

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Parents on behalf of Student,

v.

WALNUT VALLEY UNIFIED SCHOOL

DISTRICT.

OAH CASE NO. 2008020674

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on July 10 and 11, 2008, and September 8 through 12, 2008.<sup>1</sup>

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<sup>1</sup> Student's advocate, Mr. Peters, did not appear in person on July 11, 2008, and requested that he be allowed to present Student's case telephonically. The ALJ granted his request for July 11, 2008. This method, however, proved to be excruciatingly difficult on the witness and parties present at the hearing, as Mr. Peters' cell phone continually cut out, which made coherent questioning overly time consuming, frustrating, and difficult to hear and translate. Further, Mr. Peters did not have access to the evidence books which required additional time for him to consult with his aide in order to telephonically direct the witness to exhibits. Mr. Peters again failed to appear in person for hearing on July 14, 2008, and requested to continue conducting the hearing by telephone. Although the ALJ tentatively granted Mr. Peters' request, it was discovered that in order to complete Student's case, Mr. Peters intended to call 13 further witnesses, and he anticipated completion of Student's case-in-chief on the last day of scheduled hearing, leaving no time for the District's presentation of testimony and

James D. Peters III, advocate for the Parents, appeared and represented Student (Student).<sup>2</sup> Donna Kohatsu, Mr. Peter's assistant and aide, personally attended each day of the hearing. Student's Mother (Mother) appeared each day on behalf of Student. Student's Father also attended the hearing on several days. Hengky Chiok, an Interpreter of the Indonesian language (Interpreter), attended each day to translate English into Indonesian and Indonesian into English for the parents.

Lee G. Rideout, Esq. represented the District. Jose Annicchiarico, the District Director of Special Education, and Jean Hicks, the District's Elementary Coordinator, attended the hearing each day on behalf of the District.

Student filed his Request for Due Process Hearing (Complaint) on February 21, 2008. On March 27, 2008, OAH granted a joint request for continuance. On May 9, 2008, the District filed a Request for Due Process Hearing, Case No. 2008050222, which was consolidated with this matter on May 19, 2008, maintaining the timeline of this case. As of June 24, 2008, the District withdrew its Request for Due Process Hearing, (Case No. 2008050222), thereby returning the matter to only the issues raised in Student's initial Complaint. The hearing commenced on July 10, 2008, and continued on July 11, 2008. On July 14, 2008, the hearing was suspended and continued to September 8, 2008, at

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evidence. Therefore, the ALJ denied Mr. Peter's request for further telephonic testimony, and continued the matter to September 8, 2008, when Mr. Peters and the witnesses would be available to personally appear for the hearing.

<sup>2</sup> It is noted that Mr. Peters, who is a non-licensed advocate, submits his pleadings, briefs, and hearing documents under the heading of Peter D. Collisson, a Professional Corporation. Mr. Collisson, a licensed California attorney, SBN 053322, at no time appeared in this matter, or assisted in alleviating the delays caused by his advocate.

which time it reopened and continued on September 9, 10, 11, and 12, 2008. The record closed on September 22, 2008, with the receipt of the parties' written closing briefs.

On September 24, 2008, the District filed a Motion to Strike Student's Closing Brief on the ground that it was untimely filed. The District contended that Student filed her brief on September 23, 2008, the day after the record closed. The ALJ verified the declarations made in Student's Response in Opposition to the Motion, and determined that Student did attempt to file the brief in a timely fashion on September 22, 2008. However, the faxination machine at OAH was experiencing a malfunction, and transmission of Student's brief could not be completed until September 23, 2008. The District's motion is therefore denied.

### ISSUE<sup>3</sup>

Whether the District denied Student a free and appropriate public education from February 22, 2006, through February 22, 2008, because:

- A. The District failed to assess Student in all areas of suspected disability;
- B. The District failed to conduct a Functional Analysis Assessment (FAA);
- C. The District failed to develop an individualized education plan (IEP) that provided Student with an educational placement and services to meet her

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<sup>3</sup> Both Student's Prehearing Conference Statement and Closing Argument Brief set forth numerous issues that had not been alleged in Student's Complaint. Pursuant to 20 United States Code, section 1415 (f)(3)(B), this decision is therefore limited to Student's issues contained in her Complaint and as reflected in ALJ Eileen Cohn's Prehearing Conference Order dated June 24, 2008. Additionally, Student's statutory timeline is limited to two years, (20 U.S.C. § 1415(f)(3)(C), consisting of the period of February 22, 2006 to February 22, 2008.

- unique needs in the least restrictive environment; in particular, sufficient levels of occupational therapy (OT), speech and language therapy (LAS), applied behavioral analysis therapy (ABA)<sup>4</sup>, and a general education placement;
- D. The District failed to base Student's goals on her present levels of performance ;
  - E. The District failed to have appropriately trained transportation aides, classroom aides, and teachers; and
  - F. Student failed to make sufficient progress on her goals.

## WITNESSES

Student called Inger Turner, Sandra Coppock, Jose Annicchiarico, Dian Kerns-Tackett, David Paltin, Jean Hicks, Jeanene Howard, Mother, and Sallie Dashiell as witnesses in her case-in-chief. The District called Marissa Quan, Jean Hicks, and Melva Hill as witnesses on its behalf.

## CONTENTIONS

Student contends that the October 19, 2005 IEP, which was supplemented by a January 27, 2006 IEP addendum, and a May 31, 2006 proposed IEP addendum, did not offer a FAPE in the least restrictive environment. Student contends that she required (1) full inclusion in the general education classroom with a full-time one-to-one paraeducator, (2) 30 hours per week of in-home ABA therapy, (3) three hours per week of LAS services, (4) five hours per week of OT, (5) a behavior specialist, (6) an independent FAA, (7) extensive parent training, and (8) an augmentative communication assessment. Additionally Student contends that the District failed to assess Student in all

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<sup>4</sup> Mr. Peters withdrew Student's contentions regarding ABA services during the hearing.

areas of suspected disability, and therefore the District did not base Student's goals on her present levels of performance; that she failed to make sufficient progress on her goals; and that the District failed to have appropriately trained transportation aides, classroom aides and teachers, all of which denied her a FAPE between February 22, 2006, and February 22, 2008.

The District contends that it properly assessed Student, and developed an IEP for Student based on her present levels of performance known to the District at the time. The District further contends that Student made progress on her goals while attending school in the District, and the offer of placement and services presented to Student continued to constitute a FAPE in the least restrictive environment.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION:

1. Student is currently 11 years old, and is eligible for special education and related services under the classification of autistic-like behaviors. Student is of Indonesian heritage, and resided in Indonesia until she was four years old.
2. Student resides in the District, and initially attended a special day class (SDC) at Morris Elementary School in 2004. She subsequently attended a SDC for students with autism spectrum related disorders operated by the Los Angeles County Office of Education (LACOE) at Evergreen Elementary School (Evergreen) for the 2004-2005 school year. Student left the District for a short period of time, but returned as of October 19, 2005, and remained at Evergreen through the end of the 2005-2006 school year. At that time, Parents privately placed Student in the Laurel Springs Independent Home Study Program (Laurel Springs), where she continues to date.
3. On October 19, 2005, upon Student's return to the District, the District convened an IEP meeting and developed an IEP for Student, which offered placement in

the Evergreen second grade SDC and related support services as follows: 30 minutes, six times per month of group LAS therapy; 50 minutes per month of consultative OT services; four hours per week of direct ABA services from "Set Sail," the District's autism program; and 30 minutes, six times per month of adaptive physical education. The IEP provided for 15 percent of Student's school day to be spent in general education participation during recess, lunch, library time, and appropriate school events. The IEP contained seven goals relating to daily living skills, language development, math, and motor development. Parents consented to this IEP.

4. At Parents' request, the District held another IEP meeting on January 27, 2006. At that time, the IEP team modified Student's IEP to provide an additional LAS goal plus 10 minutes per week of individual LAS services.

5. On May 31, 2006, the District held another IEP meeting, again at Parents' request. Parents, with the assistance of their advocate, Mr. Peters, requested that Student's IEP be modified to provide the following: (1) full inclusion in the general education classroom with a full-time one-to-one paraeducator, (2) 30 hours per week of in-home ABA therapy, (3) three hours per week of LAS services, (4) five hours per week of direct OT, (5) a behavior specialist, (6) an independent FAA, (7) extensive parent training, and (8) an augmentative communication assessment. The District did not agree to Student's proposed modifications, and offered Student the same placement and services as contained in her existing IEP. The IEP team, however, did agree to provide the augmentative communication assessment. Parents did not sign the IEP or the augmentative communication assessment plan. It is undisputed that the October 19, 2005, January 27, 2006, and May 31, 2006 IEP documents constitute the District's formal written offer of FAPE for the 12 month period of October 19, 2005 to October 19, 2006.

6. Parents unilaterally withdrew Student from the District during the summer of 2006. Mother testified that she informed the District at the May 31, 2006 IEP meeting

that she was withdrawing Student from school for the 2006-2007 school year. The tape recording of that IEP meeting, introduced by Student, indicated the contrary. Neither Parents nor their advocate espoused any intention to remove Student from school for any period of time. The tape reflects that Parents were directly asked if they intended to keep Student in school. Mr. Peters provided an evasive response. Clearly, the subsequent actions of the District demonstrated that it was uninformed of Student's withdrawal. The District provided Parents with a written denial of the modifications and assessments requested at the May 31, 2006 IEP meeting, and attempted to schedule additional IEP meetings with Parents. Parents did not directly inform the District that they had privately placed Student in the Laurel Springs home study program until the end of September 2006, as a result of a Student Attendance Review Board hearing. Parents ignored the District's attempts to schedule another IEP meeting, and made no attempts to communicate with the District until November 2007. At that time, the District sent Parents a proposed assessment plan proposing to conduct Student's triennial assessments. Parents refused their consent until June 2008, which coincided with the District's filing of a Request for Due Process Hearing relating to the assessments.

#### THE ASSESSMENTS:

Student contends that the District failed to assess Student in all areas of suspected disability.

7. A district is required to ensure that a student with exceptional needs is assessed in all areas related to the suspected disability.

8. Inger Turner,<sup>5</sup> a school psychologist for the District, assessed Student and prepared a written report dated July 8, 2004.<sup>6</sup> Ms. Turner assessed Student as part of her transition into the District, not as a triennial assessment. As such, Ms. Turner did not assess Student as extensively as would be done in a triennial assessment. In this initial 2004 assessment, Ms. Turner administered the Vineland Adaptive Behavior Scales-Classroom and Interview Editions (Vineland), reviewed Student's prior assessments and records, observed Student, and obtained a Health and Development Review from the District's nurse. While the assessment did not qualify as an "ecological" evaluation,<sup>7</sup> a great portion of the assessment was based upon observations and the results were reflective of Student's abilities at the time. The information gleaned from Ms. Turner's assessment was also validated by similar scores on Student's prior assessments.

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<sup>5</sup> Ms. Turner is a credentialed school psychologist at Morris Elementary School. She has a B.A. and M.A. in Psychology. She has been employed by the District for 10 years. Although Mr. Peter's called Ms. Turner as his first witness, and questioned her for an entire day of testimony, he erroneously argued in his Closing Brief that Ms. Turner is a Speech and Language Pathologist for the District.

<sup>6</sup> Although Student has raised issues regarding assessments in this matter, the District's 2004 assessments are beyond the statute of limitations. Reference to Ms. Turner's assessments, and likewise Ms. Coppock's 2004 assessments, are for purposes of establishing whether additional assessments were needed as of February 22, 2006.

<sup>7</sup> Mr. Peters pursued a line of questioning regarding "ecological" assessments, which place less emphasis on standardized testing, and more emphasis on observations to determine how a child functions and relates in her environment.

9. Sandra Coppock, a school psychologist at LACOE,<sup>8</sup> conducted Student's triennial psychoeducational assessment, and prepared a written report dated October 7, 2004. Ms. Coppock administered the Leiter, Vineland, Wrat-3 and Southern California Ordinal Scales-Cognition assessments. The overall assessment process also included a review of records, observations, and interviews with teacher and the parents.

10. The report summary indicated that as of October 7, 2004, in addition to her diagnosis of autism, Student functioned in the moderate range of mental retardation. Her social affect skills were in the severe range of development. Student demonstrated difficulties in academics, communication skills, fine motor skills and attending. She also has a history of running away behaviors.

11. The LAS assessment concluded that the current testing indicated Student's overall functional language around two years, with little gap between receptive and expressive language, which showed some improvement over her scores of the previous school year. Student's expert, Sallie Dashiell,<sup>9</sup> indicated that the District did not do a full

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<sup>8</sup> Ms. Coppock is a credentialed school psychologist employed by Los Angeles County Office of Education. She has spent 29 years working primarily with children with autism, and has administered between 75 to 85 assessments on children with autism in the last two years. Ms. Coppock is a certified Behavior Intervention Case Manager (BICM) and has performed over 100 behavior assessments and FAAs.

<sup>9</sup> Ms. Dashiell has a M.A. in Speech Pathology with a minor in Audiology. She is a licensed Speech Pathologist (SLP), and has a Certificate of Clinical Competence in Speech Pathology. Ms. Dashiell is a SLP with the Speech and Language Development Center, and acts as an independent consultant to several school districts in Orange County, California.

assessment in 2004, but the assessment itself appeared to be valid. Further, Melva Hill,<sup>10</sup> Student's Speech and Language Pathologist (SLP) for the 2005-2006 school year, observed no need for additional LAS assessments.

12. Jeanene Howard, Student's teacher, provided a written Report of Teacher Assessment, dated October 15, and 18, 2005. The report provides a summary of Student's classroom performance and progress toward meeting her educational goals. The assessment results were the result of the teacher's observations, the Student's profile and the Brigance Inventory. Ms. Howard described Student's present levels of performance, and it is noted that her observations did not indicate a need for further assessments. Further, Student provided no evidence to discredit these observations.

13. Gallagher Pediatric Therapy (Gallagher) provided an OT evaluation and report dated July 9, 2004. Adrian DeDoes, a licensed OTR, administered standardized testing via the Peabody Development Motor Scales, Second Edition (PDMS-2). Additionally, the assessor conducted classroom and playground observations. Ms. DeDoes did not testify, nor did Student provide any testimony from a licensed OT, or any other OT assessments to refute the Gallagher report.

14. Dian Kerns-Tackett<sup>11</sup> testified on behalf of Student and opined that the District failed to conduct adequate developmental or ecological assessments. Ms. Kerns-Tackett advocates the use of developmental assessments for children with autism, as they provide a direct link to the creation of appropriate programs based upon the

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<sup>10</sup> Melva Hill is a licensed SLP, and has been employed by LACOE for 18 years. She has a B.A. and M.A. in Communication Disorders.

<sup>11</sup> Ms Kerns-Tackett is, as she stated, "currently unemployed" and working on her Ph.D. in Autism and Behavior Disorders. She was previously employed by the Redondo Beach Unified School District for four years as an Autism Specialist.

child's strengths and weaknesses. Developmental assessments can indicate *how* a child learns. Ms. Kerns-Tackett described the PsychoEducational Profile-Revised (PEP-R) which she defined as somewhat of a holistic approach type of assessment. This assessment looks at different domains for learning readiness skills, in maladaptive behavior, social skills, and receptive and sensory issues. While Ms. Kerns-Tackett may have had a wealth of information regarding children with autism, Student's direct examination did not solicit cohesive responses or provide factual foundations for her conclusions. Although the PEP-R, or other developmental assessments, may have been beneficial, Student did not establish that the District was required to administer this type of assessment. Further, Ms. Kerns-Tackett admitted that few school districts used the PEP-R, and a district can develop an appropriate IEP without it. Lastly, Ms. Kerns-Tackett's expertise on the subject of educational assessment and psychological testing is limited. She is not a school psychologist, and, with the exception of developmental assessments, she is not licensed, certified, or qualified to assess students or interpret their scores.

15. David Paltin, Ph.D.,<sup>12</sup> conducted an independent psychological evaluation of Student and prepared a report dated May 18, 2007. Dr. Paltin made several good points regarding the shortcomings of the 2004 assessments, including the OT and LAS assessments, conducted by the District and LACOE. Specifically, he found that at crucial periods of reassessments, such as the triennial period, Student was not administered standardized tests and measures in primary areas of impairment. This was not only true of one area of service provision, but across the multidisciplinary array of the

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<sup>12</sup> Dr. Paltin is a licensed psychologist, and Fellow of the American College of Forensic Examiners. He has a B.A. in Psychology, and a M.A. and Ph.D. in Clinical Psychology. Dr. Paltin maintains a private practice with specialties in Child and Adolescent therapy, Attention Disorders, Developmental Disorders and Autism.

psychoeducational, OT and LAS domains. Unfortunately, his assessments and observations are nearly three years in hindsight, and his conclusions focus on the assessments which fall beyond the statute of limitations. Dr. Paltin's testimony did not indicate any additional areas of need, but rather, disagreed with the District's interpretations of Student's scores, and suggested that additional assessments, in already identified areas, could be administered to gain more detailed information. Further, Dr. Paltin's findings were never shared with the District.<sup>13</sup>

16. Unquestionably Dr. Paltin's forte is behavior; however, he is not an educator. He obtained no information regarding Student in an educational setting. He did not observe the school setting or interview Student's teachers or service providers. Further, given that Dr. Paltin did not assess Student until May 2007, he made no comment on the impact of Student's home study program through Laurel Springs during the intervening 2006-2007 school year. Based upon the information the District had regarding Student between February 22, 2006 and February 22, 2008, the District did not fail to assess Student in all areas of suspected disability.

#### STUDENT'S REQUEST FOR A FAA:

17. When a student's behavior impedes his learning or that of others, a school district is required to consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. The IEP team itself can develop a behavior support plan (BSP) to address minor behavior issues that a student's teacher or other educational providers can implement in the classroom. However, when a child exhibits a serious behavior problem, which is defined as a behavior that is harmful to the child, to

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<sup>13</sup> Student did not share Dr. Paltin's report with the District until the exchange of exhibits in this matter.

others, or to property, and that significantly interferes with the implementation of the goals and objectives of her IEP, a school district must develop a formal behavior intervention plan (BIP), which becomes part of the child's IEP. A BIP may only be developed after a district has administered a FAA to the child. An FAA is justified when the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment.

Student contends that the District failed to conduct an FAA over (1) Student's toileting problem and (2) Student's removing herself from her safety harness on the school bus.

18. Student's teacher, Ms. Howard, reported that when she met Student in October 2004, she was aware that Student would wet herself in the classroom. At that time, Ms. Howard believed it was possible that Student did not know how to ask to go to the restroom. She began using positive reinforcements with Student. She also shared a sheet of six strategies for the school staff and family to implement to deal with Student's behavior. Ms. Howard reported that the wetting behavior lessened in the 2004-2005 school year, and by the 2005-2006 school year, Student's wetting problem had significantly decreased. Student could go weeks without wetting. Additionally, Ms. Howard developed a social story to address the wetting and shared it with Mother. Ms. Howard believed the interventions were successful, and as of 2006, wetting was not an issue at school, although she indicated that it was not unusual for a child with autism to have an accident once in a while.

19. Parents continued to complain about Student's wetting problem, although it appears that much of it occurred at home. On March 13, 2006, the Regional Center completed a psychological assessment and report. In its discussion of behavioral issues, the report primarily focused on Student's home behaviors which included tantruming, whining, screaming, yelling, scratching, and pulling off her clothing. The report indicated

that Student was not totally toilet trained and would have occasional accidents. "She continues to wear diapers at night." The report further indicated that, "in school, it is reported (by Mother) that Student will urinate in her clothing during the day." The assessor recommended a goal of decreasing incidents of urinating in her clothes while at school by 50 percent. This would be accomplished by taking Student to the toilet every hour and having staff check her every half hour to ensure she does not have an accident. It was also recommended that a behavior plan be put in place to include a toileting schedule, behavioral interventions and reinforcers. The recommendations are similar to the six strategies previously recommended by Ms. Howard.

20. Ms. Coppock recalled discussions regarding Student's toileting problems in the 2004-2005 school year. She did not believe a new BSP was needed to address Student's self-soiling, nor was a FAA assessment needed. As part of the classroom strategy, the teacher shortened the time between Student's bathroom breaks. As of the January 27, 2006 IEP meeting, when Mother again expressed her concerns regarding the wetting. Student's teacher reported that the wetting at school had significantly decreased. In response to Mother's concerns, the IEP team agreed that the teacher would monitor Student's behavior closely and would communicate any changes to Parents. Mother agreed and signed the IEP addendum. Further, Student provided no reports of wetting continuing after February 22, 2006. The evidence does not support a finding that Student's wetting posed a problem which continued at school during the time frame covered by this complaint of February 22, 2006 to February 22, 2008.

21. The Regional Center Assessment report indicates that while at Morris Elementary in 2005, Mother reported that Student had many problems on the school bus. Student had been getting out of her seat, and "now wears a shoulder harness." Mother raised new concerns at the January 27, 2006 IEP meeting. Mother stated that Student's behavior had changed recently. She was having difficulty getting on the

afternoon bus and was getting out of her harness. The IEP team recommended that a baseline of Student's bus behavior be obtained to determine the frequency of the behavior. The IEP notes reflect that the teacher was developing a form for all bus drivers to complete in order to report on the frequency of Student's behavior. The bus driver's observations would continue for two weeks to collect accurate data. The IEP team also discussed possible positive reinforcers. Ms. Howard indicated that the next day, while discussing the harness problem with the bus drivers, it became apparent that one of the drivers was not hooking Student's harness correctly. The drivers received instruction on proper harnessing, and the issue became moot. Student failed to establish that any problems continued with the safety harness or on the school bus after February 22, 2006.

Student further contends that the District failed to address Parent's request for a FAA to deal with Student's maladaptive behaviors in general.

22. The evidence indicates that Parents did not request a FAA until the May 31, 2006 IEP meeting. Further, with the exception of the wetting and school bus incidents, Student failed to establish any specific target behaviors requiring a FAA. Ms. Howard saw no behaviors which warranted a FAA. She indicated that she was absolutely able to handle Student's classroom behavior with classroom behavior management strategies. Student responded well to positive behavior techniques as she wanted to please.

23. Marissa Quan, who is employed as a school psychologist at Set Sail, provided ABA services to Student four hours per week in 2006. Ms. Quan collected data on Student's behaviors, such as yelling and interruptions. She worked with Student by providing redirection and positive reinforcement of communication. Student's program included the use of communication techniques to counteract the yelling. Ms. Quan

indicated that Student made improvements and she did not observe any behaviors which required further or more intensive intervention.

24. Both Dr. Paltin and Ms. Kerns-Tackett provided limited information regarding the need for a FAA. Dr. Paltin is a certified BICM, and is therefore qualified to administer a FAA. While Dr. Paltin provided detailed testimony of what constitutes a FAA and how it is conducted, Mr. Peters solicited little information to substantiate his opinion that a FAA was required. As example, Dr. Patlin opined that Student had repetitive and maladaptive behaviors at school, and a FAA was necessary based upon the "scope of Student's behaviors." His written report, however, indicated the contrary, concluding that "Student does not display significant, disruptive or problematic behaviors..." Instead, both Dr. Paltin and Ms. Kerns-Tackett focused on Mother's reports of toileting problems at home and at school. Dr. Paltin opined that Student needed an FAA because a teacher alone would be unable to deal with Student's toileting interventions.<sup>14</sup> Ms. Kerns-Tackett also concluded that Student's self-wetting occurred with sufficient frequency to qualify for a FAA.

25. Mr. Annicchiarico, the Administrative Director of Special Education Services for the District,<sup>15</sup> is also a certified BICM. He indicated that Student did not need an FAA nor did she have any behavior problems which were severe enough to require a behavior specialist. Student did not demonstrate any significant behaviors which could

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<sup>14</sup> Ironically, Dr. Paltin did not indicate who would conduct the interventions, if not the teacher, when a FAA and BIP had been completed.

<sup>15</sup> Mr. Annicchiarico is the Director of Special Education and lead psychologist for the District. He is also in charge of crisis intervention for the District. Mr. Annicchiarico has a M.A. in Educational Psychology and is credentialed in Administration/Service.

not be handled in the classroom, nor did her behaviors interfere with her education or the education of others. Student was able to be redirected when necessary.

26. Dr. Paltin's and Ms. Kerns-Tackett's conclusions regarding the necessity of a FAA bear little weight. Neither witness met Student prior to 2007, and neither observed Student in the school setting or discussed Student with her teacher or service providers to determine what type of behaviors were prevalent at school or how the teacher and staff handled those problems. Further, the failure to perform a FAA, when one is warranted, is a procedural violation of FAPE. Student did not establish whether the behavior in question, as reported at school, in any way interfered with Student's education. The evidence fails to establish that the District was required to provide Student with a FAA and BIP during the relevant times of this Complaint.

#### STUDENT'S GOALS AND PRESENT LEVELS OF PERFORMANCE:

27. An IEP is a written document which details the student's current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, and an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities.

28. The October 19, 2005 IEP and January 27, 2006 IEP addendum, as described in Factual Findings 3 and 4, constituted Student's operative IEP for the 2005-2006 school year. Parents consented to both documents. As of the May 31, 2006 IEP meeting, Student no longer consented to the placement and services as contained in her existing IEP.

Student contends that the goals contained in her IEP were inadequate and were not based upon her present levels of performance.

## GOALS IN GENERAL:

29. As indicated in Factual Finding 11, Student's triennial assessment report summary indicated that in addition to her diagnosis of autism, Student functioned in the moderate range of mental retardation. Her social affect skills were in the severe range of development. Student demonstrated difficulties in academics, communication skills, fine motor skills and attending. While Ms. Coppock recommended that Student continue to integrate with general education peers whenever possible for social, functional cognition and language development, she also indicated that Student's instruction would be more effective in a highly structured direct teaching system. Student's curriculum needed to focus on functional skills.

30. In considering the information available to them at the time, the October 19, 2005 IEP team created seven goals for Student specifically, in the areas of (1) daily living; (2) recreation/leisure; (3) community; (4) vocation; (5) math; (6) English language development; and (7) motor development. Each goal described Student's present levels of performance in that domain, and provided a single goal to be completed over the school year.

31. Dr. Paltin indicated that the goals contain in the IEP were inappropriate because goals should be driven by the assessments, and the District's assessments were both poorly selected and incomplete. In essence, as he testified, "if you don't know where you are starting from, how can you determine which goals would be appropriate?" Additionally, he believed that Student required a broader scope of services. The IEP did not include behavioral goals, socialization goals, or goals to address sensory management or visual motor integration. He concluded that there were not enough goals and services, because the proper testing had not been done.

32. Dr. Paltin also described a fundamental difference in the approach to creating goals from that of the District. Dr. Paltin does not believe that the District's

goals created by the IEP team build upon themselves. The IEP team created goals which only increased upon completion of the goal. Instead, given Student's vast areas of need, more skills should have been added to each goal as Student's progress increased throughout the year. Further, Dr. Paltin contended that there was no method of measurement for Student's goals to determine when she reached each goal. The conclusion that Student's goals *could* have been more extensive and detailed, does not automatically negate the adequacy or appropriateness of the existing IEP goals. Student did not pursue further testimony to support Dr. Paltin's conclusions. Student introduced no testimony to establish that the subject domains of the IEP goals were inappropriate; he failed establish that the goals were not based upon Student's present levels of performance known at the time of the IEP meeting; and he failed to establish that the construction of the goals resulted in a deprivation of educational benefits.

#### OCCUPATIONAL THERAPY:

33. Student's July 9, 2004 OT Assessment report from Gallagher concluded that although Student had made some gains when compared with prior testing, she continued to be delayed. Student's motor skills and behaviors showed a higher degree of function than did her standardized testing scores. Observations indicated that Student was not limited in her gross motor play by motor or sensory deficits. Although sensory registration and processing often are areas of difficulty for children with autism, Student appeared to function quite well in those areas. The report emphasized that Student had been in three different classroom placements in a short period prior to the assessment. Despite these changes of routine and location, Student demonstrated that she has the motor and sensory processing skills to function quite well in a structured educational program that provides consistent routine and expectations. She exhibited strong preference of activities, and required physical and verbal prompting to help her increase her repertoire of functional behaviors. She did not require the intervention of

OT therapy services to help her develop her skills, nor occupational therapy expertise to help the teaching staff structure her educational environment because of sensory issues. The report concluded that "OT is not recommended at this time."

34. Gallagher also provided an OT Progress report dated October 19, 2005, which described Student's present levels of performance and indicated that Student was making limited progress on her benchmark goals. As noted by her teacher, Student's progress was impacted by her difficulty attending to non-preferred tasks, and her decreased awareness of shapes. The report recommended continued consultative OT services with Student's teaching team to provide direct intervention, exchange of information, teaching techniques, therapeutic strategies, modifications of the classroom, materials to support her performance and observations of the procedures to confirm the promotion of the desired outcome.<sup>16</sup> While the assessment report required no direct OT services at the time, the IEP team continued 50 minutes of collaborative OT services to monitor Student and assist Student's teacher with OT activities in the classroom.

35. Dr. Paltin, who is not an OT, noted from his observations of Student, that she had a variety of OT needs which needed to be addressed by an OT specialist rather than a classroom teacher. He also indicated, however, that he did not know what services were contained in the District's consultative OT model. With the exception this type of generalized statement from both Dr. Paltin and Ms. Kearns-Tackett, in which they concluded that Student needed direct OT services, Student offered no further evidence on the subject. Further, Mother consented to both the October 19, 2005, and January 27, 2006 IEPs, both of which reviewed Student's OT needs, and determined that

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<sup>16</sup> The assessors did not testify at hearing. The Gallagher report was admitted into evidence by stipulation of the parties as Student's Exhibit 34. Neither party presented any testimony or evidence to refute the contents of this report.

the consultative OT services were appropriate for Student. Student failed to provide any evidence that Student failed to obtain adequate benefit from her educational program with the consultative OT services provided by the District.

#### SPEECH AND LANGUAGE:

36. As stated in Factual Finding 11, the LAS assessment report, presented as part of the October 2004 triennial assessment, concluded that Student's overall functional language scores presented around two years of age, with little gap between receptive and expressive language. These 2004 scores showed some improvement over Student's scores of the previous school year. The report recommended continuation of direct services with emphasis upon processing of auditory input and appropriate, meaningful receptive and expressive response to auditory input, and expressive use of language to meet daily needs and express herself. It further suggested auditory computer programs and ongoing language stimulation for improving social communication, problem solving skills, listening and processing and speech clarity.<sup>17</sup>

37. The October 19, 2005 IEP provided Student with two, 20-minutes of group LAS therapy per week. On January 27, 2006, the IEP team met again to discuss Student's LAS program. Mother requested that Student receive five to ten minutes per week of individual LAS services. The IEP team concurred, and 10 minutes of direct speech services were added to the IEP, along with one goal, stated, in part, as follows: "In the classroom, Student will recognize and name, nouns, learn primary colors, learn spatial concepts for increased vocabulary."

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<sup>17</sup> The LAS report was admitted into evidence by stipulation of the parties as Student's Exhibit 76. Neither party presented any testimony or evidence to refute the contents of this report, or explain what Student's scores meant.

38. Sallie Dashiell stated that she did not know of any child who could benefit from only ten minutes of direct LAS services per week. Ms. Dashiell, who assessed Student in March 2006, determined that Student had severe expressive and receptive communication issues, as well as social communication and interaction deficits. She testified that "Ten minutes a week, is really, totally unacceptable for a child with that level." Ms. Dashiell continued, "It doesn't make sense that they (the District) would have even offered that." Given the fact that Student had attention issues, as described by the District, it is Ms. Dashiell's opinion that "you need a lot more than ten minutes to just start developing that attentional behavior." While Ms. Dashiell believes that Student required more than one LAS goal, she also believes that ten minutes would not be enough time to complete even the one goal formulated by the IEP team. Student had significant processing issues, and echolalia. Her language functions more were limited to expressive language of labeling, requesting, and protesting. Further, she needed more time to process information and respond to it.

39. Ms. Dashiell also found that Student required extensive work on joint attention and mutual engagement. While the District provided Student with two, 20-minute group sessions per week, Ms. Dashiell recommended that those areas which would involve group LAS services should be deferred until Student developed foundational skills in direct therapy.

40. Lastly, Ms. Dashiell indicated that collaboration time would be necessary to work with the teacher and explain how the program could be embedded within the context of the classroom as well. Ultimately, Ms. Dashiell believed that Student required two to three hours per week of individual LAS sessions, with small group activities being added once Student developed a sufficient foundation to respond to interactive behavior.

41. Ms. Dashiell testified that it is not necessary for an SLP to observe Student in a classroom setting to determine her LAS needs. She opined that by simply assessing a child, one could observe how the child is able to function. While this may be true for assessments, Ms. Dashiell admitted that one definitely needs to observe the classroom to develop the LAS plan. Ms. Dashiell did not observe Student's classroom. She did not contact Student's teacher or SLP, both of whom may have presented significant information regarding proposed goal for Student. As example, Ms. Dashiell indicated that Student needed a foundational goal, such as turn taking, which leads to conversation. She needed a goal for regulating language, such as saying "I need a break" or "I need to go to the bathroom." Both of those proposed goals were being addressed by Ms. Howard, and were embedded in the SDC classroom experience. Further, the testimony of District witnesses described the SDC setting as a language enriched classroom, in which developing language skills is ongoing throughout the day. Unfortunately, although Ms. Dashiell completed her assessment of Student in March 2006, she did not attend any of Student's IEP meetings and her assessment and findings apparently were not shared with the District.

42. Ms. Hill, Student's SLP, provided both Student's group and individual LAS services during the 2005-2006 school year. She indicated that she worked on receptive and expressive vocabulary, pragmatics, and basic language skills with Student. Much of Student's group therapy included pragmatics, such as interaction, turn taking, waiting, being quiet, and listening. Further, Student worked on the same goals in direct therapy, only using different activities.

43. Ms. Hill agreed that Student was often not ready to attend or focus at the beginning of LAS sessions, and she would often need to work with Student to ready her for speech activities. Many times it would take her 10 minutes to get Student to attend more fully. Additionally Ms. Hill reported that Student would often roam, become non-

compliant with tasks or exhibit some other behavior which required additional time to refocus. The time necessary to get Student ready to attend, however, was always in addition to the 10 or 20 minutes of actual speech service time. Ms. Hill adamantly repeated that Student received an actual 10 or 20 minutes of speech service at each session. In addition, she collaborated with the classroom teacher. She contributed to what Student worked on in the classroom, and the teacher worked on things going on in LAS.

44. In response to Student's contention that Student required two to three hours of individual LAS services per week, Ms. Hill indicated that Student could not meaningfully participate in two hours per week of direct services. Student could not attend that long. Further, had Student required more services, she would have recommended more services.

#### PLACEMENT AND LEAST RESTRICTIVE ENVIRONMENT:

45. A school district is required to provide a special education student an educational 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 cannot be satisfactorily achieved.

Student contends the District denied her a FAPE by offering placement in a SDC rather than a general education classroom (GEC). To support this contention, Mr. Peters asked each of Student's witnesses if Student could have been placed in a general education classroom.

46. Dian Kerns-Tackett opined that any student can learn in any setting if provided proper supports and services. She continued that while a SDC provides a Student with a more individualized education, general education provides Student with more peer opportunities. In order to succeed in a GEC, Student requires an individual

aide for academics to modify the curriculum. The aide also needs to assist Student behaviorally as well. Student requires guidance through typical routines. She doesn't understand directions and requires directions and redirection. Student is also prone to escape. Ultimately, in order to adequately accommodate Student's needs, Student would receive her lessons in the GEC separated from other students.

47. Dr. Paltin opined that there was no reason not to place Student in a GEC in 2006, and it is now imperative that Student receive typical peer socialization as soon as possible. Although Dr. Paltin's opinion is based upon his 2007 assessment of Student, he reported that Student had no serious behaviors which would interfere with providing socialization in a general education setting, and he further contended that it was unlikely that Student's current behaviors did not exist in 2006. According to Dr. Paltin, many of Student's described behaviors are typical of children with autism, and are not justifications to deny placement in a GEC. It is Dr. Paltin's opinion that making progress in a SDC is not a basis for determining the least restrictive environment for a student. To the contrary, making progress is intended to advance a student towards placement in the GEC. In determining least restrictive environment, the IEP team should add supports in the GEC, and, only, if Student fails, should the IEP team consider a more restrictive environment. While Dr. Paltin's philosophy regarding least restrictive environment is sound, it is noted that he is not a teacher and does not comment on the academic components of a child's placement. Behavior is only one facet of the IEP team's considerations. Further, Dr. Paltin did not observe Student in any school or educational environment, nor did he contact Student's prior teachers or related service providers to inquire as to Student's needs in academics or other domains.

48. Sallie Dashiell responded to Student's inquiry by stating she always believes children can be mainstreamed, but qualified that statement by adding that Student would need strong supports and a general education teacher who "gets it." Ms.

Dashiell's remaining testimony, however, appears to weaken this contention. During her primary testimony regarding speech and language, Ms. Dashiell testified that Student required a comprehensive LAS plan which included intensive individual LAS services of two to three hours per week. These intensive individual sessions were necessary to develop a language foundation before moving into a group setting. Student was not ready to develop joint attention skills. Student also needed repetition and more time to respond to instruction. Further, Ms. Dashiell vehemently protested a mere 10 minute LAS session, "as it made no sense when you consider Student's attention deficit."

49. Student also asked witnesses from the District if Student could be placed in a GEC. Inger Turner responded, "Sure," but that was not the recommendation of the IEP team based upon Student's assessments due to Student's cognitive limitations, problems with attention, and lack of daily living skills. Ms. Turner further emphasized that determination of placement and services was not her decision, but rather that of the IEP team. She further indicated that her July 2004 assessment did not note any behaviors which would prevent Student's placement in a GEC, however some of Student's behaviors did affect her academic progress.

50. Sandra Coppock<sup>18</sup> did not consider a general education placement to be in Student's best interest. Ms. Coppock indicated that a GEC would be inappropriate for several reasons. Student had problems with attention and roaming. She was unable to follow directions. Student could not interact with her peers. Further, Student's low cognitive level would make it difficult for her to succeed in a second grade GEC. With

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<sup>18</sup> Ms. Coppock's opinions are given great weight. Ms. Coppock has 29 years experience working primarily with autistic children. She has the additional credibility of being the only witness who assessed Student, observed Student in the educational setting, and attended Student's IEP meetings in the relevant periods of 2005-2006.

regard to Student's behaviors, Ms. Coppock indicated that Student needed a highly structured environment. She responded well to the behavior components of the SDC, but would have difficulty in a GEC.

51. Jose Annicchiarico opined that full inclusion would be detrimental to Student. He indicated Student was not at a point in her development to progress adequately in a GEC. Student would not be able to meaningfully participate in a GEC. She needed to develop more skills before being fully immersed in a GEC. Mr. Annicchiarico emphasized that inclusion in a GEC is not merely Student's presence with an aide in a GEC. While it would be possible to physically "place" Student in a GEC, the child needs to be able to participate and communicate in that setting. He reported that, while Student did not exhibit behaviors which would disrupt a GEC, she would still require specialized intervention while in the general education setting. He reported that the IEP team felt that the LACOE placement in the Evergreen SDC provided Student with educational benefit. Further, the District mainstreamed Student with typical peers by providing interaction in some general education periods and activities.

52. Ms. Hill provided a strong opinion that a GEC would be inappropriate for Student. Ms. Hill reported that Student had problems with attending and non-compliance with tasks. She would occasionally become disengaged and leave the instruction area. She would scream and yell for short periods (a few seconds, to a minute). It would often take five to 10 minutes to get Student to focus and attend to task.<sup>19</sup> In her opinion, Student was not ready to attend and participate in a GEC.

53. The most valuable testimony regarding the issue of least restrictive environment came from Student's teacher Jeanene Howard. Ms. Howard reported that

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<sup>19</sup> Ms. Hill's opinion is based upon actual observation of Student in an educational setting during weekly LAS sessions.

she first discussed increasing Student's mainstreaming time with Mother in January 2006. Mother indicated that she wanted Student to have more opportunities with typical peers. Ms. Howard looked for additional mainstreaming opportunities and gradually increased Student's contact with typical peers in several general education settings, such as classrooms and assemblies.

54. Commencing in February 2006, Ms. Howard attempted to provide Student with time in a general education math class. It did not work out well. Student was overpowered and unable to focus. Ms. Howard described it as a negative experience for Student. Ms. Howard then tried inclusion in general education language arts. Student again had difficulty in the GEC. Student's focus wandered to other things in the room. She became upset when she could not have the things she saw. Ms. Howard reported that the general education setting did not seem beneficial to Student.

55. In an attempt to ease Student into the general education setting, Ms. Howard conferred with the general education teachers to prepare them for Student in their classrooms. She worked with Student by preparing social stories about visiting. She accompanied Student to general education assemblies and arranged reverse mainstreaming to bring typical peers to Student in the SDC. When these strategies did not work, Ms. Howard concluded that Student was too resistant to changes, and it was extremely difficult for Student to function amongst distractions. As a result, Ms. Howard determined it was necessary to first work on readiness skills. Had Student remained in the District, Ms. Howard would have continued to look for general education opportunities which would have worked for Student. Ms. Howard believes that she needed to back off from the negative experiences Student endured, build Student's basic skills, and then retry mainstreaming for a positive experience.

56. Ms. Howard's descriptions of Student's reactions and abilities in the general education are first hand, as she personally acted as Student's one-to-one aide

on each mainstreaming activity. When asked if Student could be fully included in a GEC, Ms. Howard strongly stated that "opening the door and sitting Student in a GEC" is not mainstreaming if there is no educational benefit to Student. General education is language heavy. Student could not sufficiently understand or communicate in class. She could not understand verbal directions from a general education teacher. As a result, inclusion would require translation of all verbal instruction. Student would need a small class. Visual distractions would need to be removed, and the noise level would need to be reduced. Student would need a separate work area to deflect all distractions. The curriculum would need to be significantly modified, and Student's instructional periods shortened as Student's learning is so far off from the learning of general education students. In essence, Student would have a one-to-one assistant in the back of the room providing modified instruction to Student alone. Instead, Ms. Howard opined, Student needed the structure and auditory and visual supports provided in a SDC.

#### TRAINING OF TEACHERS AND AIDES:

57. Student contends that the District failed to have appropriately trained teachers, transportation aides, and classroom aides.

Student contends that Student's teacher, classroom aides and transportation staff were not trained to implement appropriate behavioral interventions needed by Student. Student has provided absolutely no evidence to substantiate this claim. Student failed to provide any evidence as to the training required of District personnel, what training they allegedly lacked, or how it impacted on Student's education. Student touched on this contention as an implied assumption. As example, Mother contended that Student continued to wet herself, therefore, the teacher and classroom aides must not have been trained to properly implement appropriate behavior interventions. Ms. Howard showed one of the bus drivers how to properly secure Student in her harness, therefore the

driver must have been improperly trained. Student failed to provide a factual basis to conclude that any teachers or aides had been improperly trained.

#### STUDENT'S PROGRESS ON GOALS:

Student contends that she failed to make progress on her goals.

58. While Mother's testimony indicates that she was dissatisfied with Student's goals and services, particularly in LAS, there is no evidence to suggest Student was not making progress on the goals contained in her IEP. Mother's concerns focused on the level of services provided, rather than on Student's ability to make progress on her goals. As example, Mother indicated that Student did not speak much, and, therefore, she felt Student's LAS services were insufficient for her needs. Ms. Kerns-Tackett opined that, based upon her observations of Student in late 2007, some of Student's goals were way beyond Student's level, and Student made progress on goals she felt were inappropriate for Student. She provided no opinion regarding the intervening year of home study through Laurel Springs on Student's progress.

59. Student's teacher and SLP provided the only first hand evidence obtained during the 2005-2006 school years. Both Ms. Howard and Ms. Hill indicated that Student made progress on her goals during that time. Student's progress reports also reflect positive progress. Further, the IEP team discussed Student's progress at each IEP meeting, and Parents signed each IEP until May 2006. The evidence supports a finding that Student made progress on her goals from February 22, 2006, through the end of the 2005-2006 school year.

## LEGAL CONCLUSIONS

#### BURDEN OF PROOF:

1. With respect to the issues involving special education and related services, the Supreme Court has held that the burden of proof in an administrative hearing

challenging an IEP is properly placed upon the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student filed the Request for Due Process Hearing in this matter and contends that the District failed to offer Student a FAPE in the relevant IEPs. Student's advocate erroneously argues in his Closing Brief that the District has the burden of proof to show that the FAPE offers were appropriate. On the contrary, as Student is the party seeking relief, the burden of proof lies with Student. Additionally, as correctly noted in the brief, a party also has a burden of proof as to *each* fact which is essential to its prima facie claim for relief. (Evid. Code, § 500.)<sup>20</sup>

#### STATUTE OF LIMITATIONS:

2. Any request for a due process hearing shall be filed within two years from the date of the party initiating the request knew or had reason to know the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C); Ed. Code, § 56505, subd. (l).) The time period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either (1) specific misrepresentations by the district that it had solved the problem forming the basis of the due process hearing request or (2) the district's withholding of information from the parent that was required to be provided to the parent. (Ed. Code, § 56505, subd. (l)(1)-(2).) Student presented no claims of misrepresentation or withholding of information by the District; therefore, the statutory time frame of this complaint is two years from the date of filing (February 21, 2008). Much of the information solicited from Student's examination of witnesses

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<sup>20</sup> Mr. Peters' misinterpretation of these concepts may have contributed to the legal findings contained herein.

pertained to events which occurred prior to February 21, 2006, and therefore had limited application to the issues in this matter.<sup>21</sup>

#### EFFECT OF PRIVATE PLACEMENT:

3. Student contends that the District failed to provide Student a FAPE from February 22, 2006, through February 22, 2008. It is undisputed that Parents privately placed Student in Laurel Springs for the 2006-2007 school year. Additionally, Parents neither initiated nor responded to communication with the District until November 2007. As of the date of hearing, Student still has not reenrolled in the District. Accordingly, Student did not have an individual right to receive some or all of the special education and related services she would have received if she had remained enrolled in the District. (34 C.F.R. § 300.137(a)(2006).) Further, Student introduced no evidence at hearing regarding the denial of FAPE after May 31, 2006. Therefore, Student has failed to meet her burden of proof on all issues for the period of June 1, 2006, through February 22, 2008. (Factual Findings 2 and 6.)

#### FREE APPROPRIATE PUBLIC EDUCATION:

4. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA.

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<sup>21</sup> In spite of being reminded on several occasions of the relevant time frame of his case, it is noted that Student's advocate continued to spend a great deal of his time pursuing evidence regarding matters barred by the statute of limitations.

5. A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction, that meet the state's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined as specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); Ed. Code, § 56031.) Special education "related services" include developmental, corrective, and supportive services, such as speech-language pathology services and occupational therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(a)(26); Ed. Code, § 56363.)

**DID THE DISTRICT FAIL TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY:**

6. A school district is required to ensure that a student with exceptional needs is assessed in all areas related to the suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320(f).) Student's most recent triennial assessment took place in October 2004. While the validity of the 2004 assessments is beyond the two year statute of limitations allowed in this matter, the findings, recommendations, and conclusions contained in those assessments are relevant, in part, as Student's factual basis for the subsequent IEP decisions which are the subject of this complaint. Nonetheless, Student contends that the District failed to assess her in all areas of suspected disability.

7. The District completed a triennial assessment of Student in October 2004. Absent a request for additional assessments, the District was not required to further assess Student until the next triennial assessment slated for October 2007. While Student's experts opined that additional developmental assessments existed which would have benefited Student, they did not find any areas of disability which had not

already been identified by the District. Student provided no credible evidence that additional areas of suspected disability existed. Student's teacher, Ms. Howard, indicated that Student was progressing well in the SDC. She did not feel that additional assessments were needed. Ms. Hill, a veteran SLP, stated that if she believed Student needed further assessment, she would have requested one. Student fails to differentiate between the concept of identifying an area deficit through assessments, and the concept of interpreting those assessments to create a child's IEP. Student and her witnesses did not disagree with the identification of Student's unique needs; but rather, they disagreed with the placement and services offered in response to those needs. The District did not fail to assess Student in all areas of suspected disability. (Factual Findings 7 through 16.)

8. A reevaluation of a student must be conducted if, (1) the district determines that the educational or related services needs of the child warrant a reevaluation or (2) the child's parent or teachers request a reevaluation. (Ed. Code, § 56381, subd (a)(1).) A reevaluation may not occur more than once a year unless the parent and school district agree otherwise, and a reevaluation must occur at least once every three years, unless the parent and district agree that a reevaluation is unnecessary. (Ed. Code, § 56381, subd. (a)(2).) Failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District*. (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) However, 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 decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

9. Student did not meet her burden of persuasion in establishing that the District was required to assess Student subsequent to February 22, 2006. The evidence

did not suggest that any additional areas of disability were suspected or that the District had a further duty to assess Student. The teachers and service providers did not request reassessment. Student presented no evidence to suggest that Student was not making adequate progress on her goals. Parents wrote the District to request that an IEP be set in January 2006, for discussion of further assessments, and the District did indeed hold the IEP meeting to discuss Parents' concerns. The IEP team amended Student's IEP in response to those concerns. Parents consented to this January 31, 2006 IEP without requiring additional assessments. Parents finally made a formal request for additional assessments at the May 31, 2006 IEP meeting. The IEP team considered Parents' requests, and agreed to provide an augmentative communication assessment. Student's tape of the IEP meeting clearly contains the District's agreement to consider additional assessments upon Mr. Peters providing copies of assessments he claimed had been done. Mr. Peters plainly stated he would contact the District in a few days to further discuss additional assessments. The District received no further communication from Parents or Mr. Peters, and, therefore, provided Parents with written notice denying their requests for additional assessments. Moreover, Parents refused consent to the agreed augmentative communication assessment, withdrew and privately placed Student, and ceased all communication with the District until November 2007. The evidence does not support a finding that other areas of suspected disability existed, therefore the District was not required to reassess Student prior to her scheduled triennial assessment. (Factual Findings 4, 6, 9, 11, 12, 22, and 44.)

#### DID THE DISTRICT FAIL TO CONDUCT A FUNCTIONAL ANALYSIS ASSESSMENT:

10. Pursuant to title 34, Code of Federal Regulations, section 300.324(a)(2)(i)(2006), a behavioral intervention plan (BIP) is created to consider the appropriate strategies, including positive behavior interventions and supports, to address a student's behavior that impedes the student's learning or that of others. The

IDEA has never defined a behavior intervention plan, leaving such plans to the wide discretion of public agencies. States, however, may impose a greater standard to educate disabled students, if they are not inconsistent with federal standards, and those standards are enforceable in federal court under IDEA. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1524.)

11. California has created a greater standard in its behavior intervention regulations contained in the California Code of Regulations sections 3000 et seq. Under California law, when a school district determines that the instructional and behavioral approaches contained in a student's IEP are not effective, it is required to conduct a FAA. The purpose of the FAA is to assist in designing positive procedures which produce significant improvement in a student's behavior through skill acquisition and the reduction of problematic behavior. These procedures are intended to provide the student with a greater access to a variety of community settings, social contacts, and to ensure the student's right to placement in the least restrictive educational environment as outlined in the student's IEP. (Cal. Code Regs., tit. 5, § 3001, subd.(d); Ed. Code, § 56341.1(b)(1).) Additionally, in what is commonly known as the Hughes Bill, a district must conduct a FAA where a serious behavioral problem is demonstrated in which the student's behavior(s) are self-injurious, assaultive, or cause serious property damage. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(7).) On the other hand, a FAA and BIP are not always required. The IEP team may develop a behavior support plan (BSP) to address minor behavior issues that a teacher or other educational provider can implement in the classroom.

12. Student contends that the instructional/behavioral approaches specified in her IEP were ineffective, and that she exhibited serious behaviors that were self-injurious and which interfered with the implementation of her goals, thereby interfering with her ability to benefit from her education. Further, Student claims that these behaviors were

escalating, and, as a result, a FAA was necessary. The evidence, however, supports the contrary conclusion. None of the witnesses observed any escalating behaviors. Student's teacher invoked a series of strategies to lessen Student's wetting behavior which were successful, and, as of 2006, wetting was not an issue at school. The Regional Center's March 2006 assessment of Student did not recommend an FAA. Lastly, Student's school bus behaviors were solved by 2006. (Factual Findings 18 through 21.)

13. The evidence further indicates that Parents did not request a FAA until the May 31, 2006 IEP meeting. Ms. Howard saw no behaviors which warranted a FAA. She indicated that she was absolutely able to handle Student's classroom behavior with classroom behavior management strategies. Student responded well to positive behavior techniques as she wanted to please. Marissa Quan, who provided ABA services to Student, indicated that Student had made behavioral improvements, and she did not observe any behaviors which required further or more intensive intervention. Mr. Annicchiarico reported that Student did not demonstrate any significant behaviors which could not be handled in the classroom, nor did her behaviors interfere with her education or the education of others. (Factual Findings 22-26.) The District had no duty to conduct a FAA.

**DID THE DISTRICT FAIL TO HAVE APPROPRIATELY TRAINED TEACHERS,  
TRANSPORTATION AIDES, AND CLASSROOM AIDES:**

14. Student failed to provide any evidence as to the training required of District personnel, what training they allegedly lacked, or how it impacted on Student's education. Although in Factual Finding 24, Dr. Paltin commented that the classroom teacher could not provide appropriate interventions for Student's behavior problems without an FAA, Student again misses the point. While the teacher may not have been legally qualified to administer a FAA, none of the evidence suggests that she was unskilled or untrained in special education, autism, or any other subject related to

Student's education. Further, she would have been precisely the person given the responsibility of administering the BIP for Student, had the FAA been done. The District did not fail to provide appropriately trained teachers, transportation aides, and classroom aides.

#### DID STUDENT FAIL TO MAKE PROGRESS ON HER GOALS:

15. A student derives benefit under *Rowley* when she improves in some areas even though she fails to improve in others. (*Fort Zumwalt School District v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613.) A showing of progress does not require that a D student become a C student and thus rise in relation to his peers. Progress may be found even when a student's scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Department of Education*. (D.Del. 2001) 162 F.Supp.2d 316, 328.)

16. While Mother's testimony indicates that she was dissatisfied with Student's goals and services, particularly in LAS, there is no evidence to suggest Student was not making progress on the goals contained in her IEP. Student's teacher and SLP provided the only first hand evidence obtained during the 2005-2006 school years, and both indicated that Student made progress on her goals during that time. Student's progress reports also reflect positive progress. Even Ms. Kerns-Tackett indicated that Student made progress on some goals, even though she believed them to be inappropriate. The IEP team discussed Student's progress at each IEP meeting, and Parents signed each IEP until May 2006. The evidence supports a finding that Student made progress on her goals from February 22, 2006, through the end of the 2005-2006 school year. (Factual Findings 58 and 59.)

DID THE DISTRICT FAIL TO DEVELOP AN IEP THAT PROVIDED STUDENT WITH AN EDUCATIONAL PLACEMENT AND SERVICES TO MEET HER UNIQUE NEEDS IN THE LRE, SPECIFICALLY, SUFFICIENT OT AND LAS SERVICES, AND PLACEMENT IN A GENERAL EDUCATION SETTING:

17. 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. (*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. School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Rowley, supra*, at p. 200.) FAPE is determined through a student’s IEP.

18. An IEP is a written document which details the student’s current levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the

student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

19. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is “a snapshot, not a retrospective.” (*Id.* at p. 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district; not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at p. 1314.)

20. A statement of measurable annual goals must be crafted to meet the student’s unique needs that result from his/her individual disability. These goals are designed to enable the student to be involved in and make progress in the general curriculum as well as meet each of the other educational needs resulting from student’s disability. (Ed. Code, § 56345, subds. (a)(2)(A)-(B); 34 C.F.R. § 300.320(a)(2006).) Annual goals are statements that describe what a special education student can reasonably be expected to accomplish within a 12 month period in his/her special education program. Although *Rowley* notes the importance of adherence to the procedural requirements of the IDEA, the opinion also indicates that procedural flaws do not automatically require a finding of a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) While the required elements of the IEP further important policies, “rigid ‘adherence to the laundry list of items [required in the IEP]’ is not paramount.” (*Ibid.*)

21. The October 19, 2005 IEP provided Student 50 minutes per month of consultative OT services. Student presented no persuasive evidence from any of her

witnesses to support the contention that consultative OT services were inappropriate or that Student required direct OT services in order to access her education. Student presented no evidence that she was not making any progress in the area of OT. Remarkably, Student offered the Gallagher OT reports into evidence, yet provided no testimony to contradict their findings and recommendations upon which the IEP team relied in determining Student's OT services. While more OT services would certainly assist Student in maximizing her potential, under *Rowley* the District is not required to offer services that do so. Student has not met her burden of proof that the District denied her a FAPE by failing to offer her direct OT services. (Factual Findings 3, 33, 34, and 35.)

22. The October 19, 2005 IEP provided Student with 3 hours of group LAS services per month. In addition, the January 27, 2006 IEP addendum added 10 minutes per week of individual LAS therapy, and created an accompanying LAS goal for Student. Although Parents consented to the January 2006 addendum, the IEP team's determination that 10 minutes of direct LAS services is appropriate for a student with substantial autistic-like behaviors and mental retardation remains troubling. (Factual Finding 37.)

23. Ms. Dashiell presented as a credible witness in describing Student's fundamental needs in the areas of communication, socialization and sustained attention. As emphasized by Ms. Dashiell, a goal in language and communication provides the fundamental skills needed by Student to achieve other goals. Student had no form of effective communication and no goals addressing this primary deficit in communication. Given Student's attention issues, it was her opinion that a lot more than 10 minutes is necessary to just start developing that attentional behavior. Further, while Ms. Dashiell believes that Student required more than one LAS goal, she also believes that 10 minutes would not be enough time to complete even the one goal formulated by the

IEP team. Student had significant processing issues, and echolalia. Her language functions were more limited, and she needed more time to process information and respond to it. Although Student also required extensive work on joint attention and mutual engagement, Ms. Dashiell recommended that those areas which would involve group LAS services should be deferred until Student developed foundational skills in direct therapy. Ultimately, Ms. Dashiell recommended that Student receive two to three hours per week of individual LAS sessions, with small group activities being added once Student developed a sufficient foundation to respond to interactive behavior. (Factual Findings 38 through 41.)

24. Ms. Dashill's testimony, however, is not without its own limitations. While it may not be necessary for an SLP to observe Student in a classroom setting to assess her LAS needs, one definitely needs to observe the classroom to develop the LAS plan. Ms. Dashiell did not observe Student's classroom. She did not contact Student's teacher or SLP. Many of her concerns regarding Student's goals were being addressed in the SDC and combined 40 minutes per week of LAS sessions. Ms. Hill, Student's SLP, also presented as a credible witness. She indicated that she worked on receptive and expressive vocabulary, pragmatics, and basic language skills with Student. She concurred that Student was often not ready to attend or focus at the beginning of LAS sessions, and she would often need to work with Student to ready her for speech activities. The time necessary to get Student ready to attend, however, was always in addition to the 10 or 20 minutes of actual speech service time. Ms. Hill adamantly repeated that Student received an actual 10 or 20 minutes of speech service at each session. Further, Ms. Hill's testimony must be given more weight, as she is the SLP who actually worked with Student on a weekly basis in an educational setting. Most telling, in defining the appropriate amount of LAS services, is her observation that Student could

not meaningfully participate in two hours per week of direct services, as she could not attend that long. (Factual Findings 41 through 44.)

25. Once again, in determining whether the District has offered a FAPE, the focus is on the adequacy of the proposed program. Certainly Ms. Dashiell's observations and proposals would provide Student greater educational benefit than provided by the District. The District, however, is only required to provide only a "basic floor of opportunity" which consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. Even though a 10 minute LAS session may be initially suspicious, Student did not establish that she was unable to access her education or receive educational benefit with the lesser amount of LAS services contained in her IEP.

26. 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.) In considering whether a district has proposed an appropriate placement for a disabled student, a balancing test weighing four factors applies. Specifically, the IEP team must consider: (1) the educational benefit available to the student in a regular classroom supplemented with appropriate aides and services as compared with the educational benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the student's presence on the teacher and other children in the regular classroom; and (4) the cost of mainstreaming the student in a regular classroom. (*Sacramento City Unified Sch. District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1401) (*Rachel H.*.)

27. Student's October 19, 2005 IEP offered placement in the Evergreen SDC. Parents consented to that IEP, and Student remained in the SDC until the end of the 2005-2006 school year. At the May 31, 2006 IEP meeting, Parents requested that Student be placed in a GEC, contending that the SDC did not constitute the least restrictive environment for Student. In determining the least restrictive environment for a student, the four factors of *Rachel H.* must be weighed. (Factual Findings 3 and 5; Legal Conclusion 26.)

28. It is undisputed that Student would benefit from typical peer contact available in the GEC. As Dr. Paltin emphasized, it is important that Student receive typical peer socialization as soon as possible. It is also undisputed that Student did not exhibit maladaptive behaviors which prevented her inclusion in a GEC. District witnesses acknowledged that Student's negative behaviors were not severe. Mr. Annicchiarico indicated that Student did not demonstrate any significant behaviors which could not be handled in the classroom, and Student's behaviors did not interfere with her education or the education of others. Ms. Quan similarly reported that Student responded well to redirection and positive reinforcement of communication. None of Student's related services interfered with or prevented Student's placement in a GEC. Further, Student presented no evidence to suggest that the cost of mainstreaming Student was a factor in the District's offer of SDC placement. (Factual Findings 23, 25, 46 and 47.)

29. On the other hand, there is significant evidence that Student's functional levels would require such modifications as to make the GEC placement meaningless. Student's assessments indicated that in addition to her diagnosis of autism, Student functioned in the moderate range of mental retardation. Her social skills were in the severe range of development. Student's teacher reported that Student needed a highly structured direct teaching system, with a curriculum which focused on functional skills. She responded well to the SDC. Student's overall functional language skills ranked her

around two years of age. Ms. Dashiell's LAS assessment determined that Student had severe attention related behavior problems and significant processing issues, as well as social communication and interaction deficits. Ms. Dashiell concluded that although Student needed extensive work on joint attention and mutual engagement, those goals should be postponed until Student developed a sufficient foundation to respond to interactive behavior. This lack of basic communication and attention skills does not support an ability to participate in a general education setting. Ms. Kerns-Tackett observed that Student requires guidance thorough typical routines. She does not understand directions and requires personal direction and redirection from a teacher or aide. She is also prone to escape. In order adequately accommodate Student's needs in a GEC, Student needs an individual aide to modify the second grade curriculum, and in essence, translate the general education teacher's verbal instructions. She acknowledged that Student's education in the GEC might take place in the back of the classroom, segregated from the other students. All other District witnesses agreed that Student needed to develop additional functional skills before moving into the general education setting. All agreed that while physical placement in the GEC is possible, Student is still unable to communicate or participate in that setting. Ms. Howard's attempts to provide general education experiences for Student clearly indicate that Student was not ready to face full immersion into the general education setting. (Factual Findings 46 through 56.)

30. Lastly, Ms. Howard provided personal observations of Student's struggle in the GEC. Student required a small class, where visual distractions are removed and noise levels reduced. Student required a separate work area to deflect all distractions. None of these requirements are available in the GEC. Due to her cognitive abilities and attention deficits, Student requires significant modifications of the curriculum and shortened instructional periods, which differ greatly from the general education curriculum. As a result, Student becomes a class of one, with no academic connection to the other

students. Ms. Howard expressed that Student received educational benefit in the SDC, and she could be appropriately exposed to typical peers with continuing mainstreaming activities, and work towards building basic learning skills. As Mr. Annicchiarico emphasized, inclusion is more than a mere physical presence in a GEC. While it is possible to physically place Student in a GEC, she would not be able to meaningfully participate in the classroom amongst typical peers. The weight of the evidence therefore supports the finding that the Evergreen SDC constituted the appropriate placement for Student in the least restrictive environment. Student has therefore failed to meet her burden of proof to establish that the District denied her a FAPE when it offered placement in a SDC rather than in a general education classroom. (Factual Findings 51 and 56.) The District has not denied Student a FAPE.

## ORDER

Student's request for a finding that the District denied Student a free appropriate public education between February 22, 2006, and February 22, 2008, is denied.

## 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.

1. The District prevailed on issue 1.

## 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 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: October 17, 2008

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JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings