

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

In the Consolidated Matters of:

CAPISTRANO UNIFIED SCHOOL  
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2006070729

STUDENT,

Petitioner,

v.

CAPISTRANO UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NOS. N2006100264  
N2007070928

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter at OAH in Laguna Hills, California, on January 8 through 11, 28 through 31, February 1, and March 17, 19, 20 and 21, 2008.

Robyn Ginney, Michelle Ortega, and Drew Massey, Attorneys at Law, represented Student. Student's Mother (Mother) attended the hearing on all days. Student's father (Father) attended the hearing on some days.

Daniel S. Harbottle, Attorney at Law, represented Respondent, Capistrano Unified School District (District). District representatives Judy Shades and/or Jennifer Fant attended the hearing on all days.

The District filed a Request for Due Process Hearing (Complaint) in OAH case number N2006070729 on July 25, 2006, and the parties agreed to a continuance on August 11, 2006. Student filed a Complaint in OAH case number N2006100264 on October 5, 2006. On October 31, 2006, the parties stipulated to continue OAH case number N2006100264 and to consolidation it with OAH case number N2006070729. On July 26, 2007, Student filed a Complaint in OAH case number N2007070928. On August 14, 2007, OAH granted Student's motion to consolidate all of the above cases and ordered that the timelines applicable to OAH case number N2006100264 would govern all matters. On August 31, 2007, Student filed a second amended complaint combining the issue from case number N2006100264 and N2007070928. At the hearing, the parties were granted permission to file written closing arguments. Upon receipt of written closing arguments on April 7, 2008, the matter was submitted and the record was closed.

## ISSUES<sup>1</sup>

1. Was the District's May of 2005 Functional Analysis Assessment of Student appropriate, such that the District did not have an obligation to provide Student with an independent assessment in this area? Did the District fail to properly respond to parent's May 30, 2006 letter regarding independent educational evaluations (IEE's)?

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<sup>1</sup> Issue One combines the District's allegation in OAH case number N2006070729 with allegation III.C.9 in Student's Second Amended Complaint. Issue One will be considered out of chronological order because it involves legal principles applicable to Student's other claims. To the extent Student's Second Amended Complaint contained the following allegations that fall outside of the statute of limitations period (See Legal Conclusion 1, below), they were not considered in this Decision: 1) that as of February 23, 2003, Student had not been properly assessed in all areas of suspected disability; 2) that not all IEP team members were present on February 23, 2003; 3) that parents were not provided with procedural safeguards at the February 23, 2003 IEP team meeting; 4) that the present levels of performance in the February 23, 2003 IEP were insufficiently detailed; and 5) that the May 27, 2003 IEP team meeting failed to include a behavior intervention case manager and parents were not provided with a copy of their procedural rights. At hearing, and in a letter dated March 28, 2008, Student withdrew the following issues: 1) whether Student was denied a FAPE because the behavior interventions used with Student during the 2003-2004, 2004-2005, and 2005-2006 school years were not based on "peer reviewed research"; 2) whether Student was denied a FAPE because the December 18, 2003 assessment plan was not accompanied by a notice of procedural safeguards; and 3) whether the District properly responded to a January 29, 2004 request for an independent educational evaluation.

2. Was Student denied a free and appropriate public education (FAPE) from October 5, 2003, through the end of the 2003-2004 school year and extended school year (ESY), because:

- a. Student was not appropriately assessed in all areas of suspected disability;
- b. Student's goals in the operative IEP's were not measurable and did not cover all areas of need;
- c. Student's parents were not allowed to meaningfully participate in the January 29, 2004 IEP because Student's parents disagreed with District assessments and resorted to independent assessments and because the Speech and Language pathologist who assessed Student did not attend the IEP team meeting;
- d. Student was not offered an appropriate placement and related services in the least restrictive environment.

3. Was Student denied a FAPE during the 2004-2005 school year and ESY, because:

- a. Student was not appropriately assessed in all areas of suspected disability;
- b. Student's goals in the operative IEP's were not measurable and did not cover all areas of need;
- c. Student's parents were not allowed to meaningfully participate in the January 24, 2005 IEP because Student's parents disagreed with District assessments and resorted to independent assessments;
- d. The District did not conduct an appropriate Functional Analysis Assessment (FAA) or develop an appropriate Behavior Intervention Plan (BIP);
- e. The February 1, 2005 IEP and subsequent addendums do not contain a clear offer of FAPE;

- f. Student was not offered an appropriate placement and related services in the least restrictive environment.

4. Was Student denied a FAPE during the 2005-2006 school year and ESY, because:

- a. Student was not appropriately assessed in all areas of suspected disability;
- b. Student's goals in the operative IEP's were not measurable and did not cover all areas of need;
- c. Student's parents were not allowed to meaningfully participate in the IEP team meetings because Student's parents disagreed with District assessments and resorted to independent assessments;
- d. The February 7, 2006 IEP did not contain a clear offer of FAPE;
- e. Student was not offered an appropriate placement and related services in the least restrictive environment.

5. Was Student denied a FAPE during the 2006-2007 school year and ESY, because:

- a. Student was not appropriately assessed in all areas of suspected disability;
- b. Student's goals in the operative IEP's were not measurable and did not cover all areas of need;
- c. Student's parents were not allowed to meaningfully participate in the IEP team meetings because Student's parents disagreed with District assessments and resorted to independent assessments;
- d. Student was not offered an appropriate placement and related services in the least restrictive environment.

6. Was the March 12, 2007 IEP, as amended on July 17, 2007, an offer of FAPE?

7. Are Student's parents entitled to reimbursement of expenses related to the private placement of Student after May 17, 2006?

## FACTUAL FINDINGS

1. Student is a ten-year-old male. At all relevant times Student was a resident of the District who was eligible for special education based on a diagnosis of autism.

### 2003-2004 SCHOOL YEAR

2. An IEP dated February 26, 2003, was in effect at the beginning of the 2003-2004 school year. The February 26, 2003 IEP correctly identified that Student had unique needs in the following areas: speech and language including expressive and receptive abilities and pragmatics like social greetings; cognitive skills and academic readiness skills in mathematics and reading; fine motor skills; social-emotional; and behavior.<sup>2</sup>

3. The February 26, 2003 IEP contained goals to address all of the above identified areas of need. Review of the goals shows that all of the goals contained understandable summaries of Student's baseline performance, were measurable, and set forth measurable objectives with target dates for achievement. Next to each goal there was a chart setting forth who would be responsible for each goal and how progress would be measured.

4. Comparison of the District's goals in effect during the 2003-2004 school, and the goals contained in all IEP's after the October 6, 2003, beginning of the statute of

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<sup>2</sup> At hearing, Student offered expert opinions that were critical of assessments predating the development of this IEP. However, because issues related to the formulation of this IEP are outside the statute of limitations period, those opinions were not considered.

limitations period, to the goals proposed by Student's expert, Jessica Postil (Postil) in her December 21, 2006 FAA report and by Student's behavior service provider, Autism Spectrum Consultants (ASC) in its February 28, 2007 report, shows that all of the District's goals were as measurable and understandable as the goals drafted by Student's privately retained experts.

5. The operative IEP provided for placement in a District structured autism class with the following related services: five hours per week of intensive behavioral intervention (IBI) in class; one 30 minute group speech therapy session per week and two 30-minute "pull out" speech therapy sessions per week; and two 45-minute individual OT sessions per week and one 45-minute group OT session. The IEP noted that the following modifications should be implemented in class: small group instruction; visual communication system; verbal prompts; structured classroom and "behavior intervention." Student was to be included with typical peers for 50 percent of the school day. Mother signed her consent to the IEP and acknowledged receiving a notice of procedural safeguards.

6. An IEP amendment dated May 27, 2003, noted that the current behavior plan would continue until the next IEP team meeting in September of 2003. A teacher report attached to the IEP noted that Student's targeted aggressive behaviors had decreased and Student was self-regulating his aggression, using replacement behaviors of requesting desired objects, and showed an increase in peer interaction. Mother signed the IEP and initialed boxes indicating that she had received a notice of procedural safeguards.

7. For the 2003-2004 school year, Student attended the structured autism kindergarten class that was taught by Jennifer Acosta (Acosta). Acosta did not testify at hearing. The District's structured autism classes and intensive behavioral intervention (IBI) program had been developed around the year 2000 by Paul Does, Ph.D., (Dr.

Dores)<sup>3</sup> and Sharla Pitzen (Pitzen).<sup>4</sup> Dores had worked with Student's teacher, Acosta, and was of the opinion that Acosta was qualified to teach Student's the structured autism kindergarten class.

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<sup>3</sup> Starting in the late 1990's through the time of hearing, Dr. Dores had worked for the District developing and improving the District's autism programs, including the implementation of applied behavioral analysis (ABA) strategies in the classroom, curriculum development, establishing classroom ratios and teacher and staff training. Dr. Dores possessed impressive credentials in the field of ABA. First, while a psychology undergraduate at the University of California, Los Angeles, Dr. Dores participated in the autism studies of Ivar Lovaas that became the subject of a published study in 1987. Dr. Dores provided in-home discrete trial teaching (DTT) to children as part of the study. Dr. Dores went on to achieve a master's degree and his Ph.D. in psychology from the State University of New York at Stony Brook. While studying at Stony Brook, Dr. Dores worked with children with autism at the Suffolk Child Development Center. Dr. Dores was a board-certified behavioral analyst who taught functional analysis and writing behavior plans at National University. Dr. Dores has published numerous academic articles and given many presentations regarding behavioral interventions for children with autism and other developmental disabilities. Notably, Dr. Dores testified that he had recently been contacted about potentially providing training to the staff of Autism Spectrum Consultants (ASC), who, as discussed below, provided ABA services to Student and expert witness testimony for Student at hearing.

<sup>4</sup> Pitzen had a master's degree in special education and had written her master's thesis on discrete trial teaching (DTT), which is a component of an applied behavioral analysis program. At the time of the hearing, Pitzen had 14 years experience in teaching children with autism.



8. Dr. Does explained that overall, the term “ABA” referred to the science of behavioral analysis, whereas, in the context of autism treatment, ABA frequently referred to effective, behaviorally-based instruction with data collection and accountability that adhered to the behavioral theories of ABA. The instructional techniques that ABA-based therapies applied included reinforcement, modeling, shaping, prompting, and breaking down tasks into smaller pieces. Dr. Does persuasively explained that ABA principles apply to group learning environments, such as classrooms. In particular, the one-to-one model of instruction that is used in intensive ABA therapies is not intended to be permanent, but instead is designed to give children the skills needed to move to small group instruction. According to Dr. Does, since approximately 1968, the ABA literature has referred to the use of group instruction. Further, there is a chapter in Ivar Lovaas’ “Me Book” regarding moving children from individual to group instruction. Finally, Dr. Does also recalled discussing the subject with Ivar Lovaas, who described that intensive one-to-one teaching settings were appropriate only as long they would give children the skills to succeed in school.

9. The District’s IBI program was the same as what might commonly be referred to as an “ABA” program. Specifically, the District’s IBI program wholly incorporated ABA principles such as: analyzing behavior in terms of antecedent, behavior and consequence; breaking down tasks into smaller components, reinforcing appropriate behavior through discrete trial teaching, and collecting data to monitor effectiveness.

10. Dr. Does persuasively explained that one of the principles of ABA is that “behaviors are a function of where they occur,” meaning that current environmental data was essential to formulating an accurate FAA and BIP.

11. Dr. Dores, Pitzen, and District autism specialist Jennifer Fant,<sup>5</sup> credibly described the District's structured autism classes, like the one attended by Student. The structured autism classes had eight students and a student to teacher ratio of two-to-one. ABA techniques, as incorporated into the District's IBI program, were implemented throughout the school day. Visual strategies were used to convey schedules and the duration of activities was limited. District personnel who worked in the structured autism classes received training in, among other things: ABA techniques; the characteristics of autism; ABC (antecedent, behavior, consequence) analysis of behaviors; chaining skills to build to a larger skill; use of prompting; generalization; maintenance; and data collection. If a child attending a District structured autism class had an IEP that indicated a specific number of IBI hours per day, the IBI hours were individual instruction above and beyond the IBI administered as part of the classroom methodology. Dr. Dores acknowledged that the autism-specific classrooms within the District were not intended to work for all children with autism because autism is not a unitary disorder and the interventions and IEP must be based on individual needs.

12. Prior to 2006, structured autism class personnel received 20 hours of training in IBI. After 2006, structured autism class personnel received 30 hours of IBI training that included a requirement that staff demonstrate practical competence in applying the IBI techniques. Fant and Dores persuasively testified that the District's

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<sup>5</sup> Fant also had impressive qualifications. Fant had a bachelor's degree in psychology, a master's degree in clinical psychology and was a credentialed special education teacher. Fant had done a one year workshop study in ABA while obtaining her undergraduate degree and had experience providing in-home ABA services. Fant had taught in a District structured autism class, had supervised IBI, and had trained other District personnel in IBI.

improvements to its training program were intended to update and improve staff skills and were not because the prior training was ineffective or insufficient.

13. On December 18, 2003, Mother consented to an assessment plan for Student. The assessment plan covered: academic achievement, social/adaptive behavior, psychomotor development, communication development, cognitive development, audiological assessment and OT assessment. At the time, Student was approaching his sixth birthday.

14. On January 15, 22 and 26, 2004, Student was assessed in the area of OT by District occupational therapist Nicole Sadauski (Sadauski). Sadauski did not testify at hearing and no evidence was introduced to question her credentials. Sadauski's assessment used a parent interview, clinical observations, an "educator's checklist" and a sensory profile. Mother reported her concerns that Student exhibited non-compliant and aggressive behaviors at school, limited attention, and delayed reading and writing skills. Mother reported that Student was easily distracted by visual and auditory stimuli and demonstrated "sensory seeking behavior" such as mouthing objects, seeking movement and hiding under heavy pillows. Sadauski noted that in school Student would fall to the floor and cry when redirected from a preferred activity to a non-preferred activity.

15. Sadauski observed Student receiving 10-15 minutes of intense proprioceptive and vestibular input consisting of hiding in a ball pit and using a platform swing. Sadauski did not see an improvement in Student's attention to task after these activities. Sadauski noted the following about Student: easily distracted; displayed auditory sensitivity; exhibited "tactile defensiveness" when touched by others; engaged in mouthing objects and drooling; demonstrated hypo-sensitivity to vestibular input but did not appear to be calmed by spinning; and that proprioceptive input such as pulling objects or having pressure on his body appeared to calm Student. Teacher Acosta

reported that Student attended to preferred activities but avoided non-preferred tasks. Acosta also noted that Student was having difficulty with pre-writing activities such as properly holding a pencil, tracing and copying. Acosta reported that Student had shown improvement in transitioning and a decrease in non-compliance in the weeks prior to the assessment.

16. Sadauski's report recommended that Student required a highly structured environment and that the OT clinic could be overstimulating to Student "and does not appear to significantly affect [Student's] performance in his educational environment." Sadauski recommended that OT services be implemented in the school environment and a "sensory diet" be implemented to meet Student's sensory needs. Mother disagreed with Sadauski's recommendation that the occupational therapy clinic was overstimulating to Student and unrelated to Student's educational performance.

17. A speech language assessment was completed by District speech language pathologist Joselynn Jacques (Jacques) on January 29, 2004. Jacques did not testify at hearing and no evidence was introduced to question her credentials. Student was given the following assessments: 1) the Preschool Language Scale, Third Edition, resulting in an age-equivalent score of two years, nine months; 2) the Peabody Picture Vocabulary Test, Third Edition, resulting in an age-equivalent score of less than one year, nine months; 3) the Test of Auditory Comprehension of Language, Third Edition, resulting in an age-equivalent score of less than two years; and 4) examination of the structure and function of the vocal and oral musculature. Jacques' report noted Student's severe delays in all areas, but also noted that Student had stronger expressive and receptive strength when a visual aid was used.

18. A psychoeducational assessment was completed by District school psychologist Mary Schultz (Schultz) on January 29, 2004. Student was given the Beery Developmental Test of Visual Motor Integration (VMI), a test of motor ability that

involved replicating shapes. The VMI produced a standard score of 48, which was equivalent to age two years, nine months. Student was also assessed using the Vineland Adaptive Behavior Scales (Vineland) using Mother and teacher Acosta as respondents. The Vineland showed that Student was severely delayed in communication, daily living skills, and socialization, with relative strength in motor skills. Academics were assessed by observation because Student could not complete a standardized test in this area. Schultz noted in her report that the Vineland was likely the most accurate assessment because Student had poor attention during the assessment by Schultz.

19. An IEP team meeting was held on January 29, 2004. The January 29, 2004 IEP identified that Student had unique needs in the following areas: writing; attention to non-preferred tasks; social-emotional; behavior; academics (e.g. counting, pre-reading skills); and expressive and receptive language. This IEP contained goals to address all of the above identified areas of need. All of the goals contained understandable summaries of Student's baseline performance, were measurable, and set forth measurable objectives with target dates for achievement. Next to each goal there was a chart setting forth who would be responsible for each goal and how progress would be measured. The IEP reflected that the following modifications were to be implemented in class: small group instruction; visual communication system; verbal prompts; structured classroom and "behavior intervention." Student was to be included with typical peers for 50 percent of the school day.

20. The IEP meeting notes show that a speech and language assessment was reviewed, as well as proposed new speech goals, which Mother approved. No change to speech and language services was discussed, and Student's speech and language therapy continued at the same level as set forth in the February 26, 2003 IEP. Mother verified at hearing that District speech and language pathologist Jacques was present. Mother signed the IEP on January 29, 2004, indicating her consent to all with the

exception of OT goals and the level of OT services. Mother waived a reading of her procedural rights.

21. The January 29, 2004 IEP notes reflect that Mother commented that she was "extremely pleased with [the] program" and that Student was "perfectly placed in this class." At hearing, Mother testified to the contrary that she did not think Student had made progress at the time of this IEP and that Student's related services were not being appropriately implemented. Similarly, although the IEP notes reflect that Mother requested to leave the IEP team meeting early in order to attend to a family emergency, Mother testified at hearing that she actually left because she was upset. Despite Mother's later contradictory testimony, it was reasonable at the time for the IEP team to rely on Mother's contemporaneous statements.

22. At the IEP team meeting on January 29, 2004, the IEP team recommended reducing Student's participation in OT to two 30-minute group sessions per week. Mother disagreed with the level of service and the proposed OT goals and did not consent to them. Mother was offered an independent OT assessment and Mother informed the team that Student would be assessed by the University of Washington. The changes in the level of OT services proposed on January 29, 2004, were not implemented, and new OT goals proposed at the January 29, 2004 IEP team meeting were not adopted until Mother subsequently consented to them at a June 4, 2004 addendum IEP team meeting.

23. The January 29, 2004 IEP (as amended on June 4, 2004) provided for placement in an SDC with the following related services: five hours per week of IBI in class through July 16, 2004; one 30-minute group speech therapy session per week and two 30-minute "pull out" speech therapy sessions per week; and two 30-minute individual OT sessions per week plus 30 minutes per week of OT consultation. Mother signed her consent to the IEP (with the exception of the initial offer of OT, which was

later amended on June 4, 2004) and initialed an acknowledgement that she had received notice of her procedural safeguards.

24. Student was independently assessed for OT needs at the University of Washington on March 22, 2004. The University of Washington OT assessment recommended continued individual OT to address Student's sensory processing and modulation difficulties as well as continued in-class assistance with fine motor skills and coordination between Student's occupational therapist and the classroom teacher, but did not recommend a specific frequency of OT services. The University of Washington recommended that Student could benefit from vestibular input, "heavy work" (carrying or pushing heavy objects or being buried in cushions or blankets), and frequent breaks between sitting tasks. No evidence was produced regarding the costs of this assessment.

25. On March 29, 2004, the University of Washington issued a "Child Development Team Summary" regarding Student. The "team" consisted of a psychologist, a speech therapist and an occupational therapist/case manager. The summary made general recommendations about educating and treating children with autism such as the need for a structured placement, OT, speech therapy, and sensory strategies throughout the day. This assessment specifically stated that "reassessment is not necessary" unless new concerns arose in the future. No evidence was produced regarding the cost of this assessment.

26. On May 30, 2004, Kelly McKinnon (McKinnon) prepared a functional behavior assessment (FBA) regarding Student. Mother and Father hired McKinnon because Mother was concerned about Student's behaviors such as eloping, pinching, screaming, and "flopping" to the floor and non-compliance. McKinnon did not testify at hearing, but her report reflects that she observed Student at school "flopping" and screaming during table work and "flopping" upon returning from recess. McKinnon also

saw some non-compliance while walking to recess and upon being asked to transition away from recess. McKinnon did not see any pinching or eloping behaviors. McKinnon observed that Student had limited functional language, a low tolerance for demands, and did not appear able to follow basic commands like "wait" or "later." McKinnon's report made recommendations that were consistent with the types of interventions that were incorporated into the District's structured autism classes and IBI program, such as: teach replacement behaviors for maladaptive behaviors like the use of "I need a break" cards; focus on increasing Student's tolerance for adult direction; increase tolerance for "first this/then that" expectations for his behavior; and increase language skills either verbally or with a picture exchange communication (PECS) system depending on the communication system chosen by the IEP team. Absent from McKinnon's report is any recommendation to change Student's placement or replace the District's IBI program with a non-public agency specializing in ABA therapy. Mother provided the McKinnon FBA to the District shortly after May 30, 2004. No evidence was produced regarding the cost of McKinnon's services.

27. An IEP team meeting was held on June 4, 2004 to discuss changing Student's placement to an autism behavior class for the 2004-2005 school year. The IEP contained an "analysis of Student's unique needs and possible placement options" that recognized Student's need for a structured environment with a "focus on solving behaviors"; need for adult supervision due to eloping, aggression and mouthing; need to improve functional communication skills; a developmental curriculum focusing on functional academic skills; a need for a sensory diet to be implemented throughout the day and mainstreaming opportunities with typical peers. The IEP team considered the McKinnon FBA, the University of Washington OT and the University of Washington psychological report. This IEP provided for two 30-minute individual OT sessions per week, plus 30 minutes of occupational therapist consultation with the classroom teacher



per week. Three different placements were discussed and the IEP team recommended that Student be placed in the autism behavior class rather than a structured autism class. The autism behavior class was generally intended for students who exhibited greater levels of maladaptive behaviors, who might otherwise need to be served at placements, such as county-operated schools that were outside the District. The autism behavior class had a lower student to adult ratio (one-to-one) than the structured autism classes, had fewer students, and a smaller, less-distracting classroom setting. Mother did not agree with the proposed placement and no change of placement resulted. Mother initialed that she had received and understood her procedural rights.

28. An IEP team meeting was held on June 9, 2004, to discuss Student's ESY placement. The ESY period was June 14, 2004, through July 9, 2004. Student was offered placement in "SDC Structured pre-K," with the following related services: five hours per week of IBI; two 30-minute individual OT sessions per week plus 30 minutes of occupational therapist consult per week; and two 30-minute individual speech therapy sessions plus one 30-minute group speech therapy session. The IEP team also recommended that Student attend two hours per week of "IBI maintenance" at a different elementary school from July 26, 2004 through August 6, 2004 to help Student avoid regression over the summer break. Mother declined the "IBI maintenance" but otherwise agreed to the IEP. At hearing, Mother expressed that she declined the "IBI maintenance" because Mother was concerned that Student might have a regression if he attended a new program in a new place. Mother initialed a box showing that she had received a notice of procedural safeguards.

29. IEP team meetings were held on July 9, 2004 and August 26, 2004. Mother agreed to a placement for Student in a structured autism class. Mother informed the IEP team that she had observed increases in inappropriate behavior from Student that coincided with medication changes. For purposes of assisting Student with the transition

from kindergarten to the first grade structured autism class, the team recommended IBI "compliance training" for two hours per day, five days per week, between August 25, 2004 and September 30, 2004. The "compliance training" would be reviewed within 30 days. OT services remained at the levels in the June 4, 2004 and January 29, 2004 IEP's. The June 4, 2004 IEP also provided two 30-minute, individual OT sessions per week plus one 30-minute OT consult per week. The January 29, 2004 IEP had provided for two, 45-minute, individual and one 45-minute group OT session per week, as set forth in the June 24, 2003, IEP addendum. The McKinnon FBA was discussed. Mother waived a reading of her procedural rights and initialed that she had received and understood her procedural rights.

30. Beginning in June of 2004, through the present, either the dosage or type of medication taken by Student has been modified every few months. At the time of hearing, Student was taking the following medications: Depakote (to stabilize mood and reduce aggression), Risperdal (to stabilize mood and reduce aggression, impulsivity and hyperactivity), Clonidine (to help with sleep), and Luvox (to reduce compulsiveness and anxiety).

31. Student presented expert testimony from Grace Mucci, Ph.D. (Dr. Mucci). Dr. Mucci was a pediatric psychologist at Children's Hospital of Orange County where she performed evaluations and acted as a liaison between families and the neurology department. Dr. Mucci also had a private practice performing assessment for children. Dr. Mucci had provided input for approximately 100 IEP's as an assessor and/or treating psychologist. Dr. Mucci has also been hired three or four times by school districts to provide independent psychoeducational assessments. Although possessing impressive credentials as a pediatric psychologist, Dr. Mucci had never devised a BIP during her career and had supervised only one FAA, an FAA regarding Student that was performed by Postil in 2006. Accordingly, although Dr. Mucci could generally be considered an

expert in the broad field of pediatric psychology, Dr. Mucci was not established to be an expert in FAA's or behavioral interventions for children with autism. Dr. Mucci first saw Student in September of 2006, and subsequently observed him in April of 2007.

32. Dr. Mucci testified that she believed that the Vineland Adaptive Behavior Scales administered to Student by the District in 2004 may have been incorrectly scored. Dr. Mucci's conclusion was based on her review of the test protocols, which to her, looked like an entry of a one had been changed to a two on one of the scales based on a parent interview. Similarly, Dr. Mucci opined that another protocol was improper because some columns did not appear to have been filled out. However, Dr. Mucci's testimony on these points was based on her inability to decipher a partially illegible photocopy. The photocopy contained instructions explaining that there were separate columns for observed performance and estimated performance. The column for estimated performance was obscured by the photocopying. Dr. Mucci's overall credibility was diminished by her willingness to offer opinions such as the above, which were based solely on her inability to decipher a photocopy, rather than on an application of her professional expertise.

33. Dr. Mucci was critical of the District's January 23, 2004 psychoeducational evaluation for reporting the standard scores and age equivalent scores, but not the percentile scores or the subtest scores. This criticism is unfounded given that the test protocols contain this information so that a professional like Dr. Mucci could review them if necessary. Dr. Mucci also noted that the Vineland is not a cognitive measure, but instead is a measurement of adaptive behavior. Accordingly, a child could obtain low scores on the Vineland but have a high IQ, or conversely have a low IQ, yet score well on the Vineland. Dr. Mucci was critical of the psychoeducational evaluation for referring to "mildly mentally retarded" without a cognitive measure having been obtained; however, in context, the document clearly states that Student "is currently scoring in the mildly

mentally retarded range (55-69) of adaptive behavior” and also notes Student’s behaviors precluded other testing.

34. Dr. Mucci opined at hearing that Student had not made progress from year to year while attending the District structured autism class. However, Dr. Mucci’s opinion was not persuasive on this point because she had never observed Student while he was enrolled in a District program, had not reviewed Student’s IEP’s or report cards to prepare her report, and had relied mainly on reporting by Mother and Father regarding whether Student had achieved his prior IEP goals.

35. Dr. Mucci also offered the opinion that the District would be incapable of formulating a behavior program that could successfully modify Student’s behaviors. However, Dr. Mucci’s opinion was not persuasive because at most she had viewed one District classroom, she had no knowledge of the District’s IBI program or structured autism classes, and she was not an expert in formulating behavior programs.

36. Dr. Mucci testified in general that insufficient behavioral support services for Student might interfere with Student developing relationships, might cause frustration for Student not to have social abilities and that it may be frustrating for Student to not have social abilities. It was possible that left unchecked, Student’s behaviors might become more difficult to extinguish and that Student’s behaviors that allowed him to withdraw from others might themselves be reinforcing for Student.

37. Dr. Mucci thought it was possible that if Student’s aggressive behaviors had been specifically targeted with behavioral therapy as far back as 2004, that he might be more functional today. Dr. Mucci opined that further behavioral interventions might have resulted in increased academic achievement. Dr. Mucci’s opinions on these points was speculative, particularly where her credentials demonstrated that she was not an expert in behavior programs for children with autism.

38. Postil provided expert testimony for Student regarding FAA's and behavior interventions. Postil was the clinical director at ASC from 1998 until September of 2007. Postil possessed a bachelor's and master's degrees in psychology. Postil was also pursuing a Ph.D., and had left ASC temporarily in order to complete a clinical internship. As clinical director, Postil supervised staff, led social skills groups and developed the behavior intervention programs for clients, most of who were on the autism spectrum. Postil's experience in implementing behavior interventions with autistic children dated back to 1994. Postil had also been employed from June of 2005 to approximately September of 2007 as a psychological assistant to Dr. Mucci. Postil has provided parent training and group trainings in ABA techniques.

39. Postil concluded based on her record review that the five hours per week of IBI that Student was receiving in conjunction with his SDC was inadequate during the 2003-2004 school year in light of the prior need for the District to develop an FAA. Postil's opinion on this point was not persuasive because she had no knowledge of the District's structured autism classes or how IBI was implemented in the District.

40. Postil was critical of the July 9, 2004 IEP addendum for not including "compliance training" goals. However, review of the IEP notes shows that the IBI compliance training would be increased to two hours per day "within the school day" on a 30-day trial basis while Student tried an autism SDC placement. Postil's criticism was unfounded because the IEP addendum unambiguously demonstrated that the increased compliance training was intended to assist with Student's transition to a new classroom.

41. Student offered expert testimony from Barbara Moore (Moore), a licensed speech pathologist, regarding Student's speech and language needs. Moore was the Executive Director of Speech Pathology Associates, a clinical practice that treated speech and language disorders in children. Approximately 60-70 percent of Moore's clients were children with autism. Moore saw Student two times, once for assessment in June of

2006 on a referral from Student's attorney, and once for an observation in November of 2007. Mother paid \$1,000 for Moore's speech assessment. Moore's assessment was "limited" and "more informal" due to Student's lack of attention and inability to remain seated. The only prior District document that Moore reviewed prior to her assessment was Student's most recent IEP as of June of 2006. Moore was able to get some results using the Peabody Picture Vocabulary Test, but Student did not stay on task. Moore was unable to obtain a result using the Clinical Evaluation of Language Fundamentals – 4. Moore noted that Student "engage[d] in constant self talk" during activities and noted that Student had difficulty with the production of "b" and "f" sounds. Consistent with Student's diagnosis of autism, Moore determined that Student had deficits in expressive and receptive language that impacted his pragmatic abilities such as social exchanges. Moore's June of 2006 report "strongly suggested" that Student be placed "in a small classroom setting that will focus on all of his individual needs."

42. Moore offered the opinion that the 90 minutes per week of speech therapy (consisting of two 30-minute individual sessions and one 30-minute group session) that Student was offered pursuant to all operative IEP's during the relevant time period prior to May 17, 2006, had been inadequate. Moore recommended instead that Student should have received two 60-minute speech therapy sessions per week, consisting of 50 minutes of direct therapy per session, with 10 minutes of each session devoted to parent participation in the session. Moore based her opinion on Student's performance on District assessments, Moore's assessments, and on her general opinion that a greater amount of service would result in greater progress. Moore's opinion on these points was not persuasive because Moore had no knowledge of the content of the speech and language therapy services Student received in the District and no first-hand knowledge of Student, or his behaviors, prior to June of 2006. Because Moore had no knowledge of the District speech therapy services, she could not offer a persuasive

explanation for how her recommendation for speech services, which amounted to approximately 100 minutes of individual therapy, was appropriate, whereas, in her opinion, the District's provision of 60 minutes of individual speech therapy and 30 minutes of group speech therapy per week was not. Moore's opinion is further undermined because she only saw Student twice (once in June of 2006 and once in November of 2007) after his parents had withdrawn him from school and ceased speech therapy services.

43. Licensed occupational therapist Susanne Smith Roley (Roley) provided expert witness testimony for Student. Roley had 30 years of practice experience, which included clinical experience with hundreds of children with autism.

44. Roley acknowledged that the fine motor skills goal in Student's February 26, 2003 IEP was measurable. Roley also opined at hearing that she could not determine Student's OT needs based on District occupational therapist Sadauski's standardized assessment results; however, Roley's testimony failed to address that Sadauski's assessment had included clinical observation. Roley was also critical of Sadauski's report for not investigating the reason why Mother and kindergarten teacher Acosta reported different things about Student when completing a sensory profile; however, Sadauski plausibly explained the reporting differences as being explained by the differences in environmental stimuli and the demands placed on Student.

45. Roley assessed Student on July 3, 2006, for two hours and saw him briefly on April 9, 2007. Mother paid Roley \$600 for the July 3, 2006 assessment and \$350 for an assessment on April 9, 2007. Roley made it clear at hearing that her assessments and opinions were solely for purposes of the due process hearing and had not been intended for use at IEP team meetings. Roley assessed Student in part using the Sensory Integration and Praxis Tests (SIPT), which showed that Student scored below average in all areas tested. Roley's report noted that Student had difficulty with sensory

modulation, sensory discrimination, self-regulation and praxis (the ability to plan and execute unfamiliar tasks). In particular, Student had difficulty coping with high stimulus environments. Student displayed difficulty with ocular, oral motor and fine motor control, all of which impacted his writing skill. Roley recommended that Student receive "occupational therapy, 1:1, twice weekly, in a specialized clinic setting," for six months followed by a reassessment. The focus of the therapy would be improving sensory modulation, improving information processing by all senses including vestibular and proprioceptive, improving self-regulation and improve self-help skills.

46. In general, Roley did not think the amount of OT services that Student had received since the fall of 2003, and that were recommended in IEP's conducted in 2007, were appropriate based on her review of the records, and in particular, her opinion that if negative behavior was a concern, then more OT was warranted. Roley testified that she thought that Student had areas of need in coping with the classroom environment and reducing aggression. Roley concluded that the appropriate number of OT hours for Student should have been two 50-minute OT sessions in a clinic, with an unspecified amount of consultation time. Roley's opinions about the levels of past OT services were not persuasive because at no time did Roley contact Student's teachers, occupational therapists, or ABA/IBI therapists as part of her assessment process. More importantly, Roley's main assessment of Student on July 3, 2006, could not have provided an accurate picture of Student's needs in past years because the assessment was conducted at a time when Student's medication was being adjusted and after Student's parents had removed him from a structured program for more than a month.

47. Roley also expressed that she would not have been as concerned with an OT goal contained in the June 4, 2004 IEP addendum regarding Student's functional grasp. However, Roley's opinion on this point is not persuasive because at the time of the IEP, the March 22, 2004 recommendations of the University of Washington included



an emphasis on Student working to improve his functional grasp. Rather than exposing a deficiency in Student's June 4, 2004 IEP, Roley's testimony on this point highlighted that the IEP team had incorporated recommendations that Mother had obtained.

#### 2004-2005 SCHOOL YEAR

48. Misty Sedehi (Sedehi) taught Student in first grade during the 2004-2005 school year. Sedehi had a moderate/severe disability special education credential. While obtaining an undergraduate psychology degree, Sedehi was trained as an applied behavioral analysis (ABA) therapist and worked with autistic children in that capacity for two years. Dr. Dores spoke highly of Sedehi's teaching ability given her prior experience with ABA techniques.

49. Sedehi observed Mother to be an active participant in Student's education who spoke regularly with Sedehi and acted as the class parent.

50. Sedehi described that in the classroom, Student had good days and sometimes good months. However, Student sometimes exhibited aggressive and impulsive behaviors. Sedehi perceived that Student's behavioral outbursts were more frequent near the end of the 2004-2005 school year. Student was not a danger to himself, but could be a danger to peers and adults because he would bite or scratch persons close to him.

51. Student had classroom supports that included a "sensory diet" (consisting of things like the pinching pillow and breaks for movement), a picture schedule to assist with transitions, "transition" and "break" cards, and a one-on-one aide. A "sensory diet" was a systematic schedule of activities based on an individual student's need for vestibular and proprioceptive input that is derived from a consultation with an occupational therapist.

52. District speech therapist Tracy Kerins (Kerins) provided therapy to Student during the 2004-2005 and 2005-2006 school years. Kerins had a master's degree in

communication disorders, was a licensed speech therapist and had extensive experience working with children with autism. Kerins had assessed and provided speech therapy to over 500 children with autism. Kerins provided one individual therapy session to Student per week and ran Student's weekly group therapy session. The group therapy session had no more than eight children. The other weekly speech therapy session was provided by a qualified speech and language aide under Kerins' supervision. Kerins consulted with Student's teachers and class aides whenever she visited the classroom.

53. An IEP team meeting was held on September 23, 2004, at which time the IEP team recommended reducing the two hours of daily IBI compliance training to one hour because Student had successfully transitioned into Sedehi's class. Mother agreed to the IEP. All other placement and services remained the same. Mother initialed that she had been given a notice of procedural safeguards and had been provided an opportunity to participate in the IEP.

54. On January 4-6, 2005, Sedehi administered the Brigance Comprehensive Inventory of Basic Skills – Revised (CIBS-R) to Student. Sedehi found that Student could state his first name, his age, his address and phone number and his parent's names. Sedehi noted that Student had emerging skills in expressive language, writing and reading sight words and understanding quantitative concepts.

55. Sedehi described that Student was capable of using one-or two-word sentences to get his needs met. A token board was used with Student throughout the school, including the playground. Student had more social interactions with adults than peers, with whom he tended to parallel play. Sedehi noted that Student was more likely to have a behavioral outburst during less structured activities and that free time was difficult for Student.

56. An annual IEP team meeting was held on February 1, 2005. Student's placement remained a structured autism class and ESY was offered. Individual IBI

services were not offered. The IEP team recommended a gradual reduction of Student's speech therapy from the prior level of 90 minutes per week to 60 minutes consisting of one individual 30-minute session and one 30-minute group session. Mother did not agree with the reduction in speech therapy services, and Student's level of speech therapy remained at 90 minutes per week as set forth in the prior operative IEP. OT was offered at one 30-minute group session and one 30-minute individual session per week.

57. The February 1, 2005 IEP showed that Student had met all of his prior IEP goals, with the exception of the following goals in which Student had made progress: a speech and language goal regarding answering new who, what and where questions; and a speech and language goal regarding identifying the meaning of 10 location concepts. The February 1, 2005 IEP documented that Student had unique needs in the areas of expressive and receptive communication, academic skills, social skills and behavior. As to placement, the IEP noted that Student required a small class size, one-to-one instruction, a structured environment, a visual communication system, verbal prompts and behavioral interventions. This IEP contained goals to address all of the above identified areas of need. All of the goals contained understandable summaries of Student's baseline performance, were measurable, and set forth measurable objectives with target dates for achievement. Next to each goal there was a chart setting forth who would be responsible for each goal and how progress would be measured. Although a box was checked showing that no specific "social emotional" goals were required, the behavior goals in the February 1, 2005 IEP addressed social emotional needs by including a behavior goal that Student engage in interactive play with another student and a goal that Student would participate in group instruction. The February 1, 2005 IEP noted that Student would participate daily in the "Best Buddies" program that involved interaction with typical peers.

58. The present levels of performance (PLOP) for behavior in the February 1, 2005 IEP showed that although Student required one-to-one supervision to stay on task during activities, he "transistion[ed] easily by using a [picture] schedule." In addition, the IEP notes that Student had made progress in attending to tasks following sensory input breaks that were given throughout the day. It was noted that Student still had difficulty with participating in group activities. This fact corroborates the testimony of Sedehi that Student's behaviors became more severe between March and May of 2005. At the time of the IEP, Mother signed the IEP indicating her agreement and initialed that she had received a notice of procedural safeguards, had participated, and helped develop the IEP. Mother also waived a reading of the procedural safeguards.

59. Mother testified at hearing that she did not perceive that Student made progress during the 2004-2005 school year. Mother perceived that neither Sedehi, nor the classroom aides, could handle Student's challenging behaviors that included pinching, grabbing, screaming, yelling, and ripping things off the walls. While Student was in Sedehi's class, Mother observed recess approximately ten times. Mother felt that the aides should have, but did not, prompt Student to play appropriately and interact with other children. Mother testified that she did not think that the February 1, 2005 IEP adequately addressed Student's behavior needs. However, there is no indication that Mother objected at the time of the IEP, and to the contrary, Mother consented to the IEP with the exception of the level of speech therapy services. Mother's opinions about the adequacy of the District's behavioral programs was based on information that she obtained in 2006, which lead her to believe that the District's IBI program was not an "ABA" program. However, Mother's testimony regarding the adequacy of the District's behavioral programs was not persuasive given the extensive evidence that the District's IBI program was an "ABA" program and was implemented by consultants and teachers with appropriate training and experience.

60. Student's OT expert, Roley, reviewed the February 1, 2005 annual IEP for purposes of testifying at hearing. This IEP contained three goals that were the shared responsibility of the occupational therapist: that Student appropriately participate in group instruction for 20 minutes; that Student write the alphabet legibly, and that Student write his name legibly from left to right. Roley opined that these goals did not address the main issue of what she perceived to be Student's sensory struggles in the classroom. Roley's opinion was not persuasive because a sensory diet had been implemented for Student in the classroom and participation in group instruction was a step toward increasing Student's overall tolerance of classroom activities.

61. On April 6, 2005, Mother gave her consent to an FAA by signing an assessment plan dated April 4, 2005. The assessment plan provided space for parent input and included language that by signing the plan, Mother was affirming that she had received a notice of Special Education Parent Rights and Procedural Safeguards and that Mother had an opportunity to participate in assessment planning.

62. Juanita Dotson (Dotson)<sup>6</sup> was the school psychologist when Student attended a District structured autism class. Dotson perceived that Student's behaviors were challenging, even for a child with autism. On May 20, 2005, Dotson drafted an FAA and BIP (together "FAA") based on data collected by the classroom teacher, Misty

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<sup>6</sup> Dotson possessed dual degrees in psychology and school psychology, was a licensed school psychologist in Michigan, California and Utah, and throughout her career had worked with autistic children. In particular, while in Michigan, Dotson had worked at a school for autistic children with behavioral issues. Dotson was trained in behavioral analysis and the use of positive behavioral interventions, had performed hundreds of assessments and dozens of functional analysis assessments (FAA's), and had trained others regarding FAA's.

Sedehi, psychology intern Cynthia Balanza and Sedehi's classroom aides. Sedehi and her aides had kept data regarding Student's classroom behavior beginning February 7, 2005. The FAA noted that a prior behavior plan was on file, implying that it had been considered.

63. The May 20, 2005 FAA identified the target behavior to be decreased as: "aggression, especially towards adults/staff members, when [Student] does not want to do the task-at-hand." The behaviors were described as "lunging or leaning towards the adult and then attempting to pinch, scratch, hit, push and bite" that occurred across all settings such as OT, large and small groups, IBI one-on-one and speech therapy. Between February 7, 2005 and May 20, 2005, Student exhibited the target behavior 112 times consisting of: 93 episodes of pinching; 10 episodes of scratching; four episodes of hitting; three episodes of pushing; and two episodes of biting. The incidents were reported as lasting between three and five seconds.

64. The May 20, 2005 FAA listed four antecedent behaviors that occurred prior to the target behavior: 1) pushing away from a desk or table; 2) making high-pitched verbalizations; 3) making eye contact with a staff member; and 4) leaning toward or approaching a staff member. Consequent events to each of the above were stated as: 1) prompting to move closer to the table; 2) prompting to use a pinch pillow in his lap and redirection to the task at hand; 3) prompting to use words to vocalize "I am mad," and to pound on the table; and 4) staff backs away to avoid contact. The possible function of the target behavior was identified as "non-compliance and avoidance of tasks, especially work that is done at the table or desk" or "to obtain a desired object or activity," which Dotson testified meant getting up from his seat and moving around.

65. Additional antecedents that possibly influenced the behavior were also analyzed. As to health/physical factors, Student's Risperdal medication was not considered an antecedent because the side effects included drowsiness. As to

cognitive/developmental factors, Student's autism, his attention span of five to 20 minutes and limited language skills, consisting of a limited ability to ask for desired items, were noted. Ecological factors were also noted, such as: a structured daily schedule; small class with a low student to adult ratio; use of a token economy; use of a firm voice for redirection; use of visual cues; need for prompting to respond to questions; and that Student's desk and tables were too short for him. A history of prior interventions was included, and noted such techniques as a "pinching pillow," sensory objects, visual cues, redirection with a firm voice, modeling social stories, token economy and food reinforcement. Mother had told Dotson that redirecting Student with a firm voice was a technique that worked in the home setting.

66. The May 20, 2005 FAA proposed the following functional behaviors to replace the target behavior: increased use of verbal communication to express frustration and to ask for a desired activity, which, at the time, Student was able to do only 50 percent of the time; and performing less desired tasks upon request before more desired tasks. Suggested reinforcers were food, songs and music, tickles and squeezes, and "superstar points" (tokens). The plan to enable Student to demonstrate desired replacement behaviors set forth the following modifications of antecedent events and ecological factors: teach Student how to grunt and stop to demonstrate anxiety; allow choice of reinforcers; use visual communication cues; allow frequent standing; adjust table and chair to accommodate "pinching pillow" in Student's lap; provide modeling of appropriate communication; and reduce the time frame of table tasks. The plan to enable Student to demonstrate desired replacement behaviors also noted that compliance would be rewarded with the token economy system. The plan to reduce demonstration of the target behavior and behaviors identified as preceding the target behavior was: continue use of redirection to task; continue use of visual cues to

communicate appropriate behavior; continue structured schedule and continue use of sensory items.

67. Dr. Does emphasized at hearing that accurate data is highly important to the development of a behavior intervention because data limits the number of accurate conclusions that can be drawn. The forms used by the District to collect classroom behavioral data regarding Student did not require reporting the intensity of behaviors (e.g., whether “hitting” was a “tap” or a “punch”). Dr. Does did not think a lack of data on intensity was fatal to an FAA being appropriate because FAA’s are often developed with available data under “real world” conditions. However, Dr. Does also acknowledged that if intensity was an important consideration, it could be noted in the FAA data.

68. Roz Bellante (Bellante) provided District staff, including instructional assistants, with training in behavioral assessment and implementing behavior plans. Bellante was credentialed as a special education teacher and resource specialist. Bellante also had a behavior intervention case manager (BICM) training certificate. Bellante had never met Student and did not participate in developing the FAA. Bellante persuasively opined that the May 20, 2005 FAA was proper because it included information about Student’s daily activities, the techniques being used to address behaviors and included recommendations to continue techniques that had been working in conjunction with modification of antecedent events.

69. Dr. Does, also persuasively testified that he could have formulated a BIP based on the May 20, 2005 FAA because it contained information on the target behaviors, environments, a hypothesis regarding the function of the behaviors, a description of the behavior chain and a description of antecedents.

70. Postil, who conducted Student’s independent FAA, testified to various criticisms of the District’s May 20, 2005 FAA. Postil was critical of the District FAA being



limited to the school environment in order to determine whether a child's behaviors are related to specific environments. However, Postil's criticism was not persuasive on this point given that the targeted behaviors related to behaviors that interfered with Student's education. Postil was critical of the District for not taking data on attempts, as compared to completed actions; however, when Postil conducted her own FAA, she did not take data on attempts. Similarly, Postil was critical of the District FAA for reporting ranges of the duration of behaviors ("3-5 seconds"); however, some of the durations reported by Postil in her FAA were "average" durations and some reported durations were as vague as "throughout" the observation.

71. Postil was also critical of the District's FAA for not having sufficient analysis of environmental factors such as amount of sleep, which might be a cause of behaviors. Postil was critical of the analysis of cognitive and ecological factors in the District's FAA because it did not adequately express what link, if any, the factors had to the targeted behaviors. Postil faulted the 2005 District FAA for not including a comparison of the baseline data to a prior District FAA that had been done in 2002, and the data collected as a result of it, because it would have been helpful to have data on whether prior reinforcers and interventions were successful. However, Postil's criticism was not persuasive because the FAA was drafted based on input from District staff who had extensive experience with Student. Postil did not think that the 2005 District FAA adequately described the replacement behavior and did not sufficiently link it to the targeted behavior. For example, Postil thought that the 2005 District FAA was deficient by only identifying "more" verbal communication as a replacement behavior, rather than defining the specific replacement behavior such as, "I need a break." However, comparison of the District FAA to Postil's three proposed goals shows that Postil was no more specific in her FAA.

72. Postil was critical of the 2005 District FAA's suggestion that one replacement behavior was "[Student] will be taught how to 'grunt' and stomp when he begins to feel anxiety towards tasks." Specifically, Postil was not sure that Student understood the feeling of anxiety. Moreover, she did not think that his behavior was appropriate for a child like Student, who was approximately five feet tall at the time of hearing. Moore, Student's speech therapy expert, was also critical of teaching Student to grunt and stomp as a replacement behavior for communicating frustration. Moore's criticism was not persuasive because she did not have expertise in formulating behavior plans and had no direct knowledge of Student's abilities at the time. In contrast, Bellante and Sedehi plausibly opined that teaching Student to show frustration by grunting and stomping was a starting place for teaching Student other replacement behaviors for aggression.

73. Postil was critical that the "Plan to Reduce Demonstration of the Target Behavior" included "continued use of (picture) visual cues to communicate appropriate behavior" because this sentence was not specific enough about how visual cues related to the target behavior. Postil was also critical of the use of a token economy in the District's FAA. Based on a statement in McKinnon's 2004 FBA, Postil was not sure that Student understood the use of a token economy. However, this criticism was not persuasive because Postil's initial contact with Student was not until July of 2006, and Postil did not obtain any information from speaking to school district personnel or McKinnon.

74. Postil opined that the District's FAA confused "behavioral antecedents," i.e., the chain of behaviors by the child prior to exhibiting the target behavior, with the antecedent to the child's behavior, meaning the event the child reacts to. Postil herself does not employ "behavioral antecedents" in her analysis. Similarly, Postil was critical of the District's FAA for listing as "consequences" the staff response to the target behavior,

not the consequence to the Student. Postil's criticisms were not persuasive because the FAA still contained all required information, even if Postil found some of the data to be superfluous.

75. Overall, Postil believed that the BIP section of the May 20, 2005 FAA was inadequate because the FAA had been inadequate.

76. An IEP team meeting was held on May 23, 2005. Mother had signed the meeting notice, which indicated that a copy of the procedural safeguards was enclosed. The meeting notice stated that the purpose of the meeting was a behavioral conference. At the IEP team meeting, Mother signed her approval of the FAA and approved the implementation of a BIP. At the meeting, it was proposed that Student's level of speech and language services be decreased from 90 minutes per week to 60 minutes per week under a transition schedule to gradually reduce the hours. Mother and Father rejected the speech and language reduction and the IEP team agreed to retain speech therapy services at present levels of two 30-minute individual sessions and one 30-minute group session per week. Student's speech therapist was present and spoke to Mother about her concerns regarding the delivery of speech services at school and suggestions for ways to work with Student at home. Mother and Father signed the IEP indicating that they consented.

77. Postil was critical of the May 23, 2005 IEP addendum because no new goals were developed as a result of the FAA and she thought that an increase in behavioral intervention services was warranted in light of the frequency of Student's behaviors.

78. Mother chose not to send Student to school during the ESY in the summer of 2005. Mother thought that it would be difficult for Student to transition because Sedehi would not be Student's teacher and the location of the class would change. Student continued to receive speech therapy and OT.

## 2005-2006 SCHOOL YEAR

79. An IEP team meeting was held on August 29, 2005 at Mother's request. The IEP reiterated that Student would receive speech therapy in two 30-minute individual sessions and one 30-minute group session per week. This IEP clarified that one of Student's two 30-minute individual OT sessions per week could be delivered outside the clinic in areas such as the classroom, library or playground.

80. Luci Coppola (Coppola)<sup>7</sup> was a credentialed special education teacher with a bachelor's degree in psychology that she obtained in 2002 and a master's degree in education that she obtained in January of 2008. Prior to her employment with the District, Coppola taught children with autism in a SDC in another school district. There, Coppola was trained in ABA techniques by Autism Partnership. Coppola began working for the District in the fall of 2004 teaching structured autism classes. While employed with the District, Coppola was trained by the Orange County Department of Education in autism, discrete trial teaching, the use of visual strategies, and the picture exchange communication system. Dr. Dores considered Coppola to have been one of the best teachers in the District's autism program. At the time of hearing, Coppola was employed as an autism specialist/IBI supervisor for the District, which entailed supervising and training District personnel and supervising in-home behavioral programs.

81. Coppola met Student in the fall of 2005, when he was a Student in her structured autism class. The structured autism class focused on facilitating language through visual supports, prompting and modeling. The SDC had a total of eight students. Community Based Instruction (CBI), which involved trips into the community to work on money and community safety, was part of the class curriculum. The entire class participated in the "Best Buddies" program, where up to 12 typical peers would reverse

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<sup>7</sup> Coppola is sometimes identified as Luci Walshe in District documents.

mainstream into the SDC for between 20 and 40 minutes on Mondays through Thursdays. All students rotated with a buddy. Student sometimes had a difficult time with this interaction and needed adult facilitation. All of the students in the SDC had behavioral challenges in transitioning, transitioning from preferred to non-preferred tasks and communication difficulties. Student was assisted with transitions by the use of a picture schedule showing his daily activities.

82. Coppola taught Student's class with the help of aides Sue Jensen, Samantha Williams, Janet Walters, and Adrienne Reitz. During the first few weeks of the school year, some substitute aides were used, but no evidence was produced that this had any impact on the appropriateness of the placement. Jensen, Williams, Walters, Reitz and Coppola had been trained by the District in IBI. Coppola would meet with the aides to discuss implementation of Student's behavior plan and the sensory strategies used with Student.

83. Coppola and the classroom aides collected data on Student's behaviors. Substitute aides did not collect data. The data was collected as accurately as possible given that Coppola instructed her aides on how to collect data, the aides were told the definitions of the behaviors that were to be recorded, and the data collection was done on a clipboard immediately after the incident occurred. Reitz and Walters were consistent in their testimony that only completed behaviors were recorded and that Coppola frequently instructed them on how to collect data. Reitz also had been trained in teaching children with autism and data collection by a non-public agency that provided ABA therapy, and this training was consistent with that provided by Coppola and the District.

84. Mother was the room parent for Coppola's class, which involved coordinating activities like holidays and parties. Coppola was available to Mother for questions at the end of the school day and also communicated with Mother by phone

or e-mail about Student's behaviors at home and at school. Mother also attended a formal parent conference.

85. Student did not receive his individual OT during September of 2005 due to a staffing shortage. An IEP team meeting was held on October 6, 2005. Mother agreed to Orange County Therapy Services providing make-up sessions and future OT sessions. Any failure to provide OT services in the fall of 2005 was resolved by this agreement.

86. Coppola implemented the May 20, 2005 BIP without substantial modification with the exception of the type of visual prompts used. In Coppola's class, Student's behaviors fluctuated. Some days Student had a difficult time transitioning from preferred activities to non-preferred activities, but could be redirected. Other days, approximately 10-15 times during the school year, Student would have a more significant reaction that would include some combination of hitting, pinching, throwing objects, kicking, screaming or biting. On one or two occasions following such an outburst, Student attempted to elope. On rare occasions, Student grabbed a female's breasts. These behaviors lasted as little as five to ten seconds or, when more severe, as much as five minutes. Student also would take off his shoes and resist putting them back on. Student's behaviors occurred in all school settings. Student was not self-injurious in school.

87. If caught prior to eruption, Student's behavior could be de-escalated by giving him a break in a quiet area. Visual supports and reinforcement were used to get Student to complete non-preferred tasks. Typical reinforcers included computer use or alphabet books. At Mother's suggestion, Coppola attempted to use food reinforcers, but Coppola found that this only caused Student to over-focus on the food reward. After a behavioral outburst, Student would be removed from the classroom for up to ten minutes in order to allow him to calm down. Student would walk the basketball court or use outdoor equipment such as swings during this time.

88. Sensory strategies were used with Student in class, which were helpful in warding off an escalation of his behaviors. A written "sensory diet" was used and Coppola recalled that Mother and Father were provided a visual and written list of the sensory strategies. The District occupational therapist consulted with Coppola regarding when to use sensory strategies and if classroom aides were present during these consultations, they would participate in the meetings. Reitz and Walters corroborated Coppola's testimony that sensory strategies were implemented in the classroom. Mother had provided some of the sensory materials used with Student and had input into deciding sensory strategies.

89. During the fall semester of the 2005-2006 school year, Student achieved grades of "satisfactory" or "outstanding" in all categories. Coppola described that Student had made great progress in all areas by February of 2006.

90. Walters had also been an aide in Sedehi's class during the 2004-2005 school year. Walters perceived that Student had made "significant" progress from when she first met him in Sedehi's class, through the time that Student was in Coppola's class. Walters's credibility was increased because she had a good relationship with Mother and Father, and had worked for them as a babysitter for Student and his two sisters. Walters confirmed that Student used a PECS book on a daily basis to communicate.

91. On January 23, 2006, Coppola, prepared a BIP review, which reported that between September 26, 2005, and the date of the review, Student had 299 behavior incidents as follows: 77 pinching incidents; 66 hitting and grabbing incidents; 120 screaming incidents; and 12 biting incidents. The incidents were reported as generally lasting from five to ten seconds and occurring across all locations, including recess. At the time, Coppola reported her perception that based on the data and her observations, the BIP had been working. Specifically, the episodes of hitting, pinching or grabbing had lessened, and Coppola reported that Student had shown improvement by occasionally

“holding back” from aggression on his own. Coppola believed that the increase in some of Student’s behaviors, such as screaming, could be explained by Student not having attended school over the summer and by Student having to transition to new group of peers as of September of 2005. The review noted that overall, Student was showing improvement in self-regulation. It was recommended that the BIP remain in place because it was having a positive effect on Student’s behavior.

92. According to Bellante, one of the District’s behavior experts, comparison of the May 20, 2005 FAA to the January 23, 2006 behavior intervention plan review did not necessarily support an inference that Student’s behavioral problems had increased because some behaviors went down while other, less aggressive behaviors increased. Similarly, although school psychologist Dotson had not reviewed the January 23, 2006 BIP review at the time it was authored, she testified at hearing that the number of some types of behaviors may have increased because of an “extinction burst.” An “extinction burst” is a temporary increase in the targeted behaviors in resistance to the behavior intervention. Dotson noted that although some behaviors had increased, including less aggressive behaviors such as screaming, other behaviors such as pinching, scratching and pushing had been reduced. The District’s autism consultant, Dr. Dores, interpreted the January 23, 2006 FAA review as showing that there had been an increase in some behaviors and a decrease in pinching. Dr. Dores plausibly explained that any changes in Student’s behavior could have resulted from changes in Student, Student’s environment, or Student’s medication.

93. Student’s expert on FAA’s, Postil, was critical of Coppola’s January 23, 2006 FAA review. In particular, Postil thought that the May of 2005 FAA should have been reviewed every three months; however, Postil’s criticism fails where her own written FAA report was not issued until five months after her assessments and no three month review was ever conducted. Moreover, Postil’s criticism on this point was not persuasive



because it did not take into account that Mother had withdrawn Student from school during the 2005 ESY, such that the BIP was not being implemented during the summer of 2005. Postil also thought that the data from the prior FAA should have been included in the review; however, it was easy enough to compare the two documents. To the extent that the January of 2006 FAA review referenced the new behavior of screaming, Postil thought that a new analysis of antecedents and consequences should have been performed. However, Postil's criticism on this point was not persuasive because there was no evidence that the screaming behavior interfered with Student's education or caused a danger to Student or others.

94. An annual IEP team meeting was held on January 23, 2006 and February 7, 2006. The BIP review was discussed and Coppola reported that Student had made a "significant improvement since the beginning of the school year."

95. The February 7, 2006 IEP showed that Student had met all of his prior IEP goals, with the exception of the following goals in which Student had made progress: a mathematics goal regarding counting coins; a reading goal regarding mastery of sight words; and a reading comprehension goal of answering "who, what and where" questions from a spoken passage. The February 7, 2006 IEP documented that Student had unique needs in the areas of expressive and receptive communication, academic skills, social skills and behavior. It was noted that Student had been participating in adapted physical education (APE). As to placement, the IEP noted that Student required a small class size, one-to-one instruction, a structured environment, a visual communication system, verbal prompts and behavioral interventions. This IEP contained goals to address all of the above identified areas of need including APE goals. All of the goals contained understandable summaries of Student's baseline performance, were measurable, and set forth measurable objectives with target dates for achievement. Next to each goal there was a chart setting forth who would be responsible for each goal and

how progress would be measured. These goals were ultimately adopted and used by ASC, Student's privately-paid behavioral intervention provider, which further supports an inference that the goals were appropriate and measurable.

96. District speech therapist Kerins plausibly explained that Student had fewer speech goals (six) in the February 7, 2006 IEP than in the February 1, 2005 IEP (eight), because Student's needs had changed. In particular, by February 1, 2005, Kerins felt that Student needed more work on articulation, and an articulation goal was added.

97. The February 7, 2006 annual IEP set forth the following offer of placement and services: ESY; placement in a structured autism class; OT once per week at Orange County Therapy for 45 minutes and one 30-minute individual session at school per week plus 19 30-minute make-up sessions for OT missed in the fall of 2005; three 30-minute speech therapy sessions per week, consisting of one individual session, one individual session in a classroom or other school setting and one group session (despite the team recommending a reduction to two 30-minute sessions per week); and APE for two 30-minute sessions per week. Individual IBI services were not offered. The IEP specifically referenced that typical peer interaction would be continued through the "Best Buddies" program and by Student participating in music class with typical peers.

98. Procedural safeguards were reviewed at the February 7, 2006 IEP team meeting. The IEP document noted that the team discussed and provided suggestions for addressing some of Mother's concerns about drooling, keeping Student's pants up, the possibility of Student biting someone and the need to prompt Student to use more oral language.

99. Student's OT expert, Roley, reviewed the February 7, 2006 IEP. This IEP contained four goals that were the shared responsibility of the occupational therapist: two writing goals; a "self control" goal of reducing pinching and grabbing behavior; and a goal that Student reduce mouthing behaviors. Roley opined at hearing that these

goals did not address all of Student's OT needs and that she would not have writing goals because Student's behavior and drooling were more important issues. Roley was also of the opinion that Student required more OT services because he was not making progress. Roley's opinions were not persuasive. As to the goals, Roley's own opinions implicitly recognized that some goals were more important than others. Overall, it was reasonable at the time of the IEP for Student's writing needs, which were related to Student's academic progress, to be privileged over Student's drooling in the school setting. As to Student's progress, comparison of the annual IEP's dated January 29, 2004, February 1, 2005, and February 7, 2006, shows that Student had made progress on all prior IEP goals related to OT and that new, more challenging goals were developed as part of each subsequent IEP.

100. Postil did not think that the behavior goal in the February 7, 2006 IEP was properly written. The goal was written as, "[Student] will demonstrate improved self-control by reducing uncontrolled outbursts (pinching, grabbing) to no more than 1 time per day towards peers and adults in 4 out of 5 consecutive days as measured by teacher data sheet." In Postil's opinion, this goal did not expressly reference replacing a negative behavior with a positive behavior. Postil also thought that there should have been more behavior goals involving replacement behaviors. Because Postil interpreted the January of 2006 FAA review as showing an increase in maladaptive behaviors, Postil concluded that more behavior intervention services should have been offered.

101. On March 27, 2006, Student bit Coppola hard enough to draw blood while she was redirecting him to put his shoes back on. This was the first incident of aggression by Student that was serious enough to require an incident report. This was the beginning of what Coppola described as a "significant" change in the frequency and duration of violent outbursts by Student. Prior to that time, Student was manageable. Coppola could not identify any change to the classroom or Student's program that

occurred around this time. The only changes Coppola was aware of were the medication changes reported by Mother. Reitz and Walters, as well as the lack of any prior serious behavioral incident reports, corroborated that there were no serious incidents with Student prior to this time, and that prior to this time, the behavior interventions had been working.

102. On April 3, 2006, Student took off his shoes and socks during recess and when redirected to the classroom threw his shoes and socks, screamed, lunged into room dividers, attempted to throw a chair and bit classroom aide Walters on the thumb, drawing blood.

103. An IEP team meeting was held on April 3, 2006, to discuss the escalation in Student's negative behaviors at school and whether to conduct a new FAA or modify the existing BIP. Mother and Father attended. The team discussed that Student was increasingly unwilling to wear his shoes in school and had bitten Coppola and an aide, and had pinched a fellow student. Mother offered to provide a "chew toy" for Student to bite rather than people. The team discussed adjusting Student's schedule to attempt to reduce Student's frustration and requested that parents sign a behavior support team referral for purposes of determining how to modify Student's BIP. A behavioral support team referral was recommended because it would be quicker than an FAA. The behavioral support team referral noted that Student's increased aggression had been noticed in the two weeks prior to April 3, 2006. Mother and Father agreed to the behavior intervention referral. Mother and Father initialed boxes indicating that they had received a notice of procedural safeguards and had participated in the IEP team meeting.

104. The behavioral support team assessment was delayed until after April 26, 2006, the time it took Mother to provide written input regarding Student's behaviors. Mother noted at the time that she was concerned that a medication change from

Risperdal to Abilify "has played a big part in the behavior changes we have seen over the past month." Mother also noted that at the time, Student was exhibiting more obsessive behaviors about his shoes. Mother noted that Student's behavioral changes had been observed "over the past month," corroborating the testimony of teacher Coppola and her aides Reitz and Walters.

105. Another biting incident occurred on May 17, 2006; Student starting off having a "bad day." During morning recess, Student took off his shoes and socks. Reitz and Walters attempted to get Student to put his shoes and socks back on and took him into the classroom. Student's behavior escalated in the classroom. Student bit Walters and pinched and hit Reitz. The principal called Mother and told her to pick Student up from school.

106. Following the incident, Coppola discussed with Mother the severity of Student's behavior and the need for an IEP. Mother and Father were offered a choice of IEP dates on May 19, 22 or 23, 2006. Mother and Father informed the District that they were not available until June 9, 2006.

107. Student did not return to school after the May 17, 2006 incident. Student was out ill in the days after the incident; however, beginning May 26, 2006, his absences from school were unexcused. Mother continued to take Student to OT at Orange County Therapy Services at District expense, but did not make Student available for speech therapy.

108. On May 30, 2006, Student's attorney sent a letter to the District stating that Mother and Father intended to unilaterally change Student's placement and seek reimbursement from the District. The letter also requested that the District provide IEE's at public expense "in the areas of Occupational Therapy, Speech and Language, Applied Behavioral Analysis and Functional Analysis." In a letter to the District dated June 27, 2006, Student's attorney clarified that the basis for the IEE request was the parent's

disagreement with the District's January 26, 2004 occupational therapy assessment, the District's January 20, 2004 speech and language assessment, the District's January 23, 2004 psychoeducational assessment and the District's May 25 [sic], 2005 FAA. Student's letter also stated that Student disagreed with the "lack of an Applied Behavioral Analysis assessment," which can only be interpreted as an acknowledgement that an IEE was not appropriate because no District assessment had been conducted in this area.

109. Tracy Grant (Grant) was a District school psychologist. Grant performed assessments and assisted with the development of FAA's and BIP's. Grant worked with Coppola to revise Student's BIP prior to a June 9, 2006 IEP team meeting. Grant described that she and Coppola attempted to incorporate all of the successful interventions from the May 20, 2005 BIP, such that the following suggestions were made: reinforcing communication of "I need" or "I feel"; use of visual charts and timers; having staff communicate to Student "if this, then that"; limiting the time frame of tasks; provide warnings for transitions; continued use of sensory items; higher rate of compliance drills during the day; reducing agitating antecedents such as "best buddies" visits; and revising the behavior chain to try to head off Student's escalation.

110. Grant explained at hearing that an FAA of Student was not conducted after he was removed from school by Mother on May 17, 2006, because the purpose of an FAA would be to analyze behaviors in the environment that they occurred so that, in part, environmental modifications could be made. In other words, it would not be useful to take data outside of the educational environment. In addition, Grant believed that neither the behaviors, nor their function, had changed. However, Grant's opinion failed to take into account that Student's behavior escalation began in March of 2006, at a time when a new FAA could have been conducted.

111. An IEP team meeting was held on June 9, 2006 to discuss the May 17, 2006 incident. The IEP noted that Mother and Father had chosen to keep Student out of

school while he changed medications. Mother and Father were accompanied by their attorney. Mother and Father reported that Student's behaviors had deteriorated at home. Mother and Father expressed their concerns that they were unaware of Student's negative behaviors prior to the April 3, 2006 IEP team meeting, that Student did not have an updated BIP, that an FAA had not been conducted, that a revised BIP had not been provided to them prior to this IEP meeting, that the District proposed a revised BIP without conducting a new FAA and overall, that Student was not receiving a FAPE. School psychologist Grant presented a modified BIP. The team also discussed changing Student's placement to an autism behavior class that would have fewer distractions for Student. At the time, the autism behavior class had three students with one teacher and three aides. District autism specialist Pitzen attended the meeting and was available to explain the autism behavior class. Mother and Father were given an opportunity to ask questions, but declined. Mother and Father declined the offer of placement and stated that they would be unilaterally placing Student and seeking reimbursement. Mother and Father did not state where Student would be placed.

112. On July 25, 2006, the District filed a request for a due process hearing in OAH case number N2006070729. The District sought a determination that its May 20, 2005 FAA had been appropriate, such that the District had no duty to fund an independent assessment in this area.

#### STUDENT'S HOME PROGRAM AND INDEPENDENT ASSESSMENTS AFTER MAY 17, 2006

113. Mother contacted Dr. Mucci in June of 2006 about preparing a FAA of Student. Dr. Mucci asked Postil to prepare the FAA. Postil disclosed to Mother her relationship with both ASC and Dr. Mucci and limited her participation to performing the FAA. At the time, Student was on the waiting list for ASC services. Postil performed the observations for the FAA for three days in early July of 2006. Postil observed Student

in her office, at home during ABA therapy, at home without ABA therapy occurring, in the family car, and in the community. Postil interviewed Mother and Father and reviewed prior District assessments, the prior District BIPs, and assessments by the University of Washington. In August of 2006, Postil orally presented her analysis to Mother and ASC.

114. Postil did not prepare a written report until December 21, 2006. According to Postil, the report was limited to the time of her observations in July, however, a third party reading the report would likely think that the information contained in the report was accurate to December of 2006. To Postil, the delay in the report did not matter because the family had been told Postil's conclusions in August of 2006.

115. Postil's written FAA contained a summary of the behaviors observed on each day of observation. Postil set out behavior definitions for each behavior, which were intended to provide the direct service providers with a consistent definition. However, some of the descriptions, such as the definition of "throwing objects" were overly precise to the point where a third party might not take data on the behaviors. For example, Postil's definition of "throwing objects" was limited to items not intended to be thrown, such that a ball might not count, and was further limited to a raised arm, forward throw when student was "visibly frustrated." Similarly, Postil's definition of "kicking" was limited to Student lying on his back on the floor and kicking with both legs, a definition that would not include a one-legged, standing kick. Postil's definition of "grabbing" was limited to Student using all of his fingers and his thumb. When presented with the possibility that her definitions were over-precise, Postil acknowledged that behavior definitions had to be read using "common sense." Thus, applying a "common sense" reading to the descriptions of behaviors in the District's May 20, 2005 FAA shows that the District's behavior definitions could be read and understood by anyone reading the FAA and the subsequent BIP.



116. The behaviors noted by Postil, from highest to lowest severity were: eloping; seat belt removal; kicking; biting; grab/pinch; throwing objects; hitting; pushing a table away; screaming; repeating phrases; and verbal protesting. Postil's FAA noted data on frequency, duration and intensity of behaviors. For each behavior, Postil noted the antecedent events, e.g., that prior to throwing objects, Student was having trouble completing a puzzle. For the analysis section, Postil noted the following for each behavior: the consequence, e.g., that Student was reprimanded; the possible functions, e.g., escape or avoid task completion of get/obtain sensory regulation; the physiological outcomes for Student, e.g., meet his sensory needs; the environmental outcome, e.g., that Student scattered the puzzle pieces; and the Communicative intent, e.g., protesting.

117. For each behavior, Postil analyzed the antecedent (e.g., placing a demand on Student); analyzed the consequence (e.g., redirection), and formulated a conclusion about the function of the behavior (e.g. to get or obtain a preferred activity or environment). For all of Student's behaviors, the function was either getting something or escaping a demand. For each behavior, Postil described a possible replacement behavior, along with an alternative antecedent and consequence. The May 20, 2005 District FAA reached the same conclusions as Postil regarding the functions of Student's behaviors.

118. In her FAA, Postil "hypothesized" that Student's behavioral difficulties were the result of inadequate compliance training from an early age. Postil did not believe that the IBI hours provided to Student in school, which at times had been up to ten hours per week, were sufficient given Student's history of aggressive behaviors that had resulted in BIPs. However, Postil's conclusions were not persuasive because they did not factor that Student had been without services prior to Postil's observations and Postil had no data on Student's behaviors during that time. Moreover, Postil had no information about the adequacy of the District's behavioral interventions and structured

autism classes other than what Mother told her or what could be determined from documents provided by Mother.

119. Postil's FAA recommended that Student continue in a 40 hour per week ABA program plus eight to 12 hours of monthly supervision per month, with an emphasis on the following goals: 1) "[Student] will comply with demands / requests given by a therapist by the first or second trial in 4 out of 5 trials (using a visual schedule, token system and tangible reward paired with verbal praise"; 2) "[Student] will comply with demands / requests given by the parent in 3 out of 5 trials"; and 3) "[Student] will keep his seatbelt on throughout the drive without taking it off 100% of the driving occurrences." Postil believed these goals could be used verbatim in an IEP, supporting an inference that the District's IEP goals in all years at issue were measurable and appropriate.

120. Postil also made the following recommendations, in relevant part: 1) emergency training for staff; 2) a behavioral emergency plan; 3) frequent reinforcement sampling; 4) frequent breaks during learning activities; 5) arrange tasks from easiest to hardest; 6) parent and sibling training for consistency throughout environments; 7) re-evaluate medications as a possible source for increased behaviors; 8) supervision by an adult with ABA training while in the community; 9) systematic desensitization for wearing a seatbelt; 10) removal of dangerous objects; 11) removal of objects Student liked to mouth/ingest, and; 12) a sensory diet that is not used in response to an inappropriate behavior.

121. Postil's criticisms of the District FAA and BIP were undermined by the deficiencies in her own FAA. For example, Postil's FAA stated that during her observation on July 14, 2006, Student showed an increase in behaviors indicative of an "extinction burst." However, the data reported by Postil showed that there were fewer behaviors on that day than on her other observation days. Because Postil did not include data on the

length of her observations, Postil's FAA was ambiguous regarding what the frequency of the behaviors was or whether her conclusions derived from the data were accurate.

122. Overall, Postil's opinion at hearing was that as of July of 2006, through the time of hearing, Student required a 40 hour per week home program. As of July of 2006, Postil did not think it was safe to transport Student because he would not use a seatbelt. If Student did return to school, Postil believed that a program would have to be designed around his needs, including the ability to have home instruction during periods when Student's behavior was cycling. Postil's opinion that Student required periods of home instruction when his behavior was cycling was somewhat contradicted by ASC therapist Lauren Ballantyne (Ballantyne), who had far more direct involvement with Student, who testified that even when in a manic phase, Student was able to learn with just one therapist present. Postil's opinion was not persuasive because her contact with Student was limited to the period after he attended school, and was limited to her role in drafting an FAA.

123. Postil stated she would apply the same standards to an IEE performed on behalf of a school district, as she would to an IEE performed for a private client. However, Postil contradicted herself by defending any inadequacy in her FAA written report being untimely or not containing all data such as the length of her observations as being explained by the fact that it was a "private assessment" for parents only.

124. Dr. Does was critical of Postil's written FAA for being issued in December of 2006, five months after she performed her observations in July of 2006. Dr. Does logically pointed out that the FAA was useless by December of 2006 because by that time, Student had been exposed to behavioral interventions from ASC. Accordingly, Postil's FAA was of no use to develop a BIP as of December of 2006. Postil should have more clearly acknowledged in her report that it had been delayed because, for example, the report stated "[Student] is in a behavioral crisis at this time," which would lead the

reader to think the behavior crisis existed as of December of 2006. Further, if the report was intended to be useful in December, it should have included any data collected by ASC during the interventions.

125. On July 11, 2006, Mother's attorney sent a letter to the District stating that Student would receive in-home ABA therapy through Autism Spectrum Consultants (ASC).

126. Cynthia Underwood was the clinical director of ASC, a certified non-public agency that provided one-to-one ABA therapy services, social skills training and "shadowing" for children on the autism spectrum. ASC staff received a 30-hour training course followed by on-the-job supervision. Underwood had worked for ASC since 1999, working her way up from therapist, to supervisor, to clinical director. Underwood obtained a master's degree in counseling in 2004 from National University and at the time of hearing had just obtained a Certificate in Applied Behavioral Analysis from National University.

127. Underwood first met Student in July of 2006 when she was assigned to supervise his case at ASC. Underwood described Student at the time as having deficits in communication, self-help, play skills and behavior. Underwood described Student as one of the most challenging children that she has worked with given his behaviors and his size, which, at the time of hearing was approximately five feet, two inches tall. Underwood considered Student to be in a behavioral "crisis" when she met him. ASC began working with Student without an intervention plan, which was developed as ASC worked with Student.

128. ASC adopted the District's goals from Student's last IEP when they began providing services. This fact supports the conclusion that the goals in Student's operative IEP as of the year 2006 were appropriate.

129. During the first six weeks of ASC involvement, two therapists at a time were needed to manage Student's aggression. The main goal during this time was to obtain compliance from Student. Student was unable to go on community outings at this time; however, ASC billing records show that by the end of August of 2006 Student attended camp.

130. ASC therapist Ballantyne began working with Student in August of 2006, when she was first hired by ASC. Ballantyne had a bachelor's degree in English, with a minor in education. Ballantyne had a general education teaching credential but had no classroom experience. Ballantyne had experience with ABA therapy prior to her employment because her autistic brother had been an ASC client. When Ballantyne first started working with Student he was unable to read sight words (reading a whole word without decoding) and was not able to add or subtract. Student would hit, bite, kick or throw objects at his therapists throughout the day. Student would not wear a seatbelt and was also aggressive toward family and people in the community.

140. At the time of hearing, Student's therapy through ASC involved three different therapists who were supervised by Underwood during bi-weekly meetings. Ballantyne was the only therapist who had a teaching credential. Ballantyne has worked with Student for anywhere between 15 and over 30 hours per week since she first started working with him. At the time of hearing, Ballantyne worked with Student for approximately 15 hours per week.

141. Student's in-home program generally consisted of the following daily schedule: a community outing such as a coffee shop, where Student would work on staying in line, ordering, and eating properly and/or a trip to run family errands such as food shopping; a trip to a park to work on play skills; return home to work on self-help and academic goals in two sessions of approximately 45 minutes each with a break; another community outing; and finally, return home for more self-help and academic

goal work sessions. The academic portion of Student's day takes place in his bedroom. Approximately 25 percent of all session time is devoted to academics. Therapists without teaching credentials ran some of the academic programs with Student. ASC worked with Student on using a seat belt. Other aspects of the home program focused on Student's communication and self-help skills such as hygiene, eating, drinking, and manners. Sensory integration strategies were used with Student at least one time an hour. Student had interaction with his two typical sisters and their friends as well as during his trips to the park if typical peers were present. On weekends, Student participated in clinic-based OT and/or special needs baseball or soccer with the assistance of an ASC therapist. At the sports activities, Student required adult one-to-one supervision to intervene in the event of aggression.

142. At the time of the hearing, Student's aggression during therapy sessions was more sporadic and his aggressive incidents were less frequent and more manageable. At the time of hearing, Student had over 90 sight words, was adding one digit to two, and was learning subtraction. Ballantyne could still work with Student when he was in a manic phase by providing longer breaks and making fewer demands on him. Mother also testified that by the time of hearing she was better able to manage Student's behaviors outside of the home, and could take Student out herself, using ABA techniques that she had learned from ASC.

143. Dr. Hoan Nguyen (Dr. Nguyen) examined Student in November of 2006. Dr. Nguyen was a pediatric psychiatrist who, at the time of hearing, was the Director of Psychiatry at Children's Hospital of Orange County. In addition to autism, Dr. Nguyen diagnosed Student as suffering from Bipolar Disorder – NOS (a diagnosis that recognizes that a patient may meet many of the diagnostic criteria for Bipolar Disorder without meeting the criteria for manic episodes that are associated with other types of Bipolar Disorder). In children, Bipolar Disorder manifests as cycles of irritability and

psychomotor agitation that may promote aggression. Managing Bipolar Disorder requires frequent medication changes and Student's medications were adjusted approximately every two months. Dr. Nguyen's testimony regarding his diagnosis of Student is highly persuasive given Dr. Nguyen's expertise in the field. However, Dr. Nguyen's diagnosis was not communicated to the District until April 9, 2007, when Dr. Mucci referenced it in a letter to the District. Between November 8, 2006 and November 19, 2007, Mother and Father paid a total of \$1,925 to Dr. Nguyen for diagnosis and medication management. The above facts demonstrate that Dr. Nguyen's services were for medical diagnosis. No evidence was produced that Dr. Nguyen's examination and treatment of Student were undertaken as an IEE based on a disagreement with a district assessment.

144. Dr. Nguyen, thought that Student's in-home ABA program was appropriate and that although Student could be placed in a public education setting, the outcome would not be good due to Student's low tolerance for change and the provision of less one-to-one ABA therapy than Student had been receiving. However, Dr. Nguyen's opinion regarding Student's educational placement was not persuasive. Dr. Nguyen acknowledged while testifying that he is "not the expert" in behavioral therapies, that he had no expertise in education, that he had not met Student prior to November of 2006 and that he had no knowledge of the details of Student's education placement in the District or any proposed placements.

145. In December of 2006, Student's pediatrician, Dr. Mina Ghebrial (Dr. Ghebrial), filled out a "Request for Home/Hospital Instructional Services" in which he recommended that Student not attend school "indefinitely based on progress." Dr. Ghebrial noted that Student had "autism with major aggression" and noted as concerns, "biting, hitting, running out in traffic and jumping out of [a] window." In response to a District request for information, Dr. Ghebrial wrote to the District on March 2, 2007, and

stated, in part, that "I have noticed that his autism and impulse control issues have been worsening since approximately May of 2006." As of March 2, 2007, the District reasonably could conclude from the letter that Student's doctor was reporting that Student's behaviors had worsened. However, at hearing, Dr. Ghebrial was not certain the information was accurate and believed it was based solely on his review of Student's charts. Dr. Ghebrial explained at hearing that his knowledge of Student was based on 2-3 office visits of between 15-30 minutes during which Student showed aggressive behaviors and that information about Student's behavior in the community was derived from Mother's reports. Dr. Ghebrial had no knowledge about educational placements for children with autism. Dr. Ghebrial's opinion regarding Student was not persuasive evidence that Student required an in-home program because Dr. Ghebrial had no first-hand knowledge of Student outside of his office, and no expertise in educating children with autism.

146. On January 17, 2007, Underwood, of ASC, sent a letter to the District expressing that Student "still attacks his service providers and caregivers with little to no notice." Underwood recommended that Student receive an in-home ABA program to address his behaviors.

147. Underwood prepared a report dated February 28, 2007 that was based on assessments conducted on January 30, 2007 and February 1, 2007. Underwood administered the Brigance Diagnostic Inventory of Early Development – II (Brigance II). The Brigance II yielded the following results (expressed in age-equivalents because standard scores were not available for all domains, Student was eight years, eleven months old at the time of testing): total motor domain – six years, four months; total language domain – three years, six months; total academic/cognitive – five years, eight months; total daily living – three years, three months; and total social-emotional – eight months. Data collected by ASC was graphed and demonstrated that Student's manic



and/or aggressive behaviors fluctuated from day to day. Significantly, the data in the report showed that during one week, the most severe behaviors were noted to have occurred during community outings. Underwood's data supports an inference that a more appropriate educational placement for Student would be in a school environment where environmental antecedents could be controlled.

148. Moore, Student's speech therapy expert, observed Student in November of 2007 and described that he had made progress despite not having any speech therapy since May of 2006.

149. During this time period, Mother paid a total of \$5, 147 to United Studios of Self Defense for martial arts training for herself and Student's two sisters. Mother also paid a total of \$3,380 to J.F. Shea Therapeutic Riding Center between December of 2004 and December of 2006. No evidence was presented that these services were related to Student's educational needs.

#### DISTRICT ASSESSMENTS AND OFFERS OF PLACEMENT IN 2007

150. District occupational therapist Cheryl Shapland (Shapland) assessed Student for purposes of a March 12, 2007 triennial IEP team meeting. Shapland had an undergraduate degree in kinesthesiology and a master's degree in OT. Prior to her employment with the District in 2001, Shapland had worked with autistic children in a gymnastics program. Shapland conducted assessments for the District and worked with two structured autism classes and two autism SDC's. Shapland trained District IBI staff in the implementation of sensory diets.

151. Shapland was certified to give the SIPT that had been given to Student by Roley. Shapland herself did not give this test to Student both to avoid the practice effect (an increase in score based on familiarity with the test) and because she perceived that the test was not appropriate for Student because it relied in large part on multiple step directions and consisted of 17 subtests given over two hours. Shapland noted that Roley

had not been able to complete the test with Student. Shapland's assessment of Student consisted of a parent interview, teacher interview, record review, observation of Student during an OT session at Orange County Therapy Services, discussion with Student's current occupational therapist, and her testing and observation performed at a District elementary school site. In addition to making clinical observations, Shapland administered the follow tests: the Bruininks-Oseretsky Test of Motor Proficiency (Second Edition) (BOT-2); the Teacher Checklist for OT; and the Sensory Profile: School Companion Teacher Questionnaire.

152. Shapland observed Student at Orange County Therapy on February 9, 2007. Student used a schedule that was checked off as each activity was completed. The activities included swinging, obstacle courses and handwriting. The occupational therapist at Orange County Therapy told Shapland that she thought that swinging activities helped Student to attend to tasks immediately afterward; however, during Shapland's assessment she saw Student attend without swinging beforehand. The occupational therapist at Orange County Therapy agreed with Shapland that some of Student's OT program could be done in a classroom, such as the table top writing work.

153. Mother and an ASC therapist were present during Shapland's assessments. Student transitioned to a work table and attended to the BOT-2 for up to eight minutes. Shapland administered the BOT-2 in a non-standardized way due to Student's inattention and inability to follow verbal directions. Student demonstrated "praxis," which Shapland defined as the motor planning of novel movements, by copying new shapes. Student was able to trace mazes, fold paper, connect dots, and cut a circle using a scissors. Student responded well to non-preferred activities and was given breaks using a therapy ball or trampoline. Student chewed some putty and the gel handle of a safety scissors. Student grabbed Shapland's breast once and threw a pencil one time. Shapland interpreted these gesture as Student expressing agitation. At one point

Student ran out the door and stood by a tree 100 feet away. Mother and the ASC therapist did not rush to get Student and Mother stated that Student would return. Based on the above, Shapland did not observe any behaviors that would prevent Student from participating in a District structured autism class.

154. Coppola completed the Teacher Checklist and the School Companion Teacher Questionnaire based on her knowledge of Student. Coppola indicated that Student would fall out of his chair, had poor attention, had trouble keeping his hands to himself, had difficulty transitioning and organizing his behavior, had poor writing skills, had difficulty interacting with peers and had tantrums. The results of these questionnaires indicated to Shapland that Student required lots of proprioceptive and vestibular input, but could also become overwhelmed from too many stimuli. Shapland plausibly explained that she did not give questionnaires to Mother or ASC therapists because she was gathering information about Student's performance in a school environment, not at home. Shapland did get information from Mother about her concerns for Student's eloping and aggressive behaviors at home.

155. Based on her assessments, Shapland concluded that Student had the following relative strengths: gross motor tasks (running, swinging, jumping); posture; attention of up to eight minutes, ability to follow a picture schedule; and foundational skills for handwriting. Shapland identified the following unique needs: a need for increased contrast in visual stimuli; seeking sensory input; avoiding sensory input; difficulty with transitions; poor attention to task; gives up or is easily frustrated; motor planning difficulty with novel tasks; and oral processing undersensitivity.

156. Shapland testified that the professional literature on OT stated that after the age of eight, clinic-based OT does not necessarily result in improvements in children. Moreover, according to Shapland, clinic-based OT did not "carry-over" into the classroom setting because the benefits were limited to immediately after the OT session.

Thus, Shapland recommended that the same techniques used in the OT clinic could be implemented in the classroom in collaboration with the teacher and/or IBI staff.

157. As part of the District's triennial psychoeducational assessment of Student, Coppola, in her capacity as a District autism specialist/IBI supervisor and Cheri Bene (Bene), an autism specialist/IBI supervisor for the District,<sup>8</sup> observed Student at home in February of 2007. Bene and Coppola watched Student work from a written schedule on a combination of academic and gross motor activities. ASC staff prompted Student for some tasks and also engaged in "planned ignoring" of some behaviors. Student attempted to strike a male ASC service provider when he did not want to transition from a preferred activity, a trampoline, but was blocked and redirected. Mother reported to Coppola that Student had broken a window at home and had damaged the walls in his room.

158. School psychologist Grant participated in the District's triennial psychoeducational assessment of Student, which resulted in a report dated March 6, 2007. Grant observed Student at home, spoke with Mother, and spoke with Underwood from ASC. At a school site, Grant gave Student the Leiter International Performance Scale – Revised (Leiter-R), a non-verbal cognitive assessment, which resulted in full scale IQ score of 41. Grant also administered selected subtests of the Bracken Basic Concept Scale – Third Edition – Receptive (Bracken), a non-verbal test of pre-academic skills. Grant administered the test in a non-standard way because Student was above the age range for a standard application of the test. Grant persuasively explained that the test was valuable to screen Student's basic abilities. On the Bracken, Student demonstrated:

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<sup>8</sup> Bene had extensive experience working with children with autism at a foundation that ran a day program, a non-public school and a residential facility. Bene possessed a master's degree in education and had written her master's thesis on ABA.

that he knew single-digit numbers; that he could understand the words “big, small, long, little, not the same, and short”; that he could recognize the shapes of star, heart, circle, square, triangle, round, diamond, oval and rectangle; and that he could identify concepts like children being in a line or ducks being in a row. Grant noted that during her home observation, which she described as “a highly structured, routine and familiar environment,” Student read three letter words, used “touch math” to add digits and identified some two digit numbers. Grant also administered the VMI, which involved copying shapes. The VMI resulted in a standard score of 63, which was equivalent to the first percentile and equivalent to an age of four years, ten months. Grant assessed Student’s attention using the SNAP-IV attention rating scale, which was completed by Mother. Mother’s information resulted in a SNAP-IV result of Student’s behaviors in inattention, hyperactivity and oppositional behaviors falling in the top five percent of severity. Grant noted that Underwood reported that Student attended to tasks for about 15 seconds at a time during maximum teaching session times of 10 to 15 minutes. Coppola gave Student the Brigance Diagnostic Comprehensive Inventory of Basic Skills – Revised (Brigance) which resulted in the following subtest scores: readiness – between kindergarten and second grade; listening – kindergarten; word recognition – pre-primer; word analysis – unable to identify initial and final consonants; functional word placement – pre-primer; writing – able to legibly write uppercase letters with difficulty with mechanics and neatness; math – needed to rely on touch-math sheets; time – first grade; and money – able to name coins and the value of a penny.

159. Student’s psychology expert, Dr. Mucci, was critical of the District’s reporting of a full scale IQ score on the Leiter-R. Dr. Mucci did not believe that the full scale score was reliable because only a limited number of subtests were given. Dr. Mucci’s criticism was not persuasive because she did not appear knowledgeable about the Leiter-R. In particular, although Dr. Mucci testified that Student showed strength on

the “design analogies” subtest, she was unable to say what this subtest assessed. Dr. Mucci acknowledged that the District’s administration of the VMI in February of 2007, when compared to the District’s administration of the VMI in January of 2004, showed that Student had made progress. Dr. Mucci also acknowledged that the District’s administration of the Vineland in 2007, when compared to the District’s administration of the Vineland in January of 2004, showed that Student had increased his standard score from 50 to 59 in communication, had increased his standard score from 47 to 63 in daily living skills, but had not made progress in socialization. Notably, the Vineland is a rating scale that relied on Mother’s reporting, not that of District personnel, demonstrating that Mother reported progress.

160. Student was also assessed in the area of speech and language as part of the District’s 2007 triennial assessment. Although Student’s speech and language expert Moore would have liked to see more expressive vocabulary assessments, Moore was not critical of the District’s administration of speech and language assessments in February of 2007. Student offered no other evidence that these speech and language assessments were improper.

161. An IEP team meeting was held on March 12, 2007. Mother attended with an attorney, a law clerk and Underwood. The IEP identified that Student had the following unique needs: speech and language, including articulation, expressive and receptive abilities and pragmatics like social greetings; academics; gross motor skills; social-emotional; behavior; and sensory issues such as mouthing objects. The team discussed the District’s recent assessment of Student, Underwood’s report and recommendations, the proposed goals, the levels of training of District staff, and the possibility of transitioning Student from a home and clinic program to a school setting. The following placements were considered: general education, SDC, home, instruction in a non-classroom setting, NPA services and DIS. The IEP contained goals to address all of

the above identified areas of need. All of the goals contained understandable summaries of Student's baseline performance, were measurable, and set forth measurable objectives with target dates for achievement. Next to each goal there was a chart setting forth who would be responsible for each goal and how progress would be measured. Mother initialed the box indicating that she had received a notice of procedural safeguards and had participated in developing the IEP.

162. At the March 12, 2007 IEP team meeting, Underwood stated that the function of Student's maladaptive behaviors was task avoidance and sensory seeking. Underwood expressed to the IEP team that she did not believe that Student was ready to return to school based on his potential danger to other classmates and his potential danger to himself. As to being a danger to himself, Underwood was concerned that Student had broken windows at home and might do so at school. Underwood presented goals that she drafted.

163. At hearing, Underwood offered the opinion that ABA services from ASC were appropriate for Student and Underwood viewed the District's offer of IBI services as a reduction in services. However, Underwood had no knowledge of the District's IBI program, demonstrating that she had no basis on which to form an opinion about the relative appropriateness of ASC's version of ABA services versus the District's ABA-based IBI program. Similarly, Underwood opined that she was concerned about the level of training received by District classroom IBI aides; however, Underwood conceded that she had no knowledge of the level of training received by District personnel. Accordingly, Underwood's opinions about the appropriateness of District programs were not persuasive.

164. The March 12, 2007 IEP offered the following transition plan from Student's in-home ABA program to an autism behavior class: Week 1 – 35 hours of the current NPA program plus two hours NPA supervision and one hour of collaborative

District/NPA supervision, student to visit the classroom three times for 30 minutes each, classroom teacher to observe Student at home for two hours; Week 2 – 30 hours of the current NPA program plus two hours NPA supervision and one hour of collaborative District/NPA supervision, Student to attend class for one hour per day; Week 3 – 25 hours of the current NPA program plus one hour of NPA supervision and one hour of collaborative District/NPA supervision, Student to attend class for two hours per day; Week 4 – 17.5 hours of the current NPA program plus one hour of NPA supervision and one hour of collaborative District/NPA supervision, Student to attend class for three and one half hours per day, District IBI tutors to overlap with NPA staff for three hours, and a progress meeting for one hour with an NPA supervisor; Week 5 – three hours of the current NPA program plus one hour of collaborative District/NPA supervision, Student to attend class for six hours per day, plus two hours of one-to-one District IBI afterschool per week; and Week 6 – Student to attend class for six hours per day, plus five hours of one-to-one District IBI afterschool per week.

165. According to District autism specialist Bene, the intent of the March 12, 2007 IEP transition plan was to move Student back into a public school setting in collaboration with ASC. To Bene, the plan was appropriate because it relied on slow integration of Student into a classroom and included a progress meeting at which the speed of the transition could be adjusted depending upon the data collected on how well Student was adapting.

166. The March 12, 2007 IEP also offered the following: two individual 30-minute speech therapy session plus one 30-minute group speech therapy session per week; two 30-minute APE sessions per week; one 30-minute individual OT session at school and one 45-minute individual OT session at an NPA clinic until September 12, 2007, after which Student would receive two 30-minute individual OT sessions per week at school plus 30 minutes per week of occupational therapist consult to the classroom



teacher; ESY plus 15 hours per week of IBI for two weeks in August of 2007 during the school break at another elementary school; and, after Student had transitioned back to a classroom setting, two hours of IBI supervision per month.

167. The March 12, 2007 IEP contained occupational therapy goals of improving near/far copying and improving self-control through the use of a sensory diet. Student's OT expert, Roley, reviewed the March 12, 2007 IEP. Roley did not think that the OT goals in this IEP addressed all of the areas of need that she had identified in her assessment. Roley criticized this IEP for having present levels of performance that she considered to be outdated; however, Roley's criticism on this point was not persuasive because Student had not attended a District program since May 17, 2006, Mother had limited the District's access to current information about Student, and providers like Roley could have, but did not, convey their opinions to the District prior to or at the March 12, 2007 IEP team meeting.

168. Mother had observed the autism behavior class proposed placement two times. Mother testified that during one visit she saw an aide redirect one of the students by pulling the child by the hood on his garment. Mother also observed one child grab another child who had been yelling and banging his head. Mother did not think Student would make progress in this class and was concerned that Student might model the negative behavior of other students. District school psychologist Janice Casteel accompanied Mother and Mucci when the two observed the placement. This visit lasted approximately 20 minutes, 10 minutes of which involved class observation. Casteel did not observe any aide inappropriately prompt any children by pulling on the child's clothing. Casteel did observe a child flop to the floor in the classroom, but the child responded to redirection and began working. Casteel did not see any self-injurious behavior by any student. Mother and Mucci were also shown the APE room, the speech room and the swimming pool.

169. Dr. Mucci had no problem with the physical layout of the classroom other than her observation that a scissors had been left on a table, which was a potential danger. Dr. Mucci was critical of how other students in the class were handled, in particular, she observed that a student who was banging his head was removed from the room because this was upsetting to another student. Dr. Mucci thought that the student who was upset should have been removed, not the self-injurious student. Dr. Mucci did not think this classroom would be appropriate because she had concluded based on her observations that the classroom relied on the TEACCH method of educating students with autism and that only a small portion of the educational program used ABA methods. Dr. Mucci's main concern with the autism behavior class was that Student had made progress in his home program and she would not want to jeopardize this progress by seeing Student attend a program with a different methodology. Dr. Mucci was also concerned about the possibility that physical education with other students would be overstimulating to Student and cause him to act out. Underwood had also observed the proposed autism behavior class placement. She generally perceived that the Students were not sufficiently redirected. As to Student, Underwood's concern was that Student would model maladaptive behaviors such as head banging. Underwood was also concerned that it would be overstimulating for Student to participate in physical education with other Students. However, Underwood and Mucci's criticisms were not persuasive because they had no knowledge of the strengths of the District's IBI program and because they did not offer an explanation of how it was that the school environment would be overstimulating or harmful to Student when, as part of his therapeutic program with ASC, Student was taken to busy places such as coffee shops and supermarkets and where Student also participated in multiple group sports activities in public places.

170. Mother did not agree to the March 12, 2007 IEP. Mother expressed that she intended to continue to fund Student's in-home ABA program and that the other DIS services were rejected with the exception of one time per week of clinic-based OT.

171. Prior to the March 12, 2007 IEP, Mother would not release to the District any written records or reports prepared by Underwood, Roley, Dr. Mucci or Moore. Mother would not allow any exchange of information other than through oral conversations, and then, only if Mother received three days notice of the content of the conversations and the date. At hearing, Mother explained that she did not want the District to have information that she considered confidential and irrelevant to Student's triennial assessment. The District requested that all of Student's providers with current information attend the IEP team meeting, however, only Underwood attended.

172. Mother and Father paid the following amounts to ASC for services between July of 2006 and March 12, 2007, excluding, where appropriate, billing for "training" or summer camp: July of 2006, \$10,266.85 for 20 supervision hours and 146 therapist hours;<sup>9</sup> August of 2006, \$8,323.15 for 13 supervision hours and 126 therapist hours (calculated by subtracting \$618.75 for 11.25 camp hours from the total bill of \$8,941.90); September of 2006, \$8,758.75 for 10 supervision hours and 139 therapist hours; October of 2006, \$10,037.50 for 10 supervision hours and 164 therapist hours; November of 2006, \$8,369.35 for 9 supervision hours and 135 therapist hours; December of 2006, \$8,813.75 for 10 supervision hours and 140 therapist hours; January of 2007, \$11,838.75 for 18 supervision hours and 179 therapist hours (calculated by subtracting \$1,086.25 for 19.75 "training" hours from the total bill of \$12,925); February of 2007, \$8,713.10 for 16 supervision hours and 126 therapist hours (calculated by subtracting \$247.50 for 4.5 "training" hours from the total bill of \$8,960.60); and, March

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<sup>9</sup> All ASC billing increments have been rounded up or down to even numbers.

1, 2007 through March 12, 2007, \$3,520 (calculated as 8 days of therapy on March 1, 2, 5, 6, 7, 8, 9, and 12, 2007 at 8 hours per day at the rate of \$55 per hour and excluding supervision hours because the monthly clinic meeting occurred on March 21, 2007). Adding the above, Parents paid a total of \$78,641.20 to ASC for services excluding summer camp and "training" between July 1, 2006 and March 12, 2007.

173. Dr. Mucci issued a report dated March 13, 2007, one day after the IEP team meeting. Dr. Mucci performed her own assessment of Student based on assessments and observations of Student in the home conducted in September of 2006 and February of 2007. According to Dr. Mucci, Student appeared to have made progress between her home observations in September of 2006 and February of 2007. Dr. Mucci observed that Student was attending better and was less aggressive toward the therapist. Dr. Mucci observed Student during a community outing in November of 2007 and saw that Student was able to stand on line, order food, and pay for it with money provided by Mother. Student sat in the coffee shop and was able to wait until Mother was finished, despite his desire to leave. Upon leaving, Student entered the car and buckled his own seatbelt. Dr. Mucci recommended that Student remain in a 40 hour per week home-based ABA program until he was prepared to return to school. Upon returning to school, Dr. Mucci recommended: 40 hours per week of ABA therapy including 15 hours per week of home-based ABA therapy and supervisory time, a full-time ABA therapist to shadow Student at school, a single ABA supervisor for all settings and consistency of daily routine. In general, Dr. Mucci also recommended, in relevant part: twice monthly meetings of all ABA providers, collaboration among all service providers, continued pharmacological intervention, increased opportunities for typical peer interaction such as "peer mediation" (a program where typical school peers are used to model social interaction), and parent training in ABA techniques. Dr. Mucci recommended that Student receive ABA services in a "nonpublic setting" which Dr.

Mucci intended to mean outside of a classroom, not necessarily by a non-public Agency. Dr. Mucci concluded that Student was “unable to participate in any size group setting,” however; her opinion on this point was not persuasive because she had never observed Student in a group setting other than with his two sisters. Dr. Mucci believed that a more restrictive setting was needed for Student because of the danger to others.

174. As part of her assessment, Dr. Mucci reviewed a report by the University of Washington dated March 22, 2004. The University of Washington “Child Development Team Psychological Re-Evaluation” concluded, based on information from Mother, that Student’s placement at the time was appropriate, as was the plan to have Student attend the autism SDC in the fall. The University of Washington’s conclusion regarding Student’s placement was not repeated in Dr. Mucci’s report. Dr. Mucci’s failure to address the University of Washington’s 2004 conclusion that Student was in an appropriate program undermined Dr. Mucci’s overall credibility by demonstrating that despite having reviewed the document, she did not address it in her report or testimony because it appeared to contradict Student’s contentions at hearing.

175. Dr. Mucci’s opinion that Student had made progress with ASC, and that she would recommend further services was not persuasive because Dr. Mucci acknowledged that she had not reviewed the data collected by ASC to determine if Student had made progress. Moreover, Dr. Mucci’s March 13, 2007 report was written approximately five months after she administered her standardized assessments and failed to include any information from Postil’s FAA.

176. Dr. Mucci acknowledged at hearing that it would be possible to slowly transition Student back to a school environment if a program using the same ABA principles as Student’s home program was applied.

177. Student’s attorney provided the District with Dr. Mucci’s March 13, 2007 report on March 15, 2007, three days after Student’s triennial IEP team meeting had

been held. In light of the above, the District did not have as complete a picture of Student as of March 12, 2007, as they could have.

178. Mother paid Dr. Mucci \$3,100 for her assessments and report and \$2,000 for the FAA performed by Postil. Mother subsequently paid Dr. Mucci \$475 for a report generated on or about July 14, 2007; \$450 for an assessment performed on November 17, 2007, and \$1,250 for record review performed on November 25 and 26, 2007.

179. Dr. Nguyen's diagnosis of Student as having Bipolar Disorder was not communicated to the District until April 9, 2007. On that day, Dr. Mucci wrote a letter to the District stating that she recommended "home hospital instruction," in part based upon Dr. Nguyen's dual diagnoses of Bipolar Disorder NOS and autism.

180. An IEP team meeting was held on July 17, 2007, to offer a new placement because the autism behavior class was no longer available. The transition plan was adjusted based on information that the District had received after the March 12, 2007 IEP that indicated that Student now had a diagnosis of Bipolar Disorder (Dr. Mucci's letter) and that Student's aggression had become more severe since May of 2006 (Dr. Ghebrial's letter). Although at hearing, Student's witnesses uniformly testified that Student's aggression had lessened in his home program, it was reasonable for the District to believe that Student's aggression had gotten worse because Student had restricted the District's ability to review Student's records and Student's physician, Dr. Ghebrial, had sent a letter in response to a District request for information, in which he stated that Student's aggression had gotten worse since May of 2006. In order to address Mother's concern that Student was not ready for a classroom environment, a self-contained SDC was proposed in conjunction with a transition plan for Student to gradually re-enter a classroom. The July 17, 2007 transition plan included increased shadowing of Student's home program by District personnel followed by slow transition into a self-contained classroom followed by slow introduction to other school settings.

The goal was to transition Student to a placement with more peer interaction. The transition plan included a review by September 21, 2007.

181. District occupational therapist Shapland testified that the sensory diet recommended in the March 12, 2007 and July 17, 2007 IEP's would be developed once Student was in a placement. Shapland believed that a sensory diet was a very important part of a child like Student's program and generally is provided to parents in order for Student to perform OT activities across domains.

182. Mother did not think that the proposed self-contained classroom was appropriate because it contained a window and was too far away from school offices and other classrooms. Mother was concerned that Student would be alone with a therapist, whereas in the home program, even when Student was alone with the therapist, another person was in the house. Mother's concerns were not persuasive because Student would be under adult supervision at all times in the self-contained classroom and no evidence supported Mother's concerns that the self-contained classroom was so isolated from the rest of the school that additional staff could not be called to assist with Student if needed. At hearing, Underwood expressed concern that the physical layout of the self-contained classroom proposed on July 17, 2007, might be dangerous for Student; however, Underwood's concerns were not persuasive because they were not based on observation of the proposed placement, but instead were based on her interpretation of the IEP meeting notes.

183. Underwood did not attend the July 17, 2007 IEP team meeting. Underwood's goals that had been proposed at the March 12, 2007 IEP team meeting were incorporated into the July 17, 2007 IEP. At hearing, Underwood was critical of the July 17, 2007 IEP because the present levels of performance did not match those observed by ASC. Underwood also opined that Student's goals should also include goals regarding use of a safety belt, elopement and ingestion of inedible objects. However,

Underwood's criticisms were not persuasive given that Student had not been in a District program since May 17, 2006, and no ASC personnel participated in the July 17, 2007 IEP team meeting. Further, there was no evidence that had such goals been proposed by Mother and Father that they would have been rejected.

184. Underwood had heard Student request "school" on a regular basis during the time that ASC was serving Student. However, Underwood did not think that as of the date of hearing Student was ready to return to school because Student's "cycling" behavior could cause Student to be a danger to others. Underwood described that Student sometimes goes up to three weeks without a major behavioral outburst and that other times two people are needed to work with Student. Underwood acknowledged at hearing that the potential for typical peer interaction in a school setting was a positive factor in considering the District's proposed placement. Underwood's concerns for Student's school readiness, which was generally based on the possibility of Student injuring others, does not provide a persuasive reason why Student cannot be placed in a school setting. In particular, the fact that a substantial portion of the ASC program is outside the home, in locations where the possible antecedents to Student's behaviors cannot be predicted, let alone controlled by ASC, demonstrates that a school environment would be a more appropriate environment for Student. In a school placement, the professionals working with Student have the ability to modify the environmental antecedents to Student's behaviors. In other words, if Underwood believed that it was safe to take Student out in the community to restaurants, shopping centers and parks, and have him in close proximity to random people, any potential harm to Student or others because of his behavior cannot be so great that Student is incapable of being placed in a school environment.



## CONCLUSIONS OF LAW

### STATUTE OF LIMITATIONS

1. Due process complaints filed prior to October 9, 2006, are subject to a three year statute of limitations, whereas due process complaints filed after October 9, 2006, are subject to a two year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2); 34 C.F.R. 300.511(e); Ed. Code, § 56505, subds. (l) & (n).)

### BURDEN OF PROOF

2. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, the District has the burden of persuasion for the issues raised in OAH case number N2006070729, and Student has the burden of persuasion for the issues raised in OAH case numbers N2006100264 and N2007070928.<sup>10</sup>

### FAA AND BIP (ISSUES 1 AND 3D)

3. Student contends that he was denied a FAPE because the May 20, 2005 District FAA and subsequent BIP did not meet the requirements of title 5, California Code of Regulations, section 3052. In particular, Student contends: that the person who prepared the FAA was not properly qualified; the FAA failed to include sufficient descriptions of the locations where behaviors were observed, the functions of behaviors and the consequences following a behavior; information on home behaviors was not addressed; it was not clear what documents were reviewed in formulating the FAA;

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<sup>10</sup> Student's motion to shift the burden of persuasion to the District was denied on July 26, 2007.

behavioral consequences were not properly defined; cognitive and developmental factors were not adequately considered; a prior FAA was not properly considered. The District contends that its May 20, 2005 FAA was based on systematic data collection, was performed by a qualified person, school psychologist Dotson, and contained appropriate analysis of antecedent behaviors, consequences and environments. The District contends that Student's expert on FAA's, Postil, did not provide persuasive evidence given that her own FAA was not useful for the purported purpose for which it was conducted. The District contends that the appropriateness of the May 20, 2005 FAA was further demonstrated by the lack of any serious behavior reports for nearly a year after the FAA was implemented.

4. FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE

requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

7. The *Rowley* standard is used to determine whether a BIP was adequate. (*Eric J. v. Huntsville City Board of Ed.* (U.S.D.C. N.D. Ala. 1995) 22 IDELR 858 .) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Education* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265-1268.)

8. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Federal law does not contain a specific definition of "behavioral intervention" and does not any impose any specific requirements for how to conduct or implement a functional analysis assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Community Unit School Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) California has defined "behavioral intervention" as the systematic implementation of procedures that result in lasting positive changes in behavior through skill acquisition and the reduction of problematic behavior. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) "Behavioral interventions" are designed to provide the individual with greater access to a variety of community settings, social contacts and public events and to ensure placement in the least restrictive environment." (*Ibid.*)

9. California has specific regulations regarding FAA's and BIP's. California defines a "behavioral intervention plan" as a written part of an IEP "that is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (f).) The BIP must contain a statement of the frequency of consultation between the behavior intervention case manager and the parents and staff responsible for implementing the plan. In addition, the BIP must contain: 1) a summary of relevant and determinative information gathered from a functional analysis assessment; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of the use of the interventions and the frequency of the

targeted and replacement behaviors; including specific criteria for discontinuing the use of the intervention for lack of effectiveness or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other noneducational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. (*Ibid.*)

10. Under California regulations, the following criteria apply to BIP's: 1) they must be developed by the IEP team, which must include the behavior intervention case manager; 2) they must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) they must be based on an FAA, be in the IEP and used in a systematic manner; 4) emergency interventions shall not be a substitute for a BIP; 5) behavioral interventions cannot cause pain or trauma; and 6) to the extent possible the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

11. Under California regulations, an FAA must be conducted by a person with documented training in behavior analysis with an emphasis on positive behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).) The information gathered for the FAA must include information from: direct observation; interviews with significant others, and review of available assessments and records. The FAA procedure must include, in relevant part: 1) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity; 2) systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; 3) systematic

observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior; 4) ecological analysis of the settings in which the behavior occurs most frequently by looking to factors such as the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities; 5) review of records for health and medical factors that may influence behaviors such as medication levels, sleep cycles, health, and diet; and 6) review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (*Ibid.*)

12. Under California regulations, an FAA report must include: 1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms; 2) a description of the targeted behavior(s) that includes baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs; 3) a description of the rate of alternative behaviors, their antecedents and consequences; and 4) recommendations for consideration by the IEP team which may include a proposed BIP. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2).) An IEP must be held after the FAA is completed. (Cal. Code Regs., tit. 5, § 3052, subd. (c).)

13. Based on the FAA, interventions may include: 1) altering the antecedent event to prevent the occurrence of the behavior (e.g., providing choice, changing the setting, offering variety and a meaningful curriculum, removing environmental pollutants such as excessive noise or crowding, establishing a predictable routine for the individual); 2) teaching alternative behaviors that produce the same consequences as

the inappropriate behavior (e.g., teaching the individual to make requests or protests using socially acceptable behaviors, teaching the individual to participate with alternative communication modes as a substitute for socially unacceptable attention-getting behaviors, providing the individual with activities that are physically stimulating as alternatives for stereotypic, self-stimulatory behaviors); 3) teaching adaptive behaviors (e.g., choice-making, self-management, relaxation techniques, and general skill development) which ameliorate negative conditions that promote the display of inappropriate behaviors; and 4) manipulating the consequences for the display of targeted inappropriate behaviors and alternative, acceptable behaviors so that it is the alternative behaviors that more effectively produce desired outcomes (i.e., positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behaviors). (Cal. Code Regs., tit. 5, § 3052, subd. (d).) Acceptable responses to the targeted behaviors are: 1) the behavior is ignored, but not the individual; 2) the individual is verbally or verbally and physically redirected to an activity; 3) the individual is provided with feedback (e.g., "You are talking too loudly"); 4) the message of the behavior is acknowledged (e.g., "You are having a hard time with your work"); or 5) a brief, physical prompt is provided to interrupt or prevent aggression, self-abuse, or property destruction. (Cal. Code Regs., tit. 5, § 3052, subd. (e).)

14. Here, the May 20, 2005 FAA was properly conducted. The person who drafted the FAA, Dotson, had documented training in behavioral analysis with an emphasis on positive behavioral interventions. Observational data was gathered by Sedehi, who had experience providing ABA therapy, and her classroom aides. Sedehi's observations had been systematic and included data on frequency, duration, environment and antecedents. Although data was not collected on the intensity of Student's behaviors, this was less important at the time because the main behavioral concern was pinching and general aggression. Data was also collected from interviewing

Mother. The FAA reflects that Dotson considered, based on information from Sedehi, the prior interventions that had been found to work. Dotson also considered the impact of health and medical factors such as Student's medication changes. The FAA document reflects that Dotson analyzed the behavior data and consequences, developed a theory for the function of the behavior and made the recommendation that a BIP was required. The District's experts, Bellante and Dores, persuasively testified that the FAA had been properly conducted. In contrast, Student's expert witness, Postil, was not persuasive because her own FAA was susceptible to similar criticisms as those that she made regarding the District's FAA. (Factual Findings 61-75, 121.)

15. The BIP resulting from the FAA was also proper. Student's expert Postil opined that the BIP was inadequate because the FAA had been inadequate. As discussed above, the FAA was sufficient to develop a BIP. The BIP contained a plan to address Student's behavioral needs by enabling Student to demonstrate desired replacement behaviors. Modifications of antecedents were suggested such as increasing communication by using visual cues for Student, teaching Student how to better communicate through visual aids, vocalization and teaching Student to express his anxiety towards tasks by "grunt[ing] and stomp[ing]" rather than lunging at staff. These alternatives provided a range of communication methods for Student to express his needs prior to an aggressive incident. Other modifications included giving Student more choice of reinforcers, limiting the duration of activities and making sure that Student could get out his pinching urges with his "pinching pillow." The above contents of the BIP were within the range of acceptable responses to behavior set forth in title 5, California Code of Regulations, section 3052. In light of the above, the BIP was proper. (Factual Findings 61-75, 121.)



## IEE REQUESTS (ISSUE ONE)

16. Student contends that the District had an obligation to provide IEE's in response to Student's May 30, 2006 letter requesting IEE's in the areas of "Occupational Therapy, Speech and Language, Applied Behavioral Analysis and Functional Analysis." In particular, Student contends that IEE's should have been provided despite the fact that at the time of Student's request, the last District speech and OT assessments had occurred in January of 2004. Student contends that the authority relied on by the District for its position regarding the OT and speech therapy assessments does not apply because the authority pre-dates the current version of the IDEA. The District contends that it responded properly by filing a due process request that raised the issue of whether the District's May 20, 2005 FAA had been appropriate. As to Student's other IEE request, the District contends that pursuant to *Letter to Thorne*, Office of Special Education Programs, February 5, 1990, it could reasonably deny IEE requests that related to District assessments that were more than two years old without filing for due process and which came after parent had already presented independent OT and psychoeducational assessments at IEP team meetings.

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

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

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

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

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

19. Under the regulations that applied to the predecessor to the current IDEA, The United States Department of Education, Office of Special Education Programs (OSEP), considered the question of whether an education agency was required to file a request for due process when a parent has requested an IEE at public expense because the parent disagreed with assessments performed over two years earlier. OSEP responded as follows, after noting that the applicable regulations did not contain a timeline for requesting an IEE: "it would not seem unreasonable for the public agency to deny a parent reimbursement for an IEE that was conducted more than two years after the public agency's evaluation. Therefore, it would not be necessary for the public agency to initiate a hearing in this situation." (*Letter to Thorne* (OSEP February 5, 1990) 16 IDELR 606.) The ALJ declines to apply *Letter to Thorne* because it directly contradicts Code of Federal Regulations, title 34, part 300.502(b)(2), which unambiguously sets forth an education agency's options of filing for due process, providing the IEE, or proving at

a hearing that the IEE did not meet “agency criteria.” Moreover, the ALJ is unaware of any statutory or regulatory timeline other than the statute of limitations that would proscribe a student’s ability to request an IEE.

20. Here, the District met its burden of proving that the May 30, 2005 FAA was appropriate. (See Legal Conclusions 14 and 15.) Accordingly, the District need not reimburse Student for Postil’s FAA because the May 30, 2005 FAA was appropriate, such that an IEE based on disagreement with it was not warranted. There was no subsequent FAA for parents to have disagreed with. Moreover, Postil’s FAA cannot be considered to be an IEE because it was not consistent with the District’s standards. First, Postil’s FAA involved observation of Student in three different environments, none of which was a school, making it useless for purposes of demonstrating that the District’s May 20, 2005 FAA was improper. Further, because Postil’s written FAA was issued in December of 2006, six months after her observations, it was useless because it did not contain current data. Accordingly, Student is not entitled to reimbursement for Postil’s FAA. (Factual Findings 61-75, 108, 112-121, 123-124.)

21. As to the OT assessment by Roley, although the District did not file for due process to contest the IEE request, it is not reimburseable. Roley unequivocally testified that she considered her assessment to be a private assessment conducted solely for the parents, which was intended to be used to prepare for the due process hearing. Accordingly, Roley’s assessment was not an IEE that should be paid for at public expense because it was prepared in anticipation of a due process hearing. Moreover, in 2004, Student had already presented the District with an OT IEE (although not at public expense) from the University of Washington. The District had already considered the University of Washington IEE at IEP team meetings held in 2004, making an additional IEE redundant. Notably, Student did not claim that the University of Washington IEE should have been at public expense and provided no proof of its cost. As to Moore’s

speech and language assessment, the District did not file for due process to assert that its assessments had been appropriate and did not put on evidence at hearing to demonstrate that this assessment failed to meet "agency criteria." Accordingly, Moore's assessment is reimburseable in the amount of \$1,000 as an IEE. (Factual Findings 14-17, 22, 24, 27, 41, 43-45, 108, 112.)

22. To the extent Student is claiming that Dr. Mucci's neuropsychological assessment should be reimbursed as an IEE at public expense, Student's claim fails. Student's May 30, 2006 IEE request referred to requesting a "functional analysis" assessment and expressly alleged that an "Applied Behavioral Analysis assessment" had not been done by the District. There was nothing in the May 30, 2006 IEE request that could be interpreted as a request for a neuropsychological or psychoeducational assessment. In a June 27, 2006 letter, Student for the first time requested an IEE on the ground that he disagreed with the District's January 23, 2004 psychoeducational assessment. However, as in the area of OT, Student had provided the District with a neuropsychological IEE (although not at public expense) from the University of Washington during the spring of 2004, immediately after the District had conducted its triennial assessments. Student did not present any evidence of the cost of this report. Further, Dr. Mucci did not produce a neuropsychological assessment of Student until March 13, 2007, months after the District had conducted triennial assessments in January of 2007, and after an IEP team meeting was held on March 12, 2007. By the time Dr. Mucci produced her written report, it was moot because the District had already conducted a superseding psychoeducational assessment in January of 2007 and Dr. Mucci's report was not based on current data. In light of the above, Student is not entitled to reimbursement for Dr. Mucci's services in preparing her March 13, 2007 report. (Factual Findings 18, 25, 27, 33, 108, 112, 158, 173, 177.)

## ASSESSMENTS IN ALL AREAS OF SUSPECTED DISABILITY (ISSUES 2A, 3A, 4A, AND 5A)

23. For the 2003-2004 school year, Student contends that the District failed to properly assess him in all areas of suspected disability because the operative IEP as of the date the statute of limitations began running had been based on old, inadequate assessments. Student further contends that the assessments prior to an IEP conducted in January of 2004, were insufficient and not properly conducted. For the 2004-2005 school year, Student contends that he was not assessed in all areas of suspected disability because the IEP's relied on prior assessments. In addition, Student contends that this claim was proven by Mother having sought assessments at the University of Washington, which should have resulted in further assessments in the areas of sensory processing. For the 2005-2006 school year, Student contends that he was not assessed in all areas of suspected disability because neither an FAA nor additional behavioral assessments were conducted by the District. For the 2006-2007 school year, Student contends that the District's triennial assessments, conducted at a time when Student had been withdrawn from school by his parents, were inadequate because the District's present levels of performance were drawn in part from the experiences of District personnel with Student prior to his departure from the District.

24. The District contends that for the 2003-2004 school year, the evidence established that Student was assessed in all areas of suspected disability using a variety of assessment instruments and that there was no evidence that Student had other areas of need that were not assessed. As to other school years, the District contends that there was no evidence presented that additional assessments would have been warranted. As to assessments conducted after Student withdrew from school, the District contends that its assessments were comprehensive and Student failed to produce any evidence at hearing demonstrating that Student had an area of need that went unassessed.

25. For purposes of evaluating a child for special education eligibility, the District must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child’s educational needs or related services needs. (34 C.F.R. § 300.303(a)(1) (2006); 34 C.F.R. § 300.536(b) (1999); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student’s parents, reassessments must not occur more than once a year, or more than three years apart. (34 C.F.R. 300.303(b)(1); Ed. Code, § 56381, subd. (a)(2).)

26. A school district must ensure that the assessments and other evaluation materials: 1) are selected and administered so as not to be discriminatory on a racial or cultural basis; 2) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; 3) are used for purposes for which the assessments or measures are valid and reliable; 4) are administered by trained and knowledgeable personnel; and 5) are administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b)(3); see also Ed. Code, § 56320.) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A school district is also required to ensure that the evaluation is

sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).)

27. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).) As discussed above, FAPE means special education and related services that are designed to meet the student's unique needs, comport with the student's IEP, and are reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District*, *supra*, 811 F.2d at p. 1314.)

28. "If the IEP team determines that changes are necessary to increase program effectiveness, the teacher and behavioral intervention case manager shall conduct additional functional analysis assessments and, based on the outcomes, shall propose changes to the behavioral intervention plan." (Cal. Code Regs., tit. 5, § 3052, subd. (f)(5).) Minor modifications to a BIP may be made if notice is given to the parent. (Cal. Code Regs., tit. 5, § 3052, subd. (g).)

29. A "behavioral emergency" is the demonstration of a serious behavior problem, that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (c).) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the parent and residential care provider, if appropriate, shall be notified within one school day whenever an emergency intervention is used or serious property damage occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(5).) After a "behavioral emergency," a "Behavioral Emergency Report" must be completed that includes: 1) the name of the student; 2) the setting and location of the incident; 3) the name of the staff

or other persons involved; 4) a description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and 5) details of any injuries sustained by anyone as a result of the incident. (*Ibid.*) The IEP team must determine if an existing BIP needs to be modified if a "Behavior Emergency Report" is written regarding an individual who has a BIP that involves a previously unseen serious behavior or when a previous BIP is not working. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(8).)

30. Here, for the 2003-2004 school year, Student was appropriately assessed in all areas of suspected disability. Student's allegations regarding the adequacy of assessments and IEPs prior to October 5, 2003, (three years prior to the date Student filed his first complaint) fall outside the three year statute of limitations that was in effect at the time the complaint was filed. There was no evidence presented that would demonstrate that assessments were warranted between October 5, 2003, the farthest date back under the statute of limitations, and the January of 2004 triennial assessments. As to the January of 2004 triennial assessments, Student did not offer any evidence that the District assessors were unqualified. To the extent Student attempted to prove that the assessments given were inappropriate, his experts were not credible. Most importantly, Student failed to demonstrate that additional areas of disability should have been assessed. In particular, the evidence showed that Student's behaviors at the time were not so severe that additional behavior intervention assessments should have been conducted. (Factual Findings 6, 8, 9, 13-28, 31-37, 39, 41, 42, 44, 46.)

31. For the 2004-2005 school year, the evidence failed to show that new assessments were warranted in the areas of OT and speech and language, particularly when Student's progress was reviewed at the February 1, 2005 IEP team meeting and Student's goals were adjusted. An additional psychoeducational assessment, the CIBS-R was given prior to Student's annual IEP and Student did not produce evidence



demonstrating that Student's needs had changed such that an entirely new psychoeducational assessment was required. Finally, an appropriate FAA had been conducted on May 20, 2005, when warranted by Student's educational needs. The fact that Student's Mother sought IEE's at private expense in March of 2004 at the University of Washington does not support an inference that the District should have conducted additional assessments during the 2004-2005 school year because the University of Washington assessments were considered by the IEP team in June of 2004. More importantly, the University of Washington assessments were generally consistent with the District's assessments. In light of these facts, Student was assessed in all areas of suspected disability in the 2004-2005 school year. (Factual Findings 50-75, 108, 112-121, 123-124.)

32. For the 2005-2006 school year, the District failed to assess Student in all areas of disability when it failed to conduct an FAA after the biting incidents that began March 27, 2006; however, the evidence does not support a finding that Student should have been assessed in other areas. As of January 23, 2006, Student's teacher, Coppola, had reviewed Student's BIP and concluded that Student had been showing improvement and the BIP had been working. However, the biting incident on March 27, 2006, was severe enough to require an accident report and was quickly followed by the April 3, 2006, biting incident that resulted in a behavioral emergency report. Both of these incidents involved Student being redirected to put his shoes back on, an antecedent to Student's behavior that had not been previously analyzed. In addition, both of these incidents involved an intensity of biting, hard enough to draw blood, which had not previously been seen or analyzed. Further, Student's medication changes provided another possible antecedent to the behavior that only further supported the need for a new FAA. Although Coppola explained at hearing that she recommended a behavioral support team referral on April 3, 2006, because it would have been faster

than an FAA, an FAA should have been conducted given the new antecedent and new intensity of the behaviors. The need for a new FAA was highlighted when, on May 17, 2006, Student bit aide Walters, drawing blood, after she attempted to redirect him to put his shoes on. While minor modifications to a BIP would have been permissible without an FAA, District personnel should have recognized that given a new antecedent and new severity of behavior, an FAA should have been conducted after the April 3, 2007 incident. The failure to conduct an FAA under these circumstances resulted in a deprivation of educational benefit given that the next biting incident, on May 17, 2006, resulted in Student having to leave school for the day and also resulted in the District seeking to educate Student in a more restrictive placement without first trying behavioral strategies. (Factual Findings 81-83, 86-95, 101-105.) As to other assessments in the areas of OT and speech therapy, the evidence did not show that the District would have been on notice that additional assessments were necessary. In the area of speech therapy, Student's progress had been reviewed and his goals adjusted at the February 7, 2006 IEP. Similarly, in OT, the evidence showed that Student had been making progress in OT, even on his behavior goals, up to the time of the February 7, 2007 IEP. In sum, Student was not properly assessed in all areas of suspected disability during the 2005-2006 school year because the District failed to conduct an FAA. (Factual Findings 88-90, 96, 99.)

33. For the 2006-2007 school year, Student was assessed in all areas of suspected disability. Student was given a comprehensive battery of assessments and numerous District personnel observed Student in his private program. Student had not been in a classroom setting since May 17, 2006, such that District staff had to rely on their earlier experiences with Student in describing his present levels of classroom performance. Student did not produce evidence demonstrating that the assessments

that were given were improper or improperly administered. Under these facts, Student's claim for the 2006-2007 school year fails. (Factual Findings 150-160.)

#### IEP GOALS (ISSUES 2B, 3B, 4B, AND 5B)

34. For the 2003-2004 school year, Student contends that his IEP goals were inadequate because: all goals were not sufficiently measurable; the OT should have addressed more than fine motor skills and attention issues; the speech-language goals were inadequate because the present levels of performance were inadequately described; the goals after January of 2004 did not address social skills or language pragmatics; and that the behavior goals contained inadequate present levels of performance. As to the 2004-2005 school year, Student contends that the goals were insufficient because: only three OT goals were written, none of which targeted visual-motor integration, sensory integration or gross motor skills; speech goals did not include social skills and pragmatics; behavioral goals beyond attending and interacting with peers were not included; and all goals were not measurable. For the 2005-2006 school year, Student contends that the OT goals in writing, "self control" and mouthing behaviors were insufficient and that OT goals should have been written in gross motor skills, sensory integration and visual special acuity. Student generally contends that his speech therapy goals were written with insufficient present levels of performance. For the 2006-2007 school year, Student contends that the goals proposed in the IEP's, that were never agreed to by Parents, contained inadequate goals in OT, speech and language, social skills, daily living skills, aggression, and academics. The District generally contends that as to all school years at issue Student's goals were appropriate and measurable.

35. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's

other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

36. Here, review of all of Student's goals from all IEP's at issue shows that all goals and present levels of performance were sufficiently understandable and measurable. Notably, the goals suggested at various times by Student's experts were no better written or any more understandable. For each year at issue, Student's IEP's contained an extensive number of goals in each identified area of need. There is nothing in the IDEA that specifies that an IEP contain a set number of goals, or for that matter, contain goals for every possible manifestation of a child's unique needs. Student's OT expert Roley implicitly acknowledged this when she offered her opinion that she personally would not have included writing goals for Student, even though it was an area of need. After Student left school on May 17, 2006, his private behavior provider ASC adopted the District's goals, further demonstrating that the District goals were appropriate and properly drafted. Looking at the goals in terms of what was reasonable at the time, rather than in hindsight, Student's goals in all IEP's at issue did not result in a failure to provide a FAPE to Student. (Factual Findings 2-4, 19, 20, 40, 44, 47, 57, 58, 60, 95, 96, 99, 100, 110, 119, 128, 161, 167.)

#### IEP TEAM ATTENDANCE AND PARENTAL PARTICIPATION (ISSUES 2C, 3C, 4C, AND 5C)

37. For the 2003-2004 school year, Student contends that numerous procedural violations occurred at the February 26, 2003 IEP team meeting; however, these allegations fall outside the statute of limitations period. (Legal Conclusion 1.) For

the 2004-2005 school year, Student contends that Parents were not allowed to meaningfully participate in the January 24, 2005 IEP team meeting because Mother did not feel that her concerns were addressed. For the 2005-2006 school year, Student contends that Mother was not allowed to meaningfully participate in the IEP process because Mother did not feel that she was receiving sufficiently frequent updates from classroom personnel regarding Student's behaviors. For the 2006-2007 school year, Student contends that at the March 12, 2007 IEP team meeting, Mother and Underwood expressed their concerns about Student returning to a public placement, but the IEP team did not take their concerns into account, because the IEP team recommended a public placement. The District contends that the evidence at hearing demonstrated that at all times Student's Parents were appropriately involved in the IEP process and that their input was taken into account. According to the District, the evidence at hearing showed that Mother's input was accepted by the IEP team numerous times, resulting in speech therapy, OT and Student's placement remaining unchanged despite the IEP team's opinion to the contrary.

38. An IEP team must include: 1) parents and/or their representative; 2) a regular education teacher if the student is or may be participating in the regular education environment; 3) not less than one special education teacher of the student; 4) a representative of the educational agency who is qualified to provide or supervise the provision of DIS and is knowledgeable about the general curriculum and the availability of resources within the educational agency; 5) an individual who can interpret the instructional implications of assessment results; 6) at the discretion of parents or the educational agency, other persons with knowledge of the student; and 7) when appropriate, the student. (Ed. Code, § 56341, subd. (b).) There is no requirement that the person who conducted a particular assessment attend the IEP team meeting. (*Ibid.*)

39. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a) (2006); 34 C.F.R. § 345 (1999); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

40. As discussed above, in matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

41. Here, as to all IEP team meetings during the relevant time periods, Student failed to demonstrate that Mother and Father were denied meaningful participation in the IEP team meetings, such that a procedural violation resulted. There were numerous instances throughout Student's educational history when the IEP team recommended a placement, such as the autism behavior class, or levels of service, in the areas of speech and OT, that Mother did not agree with. Significantly, Mother's input was taken into account by the IEP team, who did not ultimately change Student's services. For example, at the January 29, 2004 IEP, the team recommended reduced OT services, which Mother rejected. OT services were not reduced. At the February 1, 2005 and May 23, 2005 IEP team meetings, the team recommended reducing Student's speech therapy, however,

when Mother objected, no reduction was made. Similarly, the evidence showed that Student's privately-financed IEE's were considered by the IEP team when presented, as evidenced by the Student's OT goals as of June 4, 2004, being consistent with the recommendations of the University of Washington regarding use of a functional grasp for writing. The evidence also showed that at all times Mother was in communication with Student's teachers during the school year. Finally, to the extent Student contends that Mother and Father were denied meaningful participation in IEP team meetings after May 17, 2006, this contention is meritless given that Student was represented by a special education attorney at all IEP team meetings after Student withdrew from school. Further, at IEP team meetings after May 17, 2006, Mother and Father declined to ask questions and were invited to bring their own experts to the meetings, which supports an inference that the District encouraged, rather than prevented, Mother and Father from participating. Notably, Mother and Father provided the District with a report from their expert, Dr. Mucci, on March 15, 2007, three days after an IEP had been conducted at which the District had expressly asked for input from parents' experts. In light of the above, Student failed to meet his burden of showing that parents were denied an opportunity to meaningfully participate in the IEP process at any time. (Factual Findings 19-29, 49, 53, 56, 58, 76, 79, 84, 94, 95, 98, 103, 111, 161, 162, 170, 171-180, 183.)

42. Student's contention that the January 29, 2004 IEP team meeting was procedurally flawed because a speech therapist was not present is meritless in light of Mother's testimony at hearing that District speech therapist Jacques was present. (Factual Finding 20.)

#### IEP CONTENTS (ISSUES 3E AND 4D)

43. Student contends that the February 1, 2005 IEP and subsequent addendums, as well as the February 7, 2006 IEP, did not contain clear offers of FAPE. The District disagrees, contending that all IEP's met the statutory requirements.

44. An IEP must contain a statement of the special education and related services, to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided to the pupil to do the following: 1) to advance appropriately toward attaining the annual goals; 2) to be involved in and make progress in the general education curriculum and to participate in extracurricular and non-academic activities; and 3) to be educated and participate in activities with other individuals with exceptional needs and nondisabled pupils. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a)(4).)

45. Here, all of the IEP's at issue were reviewed at hearing and each was found to meet the statutory requirements. Each IEP set out a statement of educational services and program modifications related to Student's unique needs and his goals. Each IEP at issue addressed Student's placement and contained a clear statement of the extent to which Student would participate in education with nondisabled pupils. Although some IEP's required multiple meetings and/or addendum before being finalized, the ALJ could determine what Student's placement and related services were just by reading the documents. Accordingly, Student's claim that the February 1, 2005 and February 7, 2006 IEP's and addendums did not contain clear offers of FAPE is meritless. (Factual Findings 1-6, 19, 22, 23, 27-29, 40, 53, 56-58, 79, 94, 95, 97, 98, 161, 164, 166, 171, 180.)

#### DENIAL OF A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT (ISSUES 2D, 3F, 4E, 5D, AND 6)

46. For all school years at issue, Student contends that he was offered insufficient amounts of related services in the areas of OT, speech therapy and behavior therapy (including parent training), and that the classroom placement was inappropriate. The District contends that at all times, Student was offered a FAPE and that the evidence established that during the relevant time periods, Student made educational progress. As to IEP's conducted after Student was withdrawn from school, the District contends



that the IEP's were appropriate in light of the information known to the District at the time, particularly when Parents would not provide any documents relating to Student that were generated by privately-retained service providers. As to the District's placement offers on March 12, 2007 and July 17, 2007, the District contends that these offers were appropriate based on information known by the District at the time, particular where the IEP's contained detailed transition plans that took into account the need for Student's privately-retained behavior service provider to be involved in the transition process.

47. A child receives FAPE when he receives access to an education that is sufficient to confer "some educational benefit" upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program in light of what was reasonable at the time. (See *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Gregory K. v. Longview School District, supra*, 811 F.2d at p. 1314.) To provide FAPE, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District, supra*, 811 F.2d at p. 1314.)

48. As to all school years at issue, Student was offered sufficient levels of speech therapy and OT. Between October 5, 2003 and June of 2004, Student received two 45-minute individual OT sessions per week, plus one 45-minute group OT session per week. At hearing, Roley (Student's OT expert) testified that Student should have received two 50-minute clinic OT sessions plus some consultation time with the classroom teacher. Obviously, Student cannot be said to have been underserved during 2003-2004 when he received more OT therapy than Roley recommended. Roley did not

plausibly explain how her recommendation was more appropriate than the two 30-minute individual OT sessions per week plus 30 minutes of OT consultation to the classroom that was specified in Student's IEP's for the period after June of 2004, with the exception of make-up sessions implemented after the fall of 2005. The evidence at hearing also showed that a sensory diet had been implemented in Student's classroom placements. As to speech therapy, Student's expert Moore was unable to persuasively explain how her recommended program, which would have resulted in 100 minutes of individual speech therapy per week, plus 20 minutes per week to consult with a parent, was more appropriate than the 60 minutes of individual speech therapy and 30 minutes of group speech therapy provided by Student's IEP's. The opinions of both Roley and Moore were not persuasive because they were mainly based on assessments of Student that took place after he was no longer attending a District classroom and at a time when Student was undergoing medication and behavior changes. Moreover, both experts had no knowledge of the quality of the services Student received with the District. Accordingly, Student failed to meet his burden of demonstrating that he was denied a FAPE based on inadequate OT and speech and language services. (Factual Findings 2, 5, 14-17, 19-24, 29, 41-47, 51, 52, 56, 60, 76, 79, 82, 85, 88-90, 95-97, 99, 148, 166, 167, 171, 179.)

49. Between the beginning of the statute of limitations period on October 5, 2003 and May 17, 2006, Student's last day of enrollment in the District, Student was provided an appropriate classroom placement in the District's structured autism class. First, as established through the testimony of District autism specialist Pitzen and Dr. Dores, the District's structured autism class contained the supports Student required such as a low student to teacher ratio, the use of visual schedules, a highly structured environment, and the use of ABA techniques throughout the school day. All teaching staff had been properly trained in the District's IBI program, and impressively, both

Sedehi and Coppola had extensive experience in the use of ABA techniques prior to their employment. Student's experts such as Underwood, Postil and Dr. Mucci were unable to persuasively testify to the contrary because they had no knowledge of the structured autism class or the District's IBI program, and at most had briefly observed the autism behavior class. Mother's contemporaneous statements showed that at the time, she was pleased with Student's placement. In light of the above, Student failed to meet his burden of proving that his placement had been inappropriate prior to May 17, 2006. (Factual Findings 2, 5, 6, 12, 19, 23, 27-30, 34-40, 41, 48, 50, 55, 57, 58, 59, 78, 81-83, 86, 89, 90, 93, 97, 122, 143-147, 161, 163, 166, 168, 169, 171, 175, 179, 180-182, 184.)

50. Whether Student was provided with an appropriate level of behavior intervention services must be considered in light of the conclusion that a new FAA was required in the spring of 2006. At all times, Student's classroom placement contained a strong behavior modification component in the form of the District's IBI program, which was integrated into the classroom. In addition to the behavior therapy imbedded in the structured autism class methodology, Student received one hour of individual IBI on a daily basis to target problem behaviors up to February 1, 2005. Student's IEP's showed that he made progress from year to year, and in the fall of 2004, he successfully transitioned into a structured autism classroom with the support of a limited increase of individual IBI to two hours a day. There was no evidence that at any time prior to March of 2006 that Student had any behavior incidents that were as severe as the staff biting incidents in March, April and May of 2006. Dr. Mucci's opinions that Student would have enjoyed greater success with greater amounts of behavior intervention, or that Student's behaviors would not have worsened, were speculative, particularly when she was not an expert in ABA therapy and it was shown at hearing that since the summer of 2004, Student had undergone numerous medication changes that could affect his behavior. The May 20, 2005 FAA was appropriate and had been effective prior to the end of

March of 2006. In light of the conclusion that an FAA should have been conducted after the March 27, 2006 and April 3, 2006 biting incidents, it follows that additional behavior intervention services would have been required. Considering that Student's individual IBI had been doubled to assist him with successfully transitioning from kindergarten to first grade, and that Student was not receiving any individual IBI services at the time of the spring of 2006 biting incidents, a far greater level of individual IBI was required after the spring of 2006 biting incidents. In sum, Student was not denied a FAPE because the District failed to provide adequate behavior services prior to the spring of 2006 biting incidents; however, the District's failure to increase Student's individual IBI services after the biting incidents was a denial of FAPE. (Factual Findings 2, 5-12, 21, 23, 25-31, 34-37, 39, 40, 50, 51, 53, 56, 59, 78, 81, 82, 86-95, 97, 99, 101-111.)

51. Student was not offered a FAPE at the June 9, 2006 IEP. The June 9, 2006 IEP proposed a revised BIP that had not been based on an FAA and proposed changing Student's placement to the more restrictive autism behavior class. Given the severity of Student's then-recent behaviors, without an FAA it cannot be said that the IEP team's recommendations were appropriate at the time. In particular, as discussed above, the severity of Student's new behaviors warranted additional behavioral interventions services. Moreover, the District's proposal of a more restrictive environment without first determining whether Student's behaviors could be managed through positive behavioral interventions in his current placement resulted in an offer of FAPE that was not necessarily the LRE. (Factual Findings 109-111; Legal Conclusions 32, 50.)

52. Student was offered a FAPE at the March 12, 2007 IEP team meeting. Specifically, the District offered Student a transition into the District's structured autism class with significant behavioral support from Student's private ABA provider, ASC. The plan provided for attempting to reintroduce Student into school placement while slowly fading ASC services. Significantly, the transition plan included a progress meeting with

ASC after four weeks. Speech and language services were offered at the same levels as prior to May 17, 2006. Student's clinic-based OT services were offered to continue for six more months until fading to the prior level of two, 30-minute individual OT sessions per week plus 30 minutes per week of occupational therapist consult. The IEP called for development of a sensory diet. Student's contention that he could not attend school because he was too dangerous to himself or others is entirely inconsistent with Student's preferred home program, which includes an extensive amount of time in the community in environments over which behavior therapy staff have no control. For example, the home placement includes trips to stores, restaurants, community parks, and participation in group sports activities, all of which expose Student to more variation in environmental antecedents than a school placement. In other words, if Student could safely be educated in community environments, a school placement could not possibly have been more dangerous to Student or others. A school environment provides the ability to modify antecedents, including such things as physical location, personnel, and the demands made on Student, without sacrificing the benefits of peer exposure in an educational environment. Student's experts were not persuasive regarding the home placement being more appropriate because their opinions were outside their area of expertise (Dr. Mucci, Dr. Nguyen and Dr. Ghebrial), or their opinion suffered from the logical flaw noted above (Underwood and Postil). Notably, at the time that this offer had been made, the District had not been informed by Mother and Father of Student's additional diagnosis of Bipolar Disorder and Mother and Father had not permitted the District to review any documents generated by private providers. This offer was appropriate based on the information known at the time because it provided for a transition period during which data could be collected on Student's behaviors and whether the plan was working. (Factual Findings 8-12, 31, 34,

35, 59, 121, 122, 143, 145, 147, 150-169, 171, 173-177, 184; Legal Conclusions 33, 36, 41, 48.)

54. Similarly, Student was offered a FAPE at the July 17, 2007 IEP team meeting. The IEP team had learned after the March 12, 2007 IEP team meeting that Student had an additional diagnosis of Bipolar Disorder. Like the March 12, 2007 offer, the IEP team proposed gradually transitioning Student to a school environment using ASC personnel. This time, a self contained classroom was proposed because the autism behavior class was no longer available and this setting appeared to be appropriate in light of the reports that Student was sometimes aggressive with therapists at home. The perceptions of Mother and Underwood, that such a placement would not be safe, were not persuasive given that Student's home program involved frequent trips into the community, a place containing far more possibilities for danger than a school classroom. With the exception of modifications to the transition plan, the related services offer was the same as in the March 12, 2007 offer. Accordingly, Student was offered a FAPE by the July 17, 2007 IEP. (Factual Findings 179-184; Legal Conclusion 53.)

55. In a related contention, Student contends that for all years at issue, he was denied an education in the least restrictive environment (LRE). In particular, Student contends that he was denied an education in the LRE because on June 4, 2004, June 9, 2004, July 9, 2004 and August 26, 2004, an IEP team recommended a more restrictive placement that was never implemented and at various subsequent IEP team meetings, District personnel recommended reductions in speech therapy and OT services that were never implemented. The District contends that the evidence at hearing established that the structured autism classes that Student attended during the relevant time frame were firmly based on principals of ABA and were the least restrictive environment in which to meet Student's needs particularly when Mother had rejected IEP team recommendations of a more restrictive placement and Student's position at hearing was

that he could only be educated in the most restrictive environment, i.e., a solitary home placement. As to the District's placement offers in March and July of 2007, the District contends that its placement offers were in the least restrictive environment, given that the transition plans had a goal of reintroducing Student to a classroom environment with peers.

56. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class" and; 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

57. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The

continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

58. The California Legislature intended that if behavior interventions were used for a special education student, that the behavioral interventions “ensure a pupil’s right to placement in the least restrictive environment.” (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).)

59. Here, given the severity of Student’s needs, there was no evidence that Student should have been educated in a general education environment. Instead, the evidence at hearing concerned which option, among a range of more restrictive options from the structured autism class to home placement, was appropriate. Accordingly, the appropriate analysis is whether Student was in the least restrictive environment possible in light of the range of program options. At all times prior to May 17, 2006, Student was educated in the LRE. As an initial matter, Student’s contention, as developed through his expert testimony, is that the only appropriate placement for him would have been a home placement, the most restrictive placement option. It can hardly be said that the District’s placements, in which Student interacted with both disabled and typical peers, were not the LRE when compared to a home placement. Further, the IEP team had recommended numerous times that Student be placed in the autism behavior class, a more restrictive environment than the structured autism class, but a less restrictive alternative than home placement. At all times prior to May 17, 2006, Mother did not agree with the autism behavior class placement option, and based on Mother’s disagreement, Student remained placed in the structured autism class, which was the



LRE among the range of placement options. To the extent Student contends that the District's offers of FAPE after May 17, 2006, did not offer the LRE, Student's claims fail for the same reason, i.e., that Student's preferred home placement was the most restrictive, such that the District's offers of transitioning Student back to a school environment were the LRE. For the reasons set forth above, all of Student's LRE claims fail. (Factual Findings 8-11, 27, 41, 119, 122, 141, 143-147, 169, 170, 173, 176, 182, 184.)

## REMEDIES

60. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate.<sup>11</sup> (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85L.Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the

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<sup>11</sup> Whether the District had sufficient notice of parent's intent to unilaterally place Student is not at issue in this matter. (See 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).)

student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

61. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*)

62. Student is not entitled to reimbursement of expenses for horseback riding and family self-defense lessons. No evidence was produced at hearing regarding how these expenses related to Student’s education. (Factual Finding 149.) Further, Student is not entitled to reimbursement for Student’s visits to Dr. Nguyen. The evidence at hearing showed that Dr. Nguyen’s services were strictly medical, consisting of diagnosis and psychiatric medication management. (Factual Finding 143.)

63. However, Student is entitled to reimbursement for the ABA home program funded by Mother and Father between July 1, 2006 and March 12, 2007. Student was denied a FAPE by the District’s failure to conduct an FAA and increase his individual IBI after the March 27, 2006 and April 3, 2006 biting incidents, but prior to that time had been provided an appropriate placement and related services. The District offered Student a FAPE at the IEP team meeting on March 12, 2007. (Legal Conclusions 32, 50.)

Accordingly, any award of compensatory education is limited to the time that the District failure to conduct an FAA and/or provide sufficient IBI in the spring of 2006, through the time the District offered Student a FAPE on March 12, 2007. Student's home ABA program, which was developed by Underwood in July of 2006, was appropriate within the meaning of *Burlington* and *Carter*. The home ABA program continued Student's educational goals using Student's most recent IEP, the ABA techniques used by ASC were consistent with the methodology used in the structured autism class, and Student made educational progress. Although Student would not normally have attended school during August, reimbursement for August of 2006 is appropriate given that Student did not have an educational program in place during the end of May and all of June in 2006. Other than services billed for summer camp and "training," the amount of therapy services was not reduced because review of the invoices shows that overall, Student received less than 40 hours per week of direct therapy services between July 1, 2006 and March 12, 2007. In light of the above, Student is entitled to reimbursement of \$78,641.20, the amount spent by Mother and Father on ASC services, excluding summer camp and "training" up to March 12, 2007. (Factual Findings 8-12, 127-142, 147, 148, 157, 158.)

## ORDER

Within 45 days of the date of this Order, the District shall reimburse Mother and Father \$79,641.20 (calculated as \$1,000 for Moore's speech and language IEE plus \$78,641.20 for ASC services prior to March 12, 2007).

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on issue 4a, whether an FAA should have been

conducted during the spring of the 2005-2006 school year, and 4e, whether the District failed to provide sufficient behavior intervention services during the 2005-2006 school year. The District prevailed on all other issues.

#### RIGHT TO APPEAL THIS DECISION

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

DATED: May 12, 2008

A handwritten signature in black ink, appearing to read 'R. T. Breen', is written over a horizontal line.

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division