 2008, under the stay put order. District was legally obligated to fund the stay put placement pursuant to state and federal law, and is not entitled to an offset merely for obeying the order. However, in light of the unreasonable conduct of Parents and their failure to alert anyone about Dr. Carlson's failed program, it is equitable to offset five months of residential placement and services from District's liability.

170. Based on Student's lost educational benefit, District shall be ordered to fund his prospective placement at Heartspring for 17 months from the date of the Decision, less an offset of five months as set forth above, for a net compensatory placement and services at Heartspring for 12 consecutive months, beginning August 1, 2008. In the event the IEP team agrees to a different residential facility during that time period, then upon Parents' written agreement to that facility, the District's obligation shall transfer to the agreed upon facility. As part of the prospective compensatory placement, District shall also fund not less than two and up to four visits annually for two people in the family to visit Student at the residential facility, including round-trip transportation and lodging, and per diem meal expenses, plus two visits annually for Student to return to his family home over school vacation periods. Parents shall provide the District written evidence of Heartspring's approval of their proposed visits along with their request to the District to fund each trip.

171. In the event that Student's IEP team, including Parents, agree in writing that he no longer requires a residential placement to receive a FAPE, District's obligations to fund this compensatory residential placement shall end upon Student's return to his family home.

172. Student did not provide any legal authority for his request for a monetary

sum. The IDEA does not provide for an award of monetary damages as compensation for a loss of educational benefit. Student did not produce any evidence of appropriate compensatory programs or services to meet his needs at the present time, other than the residential placement ordered herein.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party petitioning for relief in Case No. 2008030743, has the burden of proof in this consolidated proceeding as to Issues One and Five. District, as the party petitioning for relief in Case No. 2008010224, has the burden of proof as to Issues Two, Three, and Four. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

THE PROVISION OF FAPE

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities in Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent or guardian, that meet the State educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. School districts receiving federal funds under the IDEA are required to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the

child's progress toward meeting the annual goals will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and districtwide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. (20 U.S.C. § 1414(d)(1)(A)(i); Ed. Code, § 56345.)

SETTLEMENT AGREEMENTS

4. The jurisdiction of OAH to hear due process claims under the Individuals with Disabilities in Education Improvement Act (IDEA) is limited. (20 U.S.C. § 1400, et seq.) There must be a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE to a child, or the refusal of a parent or guardian to consent to an assessment of a child, or a disagreement between a parent or guardian and the district as to the availability of a program appropriate for a child. (Ed. Code § 56501, subd. (a).)

5. This limited jurisdiction does not include jurisdiction over claims alleging that a school district has failed to comply with a settlement agreement, which must be pursued through a separate compliance complaint procedure with CDE. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) However, OAH has jurisdiction to adjudicate claims alleging the denial of a FAPE as a result of a violation of a settlement agreement, as opposed to "merely a breach" of the agreement that should be addressed by CDE's compliance complaint procedure. (*Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 26541.) Depending on the circumstances and the terms of the settlement agreement, a student's placement set forth in a settlement agreement reached by the parties may constitute the student's current

educational placement and be found to be the student's stay put placement in a subsequent dispute. (*Casey K. v. St. Anne Comty. High Sch. Dist. No. 302* (7th Cir. 2005) 400 F.3d 508, 513.)

FAILURE TO IMPLEMENT AN IEP

6. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the student's IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770.) A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial and significant provisions of the IEP. (*Ibid*)

7. The materiality test is not a requirement that prejudice must be shown. "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Van Duyn, supra*, at p. 822.) The child's educational progress, or lack thereof, may be probative of whether there was more than a minor shortfall in services. A shortfall in services and a shortfall in the child's achievement in that area tend to show that the failure to implement the IEP was material. The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

Issue 1: Did the District fail to provide Student a FAPE from May 23, 2006 through February 11, 2008, because it failed to implement and materially deviated from the settlement agreement between the parties ?

ISSUES 1(A) THROUGH (C): IEPs, GOALS, PERFORMANCE LEVELS, INTENSIVE HOME PROGRAM, ABA, FUNCTIONAL ANALYSIS, BEHAVIORAL INTERVENTION, AND TRAINING FOR AIDES AND PARENTS

8. Based on Factual Findings 3, 8, 12-15, and 20-62, and Legal Conclusions 2-7, the evidence established that Dr. Carlson, and hence, the District, did not implement substantial provisions of Paragraph 3 of the settlement agreement placement because Dr. Carlson did not provide the agreed upon interim intensive ABA-based home program in July 2006, and from October 2006 to August 31, 2007, when he resigned. Dr. Carlson provided only minimal consultation services in July 2006, did not conduct an FBA or FAA, did not develop any written behavior intervention or support plan, and did not develop any annual goals to submit to the District. Dr. Carlson's services in August and September 2006 substantially complied with the program requirements, and provided Student with some educational benefit because Student showed some improvement in several areas, including math and communication. From October through January 2007, Dr. Carlson did not adequately train aides, Student received inconsistent, sporadic direct services and there was no evidence that any cohesive ABA-based program was in place. By the end of January 2007, Dr. Carlson knew his program was ineffective, and during those months Student's aggressive and maladaptive behaviors regressed. Dr. Carlson never provided parental training, did not provide Student with any direct aide services after January 2007, and did not notify the District of his problems. As in *Pedraza, supra*, 2007 U.S. Dist. LEXIS 26541, Parents and the District agreed that the placement and services in the settlement agreement constituted a FAPE. The failure to provide the above services, that were the foundation of the daily, intensive behavioral and functional education designed by the parties in the settlement agreement, was significant. The facts of this case are therefore

distinguishable from the facts in *Van Duyn, supra*, 481 F.3d at 782, where deviations from some elements of an IEP's behavioral management plan, such as social stories and strict use of a behavioral card, were found not to be material. Based on all of the foregoing, District failed to implement and materially deviated from the requirements for the interim intensive home program, which denied Student a FAPE in July 2006 and from October 2006 to August 31, 2007.

9. Based on Factual Findings 3, 8, 12-15, and 20-62, and Legal Conclusions 2-7, it was the District's responsibility to provide the interim home services, and the fact that it delegated the duty to a service provider does not relieve it of liability. Therefore, Dr. Carlson's failure to implement and deviation from significant provisions of the placement and material deviation from agreed upon services over many months is imputed to the District. In addition, District abrogated any responsibility to monitor the program, did not convene an IEP to implement and supplement the agreement, did not develop annual academic and functional goals designed to meet Student's educational needs and enable him to make progress, did not determine how his progress toward meeting the annual goals would be measured, and did not identify his present levels of performance. It did not adequately oversee Dr. Carlson's billing invoices to notice the reduced provision of services over the months. It did not convene annual IEP meetings thereafter to review Student's progress and the effectiveness of the program. Based on all of the foregoing, District failed to implement and materially deviated from the interim intensive services in July 2006 and from October 2006 to August 31, 2007, which denied Student a FAPE. Based on Factual Findings 66-69, after Dr. Carlson resigned on August 31, 2007, the District did not hire another behavior specialist to replace Dr. Carlson and run the program, which materially deviated from the substitution clause of Paragraph 3 of the settlement agreement, and denied Student a FAPE between August 31, and December 18, 2007.

ISSUE 1(D): MATERIALLY DIFFERENT PLACEMENT AND SERVICES OFFERED IN THE NOVEMBER AND DECEMBER 2007, AND JANUARY 2008 IEP OFFERS

10. Based on Factual Findings 88, and 98-104, and Legal Conclusions 2-7, in the November 2007 IEP, the District offered Student interim services with Dr. Carlson at his office; however, they were not clearly described, and they omitted any reference to the intensive behavioral services agreed upon in Paragraph 3 of the settlement agreement. The November 2007 IEP did not offer an intensive ABA-based program, a functional analysis and behavioral intervention, or any of the other elements in the 2006 agreement, such as intensive functional communication training or trained aides. Therefore, the November 2007 IEP included deviations from the agreed upon placement that were material, which thereby denied Student a FAPE.

11. Based on Factual Findings 121-133, and Legal Conclusions 2-7, the December 2007 IEP offered Dr. Carlson's services in an intensive program that was substantially the same as the program required by Paragraph 3 of the settlement agreement. The change from a home program required in the agreement to Lillian Larson was therefore not a change in Student's agreed upon educational placement. Student would still be educated on a one-to-one basis in an intensive ABA-based program with the same intensive services by Dr. Carlson and trained aides. The differences, that included a change in location to the school and District's direct hiring of the aides, were not material deviations in Student's services, and did not constitute a denial of FAPE.

12. Based on Factual Findings 105-109, and 134-136, and Legal Conclusions 2-7, the November and December 2007 IEPs did not offer a residential placement for Student comparable to Paragraphs 3(f) and 4 of the settlement agreement. This deviation from Student's agreed upon placement would have eliminated the residential placement if Parents had consented to either offer and was therefore material. District's argument that it intended to honor the residential placement provision if an opening occurred was not supported by the evidence. The evidence demonstrated that the District was advised by

legal counsel, did not disclose material information about the residential placement to IEP team members at both meetings, and carefully omitted any language offering such a placement from both IEPs. The failure to include a residential placement in both IEPs materially deviated from the agreed upon placement, and thereby denied Student a FAPE.

13. Based on Factual Findings 110-114, and 137-139, and Legal Conclusions 2-7, District's November and December 2007 IEP offers for DIS therapies of speech and language, OT and AP deviated from the services agreed upon in the settlement agreement because the agreed upon services did not require any DIS. The deviation was material because Student would have received three different therapies from different service providers, instead of one intensive program. In addition, even if the DIS transportation offered in both the November and December IEPs is viewed as a minor deviation from the services agreed upon, they did not offer aide support. The lack of aide support materially deviated from the agreed services because the settlement agreement required daily aide support. Based on the foregoing, the DIS therapy and transportation offers denied Student a FAPE.

14. Based on Factual Findings 142-155, and Legal Conclusions 2-7, the January 2008 IEP offer did not materially deviate from Paragraph 5 of the settlement agreement, in transferring Student into his high school district in ninth grade after he turned 14 and a half years old on February 28, 2008. Even if Student's grade level in May 2006 was in dispute, the District's placement of Student in ninth grade for the 2007-2008 school year was consistent with the agreement to transfer him to high school by the end of February 2008. Therefore, the January 2008 IEP offer did not deny him a FAPE.

15. Based on Factual Findings 156-159, and Legal Conclusions 2-7, the January 2008 IEP, as amended on February 1, 2008, did not offer to fund family visits for Student's family to visit him at Heartspring consistent with the settlement agreement. This deviation from the agreed upon visitation services was not material at the time the offer was made,

because the District offered to fund placement at Heartspring for only a two-week period, from February 11, to February 29, 2008, when its jurisdiction would cease, and therefore did not deny a FAPE.

PROCEDURAL VIOLATIONS

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

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

18. IDEA's procedural mandates also require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley, supra*, at pp. 207-208.) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code §§ 56341, subd. (b)(1), 56342.5.) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.)

NOTICE OF IEP MEETING

19. The LEA must provide the parent with adequate advance notice to ensure that at least one parent is present at the IEP meeting or has been afforded an opportunity to participate, and must be sent out early enough to ensure attendance. (Ed. Code, § 56341.5, subds. (a), (b).) The IEP meeting should be scheduled at a mutually agreed upon time and place. An IEP meeting may be conducted without a parent in attendance if the LEA is unable to convince the parent to attend. In that event the LEA is required to maintain a record of attempts to arrange a mutually agreed upon time and place, including detailed records of telephone calls, copies of correspondence, and records of visits to the parent's home or place of employment. Telephonic conferencing is authorized as an alternative method of holding an IEP meeting. (34 C.F.R. §§ 300.322, 300.328; Ed. Code, § 56341.5, subd. (h).)

Issues 2(A) and 3 (A): Did the District's 2007 IEP offers constitute a FAPE by scheduling the November and December IEP meetings at mutually agreed upon times, including providing notice to the Parents?

20. Based on Factual Findings 70-79, and Legal Conclusion 16-19, District provided only one communication in writing on November 5, 2007, to propose two IEP meeting dates. When it either did not timely receive or overlooked Ms. Zachry's November 12, 2007, response, it unilaterally selected the date of November 16, 2007, and hand-delivered the notice to Mother at home only one day before the meeting. Therefore, the District only gave Parents one day's notice of the IEP meeting date. There is no evidence that District or its attorney made any attempt between November 5 and November 15, 2007, to contact Ms. Zachry by telephone, email, or letter to try to negotiate a mutually agreeable date. District made insufficient attempts to communicate, such short notice was insufficient and the date was not mutually agreeable to Mother or her advocate. This procedural violation significantly impeded Parents' rights to participate in the IEP process

as the meeting was held without them, and it therefore denied Student a FAPE.

21. Based on Factual Findings 115-118, and Legal Conclusion 16-19, District provided adequate advance notice of the December 18, 2007 IEP meeting, at 3:00 p.m., and the parties mutually agreed on the date. However, due to a severe weather storm, Parents' advocate, who lived about three hours south of District's office, asked for a brief continuance of the meeting due to unsafe driving conditions. Hence, the date was no longer mutually agreeable. District's refusal to agree to reschedule another mutually agreed upon date was unreasonable. District called Mother but made no attempt to arrange for the advocate to participate in the meeting telephonically. This procedural violation significantly impeded Parents' rights to participate in the IEP process as the meeting was held without them, and therefore denied Student a FAPE.

MAKEUP OF THE IEP TEAM

22. A pupil's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b)(2); *See, W.G. v. Board of Trustees of Target Range School Dist. No. 23, supra at 1484; Amanda J. v. Clark County School Dist. (9th Cir. 2001) 267 F.3d 877.*)

23. The IEP team shall also include not less than one special education teacher of the pupil, or if appropriate, not less than one special education provider of the pupil. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(3); Ed. Code, § 56341, subd. (b)(3).) The special education teacher "of the pupil" does not have to be the child's current teacher. The federal law requires that the special education teacher or provider who is a member of the child's IEP team should be the person who is, or will be, responsible for implementing the IEP. The Ninth Circuit has held that the special education teacher or provider should be one who has actually taught the child. (*See R.B. v. Napa Valley Unified School District (9th Cir. 2007) 496 F.3d 932 at 940.*)

Issue 2(B): Did the District's November 2007 IEP offer constitute a FAPE by including all IEP team members required by law to participate in the IEP meeting?

24. Based on Factual Findings 80-83, and Legal Conclusions 16-18, and 22-23, the November 2007 IEP offered intensive behavioral services at Dr. Carlson's office in Los Osos and not at a school in the District. The IEP therefore provided that zero percent of the time would be spent participating in any regular education environment. Hence, at this meeting, there was no possibility that the offer contemplated any exposure to regular education, and no general education teacher was required to be present at the meeting. Accordingly, the failure to include a general education teacher at the meeting was not a procedural violation and thus did not deny Student a FAPE.

25. Based on Factual Findings 80-85, and Legal Conclusions 16-18, and 22-23, District failed to have Student's special education service provider, Dr. Carlson, at the November 2007 IEP meeting. This violation deprived the Parents of his knowledge and input about Student's academic and functional levels of performance and needs, including maladaptive behaviors, and deprived them of material information about Dr. Carlson's failure to fully implement the home program, his difficulties regarding hiring aides, training, and developing a cohesive behavioral program, and his lack of timely disclosures to the District. Therefore, the absence of Dr. Carlson significantly impeded the Parents' participation in the IEP process, which denied Student a FAPE.

Issues 2(C) and 3(B): Did the District's November and December 2007 IEP offers include proposed assessment plans?

26. Based on Factual Findings 90, 91, and 119, District proposed to assess Student in its November and December 2007 assessment plans. Since Parents consented to the plans, the assessment issues are moot. They were separate proposals that were not

part of the IEPs and are not subject to a FAPE analysis.¹⁹ District did not provide any legal authority otherwise.

OFFER OF FAPE

27. For a school district's IEP to constitute a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, be reasonably calculated to provide the student with some educational benefit, and comport with the child's IEP. (20 U.S.C. § 1401(9); *Rowley, supra*, 458 U.S. at pp. 206-207.) FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (*Id.* at p. 189.) The *Rowley* court rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." (*Id.* at pp. 198-200.)

28. A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams etc. v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that "[a]n IEP is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Id.* at 1149; See also *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative preferred by the parents. (*Gregory K. v. Longview*

¹⁹ See Education Code sections 56320 and 56381.

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

DIS SERVICES

29. Related or DIS services include transportation and such developmental, corrective, and "other supportive services as are required to assist a child with a disability to benefit from special education," and include speech and language therapy, audiology, interpreting, psychological services, physical and occupational therapy, recreation, counseling, and parent counseling and training, among others. (34 C.F.R. § 300.34; Ed. Code, § 56363.)

Issue 2(D): Did the District's November 2007 IEP offer constitute a FAPE by offering an appropriate special education placement and related services?

30. District's November 2007 IEP was fundamentally flawed in many respects. Based on Factual Findings 19-25, 29-33, 54, and 92-95, and Legal Conclusions 2, 3, 27, and 28. District had previously failed to develop annual goals with Dr. Carlson, and that ongoing denial of FAPE from July 2006 forward carried over into the November 2007 IEP. The team's decision to use proposed annual goals from January 2006 was inappropriate because they were not based on Student's 2007 needs and levels of performance, which were unknown by the IEP team. Hence, the continued absence of current annual goals in the November IEP offer deprived Student of educational benefit and denied him a FAPE.

31. Based on Factual Findings 99-104, and Legal Conclusions 2, 3, 27, and 28, the law did not require the IEP team members to offer services consistent with the operative placement in the settlement agreement if they had information that the operative placement was no longer appropriate. However, the November 2007 IEP team had no assessment or other objective information upon which to materially change the program, other than the fact that Student's home program had been terminated. Thus, the November 2007 IEP offer of Dr. Carlson's intensive services at his office, fifty miles away,

was made based on insufficient information because members of the IEP team were not informed that Dr. Carlson's prior program had failed, that he had not disclosed important information to the District, that Parents questioned his ability to run the program effectively, or that Mother had declined to transport Student for two hours a day to Dr. Carlson's office. Moreover, the IEP only offered Dr. Carlson's services for about a month, until December 20, 2007, an unreasonably short period of time. For all of these reasons, the November 2007 offer for Dr. Carlson to provide special education services at his office in Los Osos was not reasonably calculated to enable Student to receive educational benefit, thereby denying Student a FAPE.

32. Based on Factual Findings 105-109, and Legal Conclusions 2, 3, 27, and 28, the lack of a residential placement in the November 2007 IEP was likewise not reasonably calculated to enable Student to receive educational benefit and did not address his unique needs. Members of the IEP teams were not informed of the existing agreement for a residential facility and were denied material information. The IEP team had no assessment data or other objective information upon which to base a decision to eliminate the residential placement, particularly in light of compelling testimony from both Dr. Green and Dr. Carlson that Student needed to be moved out of his home and placed in a residential facility for intensive behavioral and daily living skills interventions. Thus, the absence or elimination of a residential placement did not address Student's unique needs and was not reasonably calculated to provide educational benefit, and constituted a denial of FAPE.

33. Based on Factual Findings 110-113, and Legal Conclusions 2, 3, and 27-29, the duration of the November 2007 IEP offers for DIS therapies were flawed. The offer for speech and language was only until December 20, 2007, an unreasonably short period of time because the District's offered assessments could have taken another month. The duration of the OT and APE offers were only for the same day of the November 16, 2007

IEP meeting, an impossibility. The duration of the OT and APE offers therefore were not clear written offers for services because Parents could not understand the offers, and therefore, constituted a procedural violation. The lack of a clear written offer for OT and APE significantly impeded Parents' meaningful participation in the decision making process, which denied Student a FAPE.

34. The offers of the above DIS therapies were inappropriate because they were based on outdated IEPs and "typical services" for autistic children, and were not based on assessments reflecting Student's unique needs in November 2007. The IEP team had no information to substantiate the offer. There was no evidence that Dr. Carlson was even aware the services were offered, he was not at the meeting, and no one consulted him about Student's needs in these areas, or whether he thought offering so many services with three different therapists, requiring extensive transportation, would provide educational benefit given Student's maladaptive behaviors. There was also no offer for Dr. Carlson's consultation with the therapists. Based on all of the foregoing, the DIS therapy offers in the November 2007 IEP were not substantively designed to meet Student's unique needs and therefore denied Student a FAPE.

35. Based on Factual Findings 114, and Legal Conclusions 2, 3, and 27-29, the District offered round-trip DIS transportation for Student's special education, which would include transportation to and from Dr. Carlson's services at his office in Los Osos and transportation to and from the DIS therapy sessions. Based on Factual Findings 31 and 40, Student had aggressive and maladaptive behaviors, including fear of riding in a vehicle, and demonstrated during Dr. Carlson's home program that he needed adult support to ride in a car. The transportation offer was not reasonably calculated to address his unique needs because no aide was offered to support Student during District-provided transportation, and the offer consequently denied Student a FAPE.

LOCATION OF EDUCATIONAL SERVICES

36. Placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school. (71 Fed.Reg. 46687 (Aug 14, 2006); see also *Johnson v. SEHO* (9th Cir. 2002) 287 F.3d 1176.) In California, placement includes the unique combination of “facilities, personnel, location or equipment” necessary to provide educational services. (Cal. Code. Regs., tit. 5, § 3042.)

Issue 3(C): Did the District’s December 2007 IEP offer constitute a FAPE by offering an appropriate special education placement and related services?

37. Based on Factual Findings 19-25, 29-33, 54, 92-95, and 120, and Legal Conclusions 2, 3, 27, and 28, the December 2007 IEP team abandoned trying to offer the outdated January 2006 goals and appropriately agreed to offer to wait until the assessments were done to propose new annual goals. Nevertheless, the District’s continued absence of current annual goals at the December 2007 deprived Student of educational benefit and the ongoing violation denied him a FAPE.

38. Based on Factual Findings 121-133, and Legal Conclusions 2, 3, 27, 28, and 36, the December 2007 IEP offered Dr. Carlson’s intensive behavioral program, changed the location to Lillian Larson, and provided that the District would directly hire the aides who would work with Student. The program would be for seven hours a day and Dr. Carlson would begin training an aide in January 2008. There was no evidence that the Lillian Larson campus and staff, as of December 2008, could not support Dr. Carlson’s intensive behavioral program, despite Student’s historical problems there. Student was exposed to nondisabled children in the home environment, would also have that opportunity at school, and would still be educated on a one-to-one basis. The IEP team was not legally required to offer another home-based program if it did not believe such a placement would provide Student a FAPE due to changed circumstances. Based on Factual Findings 44-54, the home location was severely limiting, impeded the ability to provide any

consistent behavioral services, involved a chaotic home environment with eight or more adults and children, was isolating for Student, and contributed to deny him a FAPE. Although the evidence supported a finding that there were reservations about Dr. Carlson's ability to deliver the program, based on his administration of the home program (Factual Findings 66, 67, 98-104), the operational and location changes gave District more direct control over the aides and daily oversight of the services. Based on the foregoing, the IEP team's offers of Dr. Carlson's intensive services, and the Lillian Larson campus location were reasonably calculated to provide Student educational benefit and therefore did not deny him a FAPE.

39. Based on Factual Findings 134-136, and Legal Conclusions 2, 3, 27, and 28, District did not offer to continue the residential placement provision as part of the December 2007 IEP offer. The December 2007 IEP team did not have any information upon which to base a decision to eliminate the residential placement from the agreed upon services as no longer appropriate. Indeed, there was no evidence that two members of the IEP team, one of which was Dr. Carlson, understood that the IEP in which they were participating used careful language to avoid or eliminate an offer of a residential placement. Dr. Carlson was skeptical about any placement other than a residential setting, and would not have agreed with the offer had he known. Since the evidence established that Student needed a residential placement, the lack of such a placement offer in the December 2007 IEP did not address his unique needs, was not reasonably calculated to provide educational benefit, and therefore denied Student a FAPE.

40. Based on Factual Findings 137-138, and Legal Conclusions 2, 3, and 27-29, the December 2007 offers for the DIS services were substantively inappropriate because they were offered arbitrarily. The offers were still premature because assessments had not been done. There was no evidence that Dr. Carlson was even aware the services were offered, and no evidence that the team members consulted him as to whether Student

could handle receiving therapy from three different therapists while transitioning to a school and undergoing assessments. In addition, there was no offer for Dr. Carlson or another behavior specialist to consult with the therapists to ensure consistency across all settings in addressing Student's aggressive and maladaptive behaviors. Based on all of the foregoing, the offers were not designed to meet Student's unique needs in December 2007, and, pending assessment of what those needs were, the offers were not reasonably calculated to offer a FAPE.

41. Based on Factual Finding 139, and Legal Conclusions 2, 3, and 27-29, and similar to the November 2007 offer, the December 2007 IEP offered Student door-to-door transportation to attend school, but no aide was offered to support his transportation. Given Student's aggressive behaviors, and fear of riding in cars, the IEP team members had no information that he was capable of traveling safely without an aide. The transportation offer was therefore inappropriate and denied Student a FAPE.

TRANSFER TO HIGH SCHOOL DISTRICT

42. When a student is to transfer from an elementary school district to a high school district, the elementary school district shall invite the high school district to an IEP meeting prior to the last scheduled review, and the IEP shall specify the appropriate high school placement. If a representative of the high school district has not participated in the "IEP development" prior to transfer from the elementary program, the elementary school district shall notify the high school district of the transfer. Upon the student's enrollment, the high school district shall make an interim placement in accordance with Education Code section 56325, or shall immediately convene an IEP meeting. (Cal. Code Regs., tit. 5, § 3024, subd. (b).)

Issue 4: Did District's IEP offer of January 29, 2008, as amended on February 1, 2008, for Student's special education placement of a transfer to the Paso Robles District in the ninth grade commencing February 29, 2008, offer him a

FAPE, such that the District was no longer obligated to provide educational services beyond that date?

43. Based on Factual Findings 142-155, and Legal Conclusions 2-5, 27, 28, and 42, the January 2008 IEP, as amended on February 1, 2008, offered a residential placement at Heartspring. Parents agreed to the residential placement at Heartspring and agreed to most of the rest of the IEP. Thus, the January 2008 IEP, as amended, constituted Student's agreed upon IEP placement. Parents did not agree to that part of the January 2008 IEP offer that called for the termination of District's funding of his education and transfer to his high school district on February 29, 2008, when he was 14 and a half years old.

44. Based on Factual Findings 142-150, and Legal Conclusions 2-5, 27, 28, and 42, consistent with the settlement agreement, Student was in seventh grade during the 2005-2006 school year. Consequently, by natural progression from year to year, Student began the 2007-2008 school year in ninth grade. The January 2008 IEP therefore appropriately designated his grade as ninth grade for the 2007-2008 school year and did not artificially promote him. The evidence established that grade level for a special education student is appropriately determined by the IEP team, and that, based on Student's chronological age, ninth grade was the appropriate grade level for him. The January 2008 IEP team's offer was therefore reasonably calculated to provide Student with educational benefit, and did not deny him a FAPE.

45. Despite the termination date of February 28, 2008, which would end the District's legal responsibility to fund Student's educational placement and services, the January 2008 IEP was the most recent agreed upon placement that would accompany Student into the Paso Robles District for his transfer to high school. The District was obligated to inform Paso Robles District of the impending transfer and did so. Based on all of the foregoing, the January 2008 IEP team's offer to transfer Student into his high school district was reasonably calculated to provide Student with educational benefit, and did not deny him a FAPE.

TRANSPORTATION

46. DIS services may include transportation. Transportation may, when educationally appropriate, include transportation costs and expenses related to family visits to a distant residential placement. (See *Aaron M. v. Yomtoob* (N.D. Ill. Feb. 3, 2003, No. 00C7732) 2003 U. S. Dist. LEXIS 1531 (FAPE for residential placement included transportation costs for five, two-day parental visits and daily meal allowance); *Richmond Elementary Sch. Dist. and Lassen Co. Office of Ed.* (CA 2003) 104 L.R.P. 4695 [meal reimbursement provided for parental visits to in-state distant placement].) Parental transportation expenses may be denied where there is no evidence that parental participation at the school was required to meet an IEP goal. (See *Agawam Public Schools* (MA 2004) 42 IDELR 284.)

STAY PUT

47. Under California and federal special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise, which is commonly referred to as "stay put." (20 U.S.C. § 1415(j); Ed. Code, § 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent Sch. Dist.* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.)

Issue 5: Did District deny Student a FAPE by failing to provide appropriate funding for family visitations with Student at Heartspring School in Kansas, either as part of stay put or pursuant to its January 2008 IEP, as amended on February 1, 2008?

48. Based on Factual Findings 9, and 156-159, and Legal Conclusions 2, 3, 27-29, and 46, the January 2008 IEP, as amended, did not offer to fund family visits for Student's

family to visit him at Heartspring, but it did offer to fund the family's initial transportation and lodging to deliver him to the school by February 11, 2008, and also funded Parents' return trip home. Since the District offered to fund placement at Heartspring for only a two-week period, from February 11, to February 29, 2008, when its jurisdiction over Student's education would terminate under the settlement agreement, the failure to offer funding for family visits to Heartspring was reasonable. Consequently, District's failure to offer visitation after February 11, 2008, over such a short time period to February 29, 2008, was not inappropriate and did not deny Student a FAPE.

49. Based on Factual Findings 9, and 158-162, and Legal Conclusion 47, the stay put order of February 29, 2008 directed District to provide placement and services in compliance with Paragraph 4 of the settlement agreement, which included District's obligation to fund up to four family visits per year to the residential facility to visit Student. District thereafter denied Parents' request to provide funds by March 14, 2008, to enable them to visit Student. He did not establish that the denial of funds was unreasonable or denied him educational benefit. Student had only been at Heartspring for about a month, and District had just funded the initial trip the month before. Based on the foregoing, District's failure to fund a family visit in March 2008 did not impair Student's receipt of educational benefit and thus did not constitute a denial of FAPE. Even if the District's denial to fund a family visit in March 2008 denied Student a FAPE, it was immediately remedied when District funded the May 2008 visit.

REMEDIES AND COMPENSATORY EDUCATION

50. Administrative law judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.*, *supra*, 471 U.S. at pp. 359, 370; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496.) Equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993)

510 U.S. 7, 16; (*Puyallup, supra*, at 1496.)

51. Based on the principle set forth in *Burlington, supra*, 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. (*Puyallup, supra*, at 1496.) Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid*)

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

53. Based on Factual Findings 12-159, and Legal Conclusions 50-52, Student lost approximately 17 months of educational services based on the District's and Dr. Carlson's failures to implement the interim home-based program. Weighing the equities in this case also involves consideration of Parents' silence about those violations for a long time, even though they knew how to take action on behalf of their son as they had done several times in the past. Consequently, District's obligation to provide compensatory services is reduced by five months. Based on Student's lost educational benefit and weighing all equitable considerations, District shall be ordered to fund Student's prospective, compensatory residential placement at Heartspring for 12 consecutive months from the date of this Decision, beginning August 1, 2008, as set forth herein.

54. District shall also fund family visits for Student's family to visit him in his

residential placement not less than two and up to four times per calendar year, plus up to two visits per calendar year for Student to come home to visit his family. The "family" is defined as two people, including at least one adult who is one of Student's parents. Parents shall submit written approval from Heartspring to the District with each request to fund a family visit.

55. Student's request for a monetary sum in lieu of all or part of the award of compensatory services was not supported by any legal authority or evidence of the costs of the Heartspring placement. In any event, a monetary award is not authorized under the IDEA and is denied.

ORDER

1. District shall pay for Student's residential educational placement and related services at Heartspring School in Kansas for 12 consecutive months from the date of this Decision, beginning on August 1, 2008.

2. The District shall have no further legal responsibility for Student's educational placement and services subsequent to February 29, 2008, other than as ordered herein.

3. In order to implement, supplement and monitor the compensatory placement and services ordered herein, District shall cooperate with Student's high school district and shall provide reasonable notice to the high school district, Parents, and their representatives, and convene a joint IEP meeting within 30 days of the date of this Decision. In the event that Student does not enroll in high school, District shall be solely responsible for Student's IEPs during its funding of the compensatory placement ordered herein.

4. In the event that Student's IEP team offers a change in location to any other residential facility within 12 consecutive months from August 2008, then immediately upon Parents' written agreement to that facility, in an IEP or otherwise, the District's obligation

to fund the Heartspring placement, as set forth in Order Number 1 above, shall transfer on the effective date of the agreed upon change in location, and shall fund Student's residential education placement at the agreed upon facility for the balance of the compensatory placement period ordered herein. In the event that Parents do not consent to the offered change in location, this order controls the District's continued obligation to fund the compensatory placement ordered herein at Heartspring.

5. During District's funding of Student's residential placement as set forth above, District shall also pay for not less than two, and up to four visits annually for Student's family to visit him at the residential facility, plus two visits annually for Student to return to his family home over school vacation periods. Funding shall include round-trip transportation, daily lodging, and per diem meal expenses for two people, including one adult who is one of Student's parents, in addition to Student. Within 30 days of the date of this Decision, Parents shall provide written notice to the residential facility of the family visit order in this Decision. Thereafter, Parents shall provide the District written evidence of the residential facility's approval of each proposed family visit when submitting their request to the District to fund each trip.

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. Issues 2(C) and 3(B) were moot. District prevailed on Issue 4. Student prevailed on all other issues in this case.

NOTICE OF APPEAL RIGHTS

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

56505 subd. (k.)

DATED: July 30, 2008

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

DEIDRE L. JOHNSON

Administrative Law Judge

Office of Administrative Hearings