

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:  HERMOSA BEACH CITY SCHOOL DISTRICT,  v.  STUDENT.	OAH CASE NO. 2008040039
STUDENT,  v.  HERMOSA BEACH CITY SCHOOL DISTRICT.	OAH CASE NO. 2008040616

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Hermosa Beach, California, on June 10, 11, 12, and 30, 2008, July 7 and 8, 2008, August 5, 8, 13, and 28, 2008, and September 26, 2008.

Andrea Tytell, Attorney at Law, represented Student. Student's Mother (Mother) and/or Father (Father) attended the hearing on all days.

Peter Sansom, Attorney at Law, represented Hermosa Beach City School District (District). District Coordinator of Special Education Linda Diana Bowlby (Bowlby) or Superintendent Sharon McClain (McClain) attended the hearing on all days.

The District filed its request for due process hearing in OAH case number 2008040039 on March 31, 2008. Student filed his first amended request for due process hearing in OAH case number 2008040616 on April 23, 2008. On April 28, 2008, Student's motion to consolidate was granted. All timelines applicable to OAH case number 2008040616 were ordered to apply. At hearing, the parties were granted permission to make closing arguments by September 26, 2008. Student made an oral

closing argument and the District filed a written argument. Upon receipt of closing arguments the matter was submitted and the record was closed.

## ISSUES

1. Whether Student was denied a free and appropriate public education (FAPE) from April 16, 2006, through the 2007-2008 school year, because:
  - (a) Student's educational program in the District required an excessive number of transitions and pull-outs; and
  - (b) Student's unique needs required placement in a nonpublic school, such as Summit View, rather than placement in a District general education classroom with supports and related services.
2. Whether Student's Individualized Education Program (IEP) dated November 29, 2007, as amended on January 14, 2008, February 19, 2008, and March 24, 2008, provided Student a FAPE.<sup>1</sup>

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<sup>1</sup> In its due process hearing request, the District also sought resolution of the following issue: Whether Student was required to enroll in a school in the District and accept the offer of placement and services in the IEP dated November 29, 2007, as amended on January 14, 2008, February 19, 2008, and March 24, 2008, if Student desired the District to provide him with a FAPE. However, this second "issue" does not require findings of fact and conclusions of law, and instead states the consequence to Student for the 2007-2008 school year should the District prevail. (See Ed. Code, § 56505, subd. (h) [due process hearing decision is the final administrative decision that is binding on all parties].) Accordingly, no separate resolution of this "issue" is required.

## FACTUAL FINDINGS

1. Student is a nine-year-old boy, who, at all relevant times, lived within the District boundaries. Student has an immune deficiency that left him prone to infections, particularly of the ear and nose, and which caused him to be ill more often than typical children. At all relevant times, Student was eligible for special education under the categories of speech and language impairment or other health impairment based on speech and language delays and/or attention deficits.

2. Student was in kindergarten during the 2005-2006 school year. Student's operative IEP as of April 16, 2006 (two years prior to the date Student first filed a request for a due process hearing) was dated October 18, 2005, and listed Student's primary eligibility as speech and language impairment. The IEP noted that at the time it was drafted, Student was improving in all areas related to school functioning. Specifically, Student's knowledge of letters, numbers and reading simple words had improved, as had his pronunciation. Student had difficulty with using full sentences for questions, forming lowercase letters, cutting precisely with scissors, and Student sometimes engaged in a self-stimulatory behavior ("stimming") of hitting or rubbing his legs. It was noted that Student had increasing interest in socializing, but "tends to walk away from social situations if he feels anxious." Parent concerns at the time were that Student was having difficulty learning in a group environment and was exhibiting frustration.

3. The October 18, 2005 IEP offered, and Mother agreed to, placement in a District general education kindergarten class with the following related services: three, 30-minute resource specialist periods (RSP) per week, plus 15 minutes per week of resource specialist consultation; three, 30-minute speech therapy sessions per week; two, 30-minute occupational therapy (OT) sessions per week; and, an instructional assistant in the general education classroom.

4. The October 18, 2005 IEP contained goals in the following areas that were consistent with Student's areas of need: reduction of "stimming" behavior; asking for help; counting; using accurate question form; far point copying; writing lowercase letters properly; cutting accurately with scissors; improving pattern recognition (a math goal); reading kindergarten words; and, writing simple sentences. A review of the goals shows that all goals were understandable, measurable, achievable, and included short-term objectives.

5. Kimberly Long (Long) was a District resource teacher whose job duties included providing multi-modal (e.g., kinesthetic, visual, verbal) instruction in reading, writing, and math to students at different ability levels. Long was a credentialed special education teacher who had experience working with children with learning disabilities and autistic-like behaviors. Long was trained in using reading materials from publishers such as Lindamood-Bell, SRA and Houghton-Mifflin. At the time of hearing, Long was taking courses toward a masters degree. Long first met Student in September of 2004, when he was enrolled in a District pre-kindergarten program and she provided Student with "pull-out" RSP services from that time until February of 2007, when Long was reassigned to another school site. After February of 2007, Long still had contact with Student when she would substitute for his RSP teacher. Long had attended numerous IEP's for Student and acted as his IEP "case carrier" during the time he was enrolled. Long discussed Student's educational needs with Mother on at least a weekly basis during the time he was enrolled. Long also provided classroom consultation consisting of discussing academic and behavioral strategies to use with Student, as well as Student's progress and any concerns.

6. Student made progress with Long during the 2005-2006 school year. He went from being unable to write his name to being able to write his first name without support and his last name with support. Similarly, Student went from being unable to

cut straight lines with scissors to being able to cut shapes. Student progressed in reading words on flash cards and increased his number recognition. Although Student did not meet his goal of writing a sentence, he progressed to where he only needed cues from flashcards. In math, Student had a goal of matching patterns, which he met by progressing from not being able to match patterns at all. Student also made progress on self-help skills, moving from avoidance behavior to asking for help. Student also made progress on the goal of reducing his "stimming," which lessened in class, and was not occurring during RSP instruction. Although Long did not provide speech or occupational therapy, she saw that Student made progress in these areas, specifically that Student met his speech goal of properly asking questions and made progress on his far point copying goal. Long also observed that Student's attention span increased from October of 2005 to October of 2006. Mother showed confidence in Long, and Student's progress with her, by hiring Long to privately tutor Student during the summer of 2006. To accommodate Mother's concern about minimizing the amount of time Student had "pull out" services, Long voluntarily conducted some of Student's RSP sessions prior to the start of the school day.

7. Student was in first grade during the 2006-2007 school year. Student's operative IEP at the beginning of the school year was the October 18, 2005 IEP. A new IEP, which Mother consented to, was developed on October 18, 2006. Student's eligibility category remained speech or language impairment. The IEP noted that Student "likes school and always seems happy" and that Student "loves school and class." Parents' "biggest concern" was Student's confidence with reading and his reading ability.

8. Student's present levels of performance in academics and functional skills were reported in the October 18, 2006 IEP. The IEP noted that in academic and functional skills, Student had made progress in all academic areas. Specifically, Student

had increased his reading skills by being able to identify all upper and lower case letters and saying all letter sounds and had mastered 90 percent of his kindergarten "word ring" (a ring of flashcards of targeted words), but still required work on reading fluency. Specifically, Student could read seven words per minute at kindergarten level. At the time of the meeting, Student's first grade teacher, Chris Shima (Shima) reported that Student did not appear to have made progress in reading during the first few weeks of school. On comprehension tasks, even when it had not appeared that he was paying attention, Student was able to answer 100 percent of the questions at kindergarten level and 90 percent of the questions at first grade level. In math, Student had increased his knowledge of numbers to 50, but still had difficulty counting sequentially to 50. Student was able to complete simple math calculations and had improved his performance completing patterns. It was noted that although Student had asked for help appropriately in kindergarten, and continued to do so in the resource room, he was not doing it in enough in class.

9. The October 18, 2006 IEP also reported present levels of performance in communication development, gross/fine motor development, social/emotional/behavioral, health and adaptive/daily living skills. In speech and language, Student met his expressive language goals from the October 18, 2005 IEP, was using complete sentences and accurate question form, and had grade-level language skills. However, Student continued to need therapy for articulation of /s/ sounds. In motor development, Student made progress in copying designs (with up to 60 percent accuracy), but continued to have difficulty writing lower case letters and cutting precisely with scissors. In social/emotional/behavioral areas, Student was not "stimming" by the end of kindergarten; however, the behavior had returned upon starting first grade. Student continued to demonstrate interest in socializing, but still tended "to walk away from social situations if he [felt] anxious." In health, Student was

"in relatively good health since the beginning of the school year." Student had adequate adaptive/daily living skills for his age.

10. The October 18, 2006 IEP contained goals in the following areas that were consistent with Student's areas of need: fine motor/visual motor skills in far-point copying and writing; reading fluency; math calculation and fluency; writing sentences accurately; increasing attention through sensory strategies; and a speech goal of proper articulation of the /s/ sound. A review of the goals shows that all goals were understandable, measurable and included short-term objectives.

11. The October 18, 2006 IEP provided for placement in a general education first grade class at a District elementary school, with the following related services: group, "pull out" RSP two times weekly for 45 minutes each time, plus individual "pull out" RSP once a week for 30 minutes; speech therapy once a week for 25 minutes; and, after school occupational therapy by a non-public agency one time per week for 60 minutes. Under this IEP, Student was outside of a general education environment for 12 percent of the school day. The IEP also included the following accommodations and modifications: use of math manipulatives; preferential seating near the teacher and/or a positive peer role model; prompting as needed; an instructional assistant in the general education classroom; presentation of one task/direction at a time, instructions repeated/rephrased; and, checking with Student for understanding.

12. Long was present at the October of 2006 IEP team meeting and her perceptions that Student had made progress are reflected in the present levels of performance. Long saw that Student's physical health improved over the time she knew him. Long does not recall Mother raising any issues about lack of progress, anxiety, health issues, or that Student was not appropriately placed.

13. Shima taught Student's first grade general education class during the 2006-2007 school year. Shima had four years teaching experience and had training in

tailoring and modifying curriculum for special education students. In addition to working with Student in class every day, Shima saw Student at recess five days a week, at physical education once a week and at lunch/snack, one or two times a month. Shima coordinated with RSP instructor Long and Student's speech therapist.

14. Student was assisted in Shima's class by a one-to-one aide, who worked without drawing attention to Student by seeming as if she was an aide for all Students. Student's aide would modify Student's assignments or prompt him as needed.

15. Student participated in reading groups with Shima and other students for four, 30-minute sessions per week. Shima saw Student make progress in reading. At the beginning of the year, Student had trouble pronouncing and decoding, but by Memorial Day weekend of 2007, Student had advanced to more challenging word lists, his fluency had increased and he was successfully reading aloud. Shima also saw growth in Student's reading comprehension as evidenced by Student's increased ability to answer questions about a story that was read in class. Shima also saw Student make progress in math, increasing his accuracy and rate of computation. In writing, Shima saw Student's writing mechanics improve. Student went from having difficulty writing within the lines of lined paper to being within acceptable guidelines for Student's grade level. In spelling, Shima described that, overall, Student's spelling had improved, however, toward the end of the year, Student's progress slowed when faced with more challenging words.

16. Student liked math and science and would participate in class discussions. Shima recalled that Student enjoyed talking about RV trips, vehicles and animals. Shima perceived that it was beneficial to Student to display his knowledge of animals in front of the class because it allowed Student to show the other children that he had a talent.

17. As to attention in class, Shima noted that Student's attention was easily redirected back to task by his aide with a gesture or tap on the shoulder. At times when

Student was distracted by his friends, he was redirected using the same warning system of green, yellow, orange and red cards that was used with all of the students. A “yellow” warning card was usually sufficient for Student to correct his behavior. Student was more distractible when performing tasks that he liked the least, such as writing, but was not disruptive in class.

18. Shima described a typical school day. Student arrived in his classroom either from the playground or from RSP. Student was not disruptive when he entered class and did not need any support to transition into the classroom. During classroom transitions to activities like snack time, Student behaved like the other children and did not require aide support. Student enjoyed snack time because he got to play with his two friends. Student’s play was typical for his age, and Shima would see Student and his friends doing things like making things with building toys or playing in a sandbox. Student did not need assistance to transition from snack back into class even though transition from recess required all students to freeze, line up with their class, and proceed in line to class. To transition to lunch, Student cleaned up his work like the other children and followed directions without support or behavior problems. Student ate lunch with the same two friends. Student returned from lunch without the need for adult support and followed the routine of lining up after the bell rang. Classroom instruction used a “centers” technique of teaching in small groups with the small groups rotating between centers. Student was on the same rotation as other Students and transitioned between centers without adult assistance. If Student required pull-out services like speech therapy, Student transitioned without difficulty, appearing to resist only when something interesting was going on in the classroom. Even at those times, Student transitioned with ease. Student transitioned easily with the other students to physical education and music. At no time did Shima see Student appearing overwhelmed, fatigued, anxious, or depressed. Student transitioned between activities

with no more difficulty than typical peers.

19. Shima saw Student benefit from modeling the behavior of his typical peers. For example, Student learned to use “indoor voice” and how to properly get the teacher’s attention by modeling his peers.

20. During Student’s first grade year, Long assessed him in grade-level math on February 15, 2007. Student got 63 percent of the problems correct. When Long administered the same assessment to Student on September 24, 2007, Student got 84 percent correct, demonstrating that Student had made progress in math while in Shima’s class.

21. Student would talk excitedly to Long about his friends, his weekly playdate and what he was going to do with his friends. Long did not see any signs of depression, and to the contrary, Student expressed his happiness about his friends and his teacher. Similarly, at no time did Student or Mother say anything to Long that would indicate that Student had anxiety about school. Long did not see any sign that Student had difficulty getting to school in the morning and he generally arrived on time. Student did not exhibit any difficulty transitioning from his class to RSP or back again. Long saw Student playing at recess with what she described as a “handful” of friends. Long never saw or heard that Student was bullied at school.

22. In the spring of 2007, Mother told Long that she was happy with the placement in Shima’s class and with his progress, with the exception of his progress in spelling. Mother never mentioned to Long that she believed that Student required a placement in a non-public school.

23. Long believed that Student benefited from interaction with typical peers and as an example noted that she had seen Student stay on task by self-correcting after looking to see what the other kids were doing.

24. Long described how Student's one-to-one aide acted in a way that would not stigmatize Student. For example, she saw that Student's aide could get him to refocus during reading groups by glancing at him or tapping him on the shoulder. In addition, the aide acted as the aide for the entire class when Student did not need assistance. Other children receive pullout services, so this would not be stigmatizing. Similarly, other children, including typical children, relied on accommodations like visual schedules or standing during classroom.

25. Kelly Tyrao (Tyrao) was a resource assistant for the District. Tyrao knew Student from working with him in the RSP room under Long's direction, working on the playground as lunch-time aide and privately tutoring Student two to three hours a week for Mother. Tyrao had nine years experience in her position, which she described as including working one-to-one with RSP students to modify assignments under Long's direction, and assisting with transitions. When working as a tutor for Mother, Tyrao mainly monitored Student's assignment completion and kept him focused on the task. Although Tyrao was not a credentialed teacher, her observations were found credible, particular because Mother trusted Tyrao enough to hire her as a tutor.

26. Generally, Tyrao saw that Student lined up and followed his class appropriately when needed and did not need aide support to transition from lunch back to class. At no time during lunch recess did Tyrao see Student isolated or alone, and instead, she described seeing Student using building blocks, playing in the sand and using the swings with other children. Although Tyrao recalled that Student had two best friends that he preferred to play with, she recalled him playing with other students as well. At no time did Student appear fearful or overwhelmed by the lunch recess environment of 250 children. To Tyrao, it appeared Student benefited from typical peer interaction because he conformed his behavior to that of the students around him.

27. In RSP, Tyrao worked with Student on reading and math, and sometimes on writing. Tyrao implemented sensory breaks at Long's direction, consistent with Student's IEP. During the 2006-2007 school year, Long saw Student improve his reading by going from reading sight words to reading entire sentences. In math, Student improved from relying on manipulatives to doing calculations to mastering some math facts. For example, by the time Student left school, he was no longer counting on his fingers to assist in calculations. Student's writing got neater, as evidenced by proper case and punctuation. Student was able to write complete sentences with enough success to meet the journal requirement for Shima's class. Tyrao also saw improvement in Student's attention. Tyrao had seen Student engage in the "stimming" behavior of rubbing his legs, but this decreased as the 2006-2007 school year progressed.

28. According to Mother, Student told her that he was placed in the back of Mr. Shima's classroom to work with his aide, which caused him stress because he felt different. However, this description of Student's classroom placement was not persuasive because it was uncorroborated by other testimony at hearing.

29. Mother believed that Student should not have received related services on a "pull-out" basis because it would cause Student to be self-conscious and that other students might make fun of Student.

30. Mother was also distressed that when she saw Student at recess, she only saw him with his two close friends. Mother believed that Student's aide should have facilitated Student in developing more friendships. Although Mother was concerned for her son's well-being, the fact that Student had two close friends to play with while enrolled in the District program did not demonstrate a social deficit, but instead demonstrated social success in the general education environment.

31. Father never saw Student in his classroom during the 2006-2007 school year (first grade). During that time, Father drove Student to school sometimes. Prior to

school, Student would state that he did not want to go to school and needed to be cajoled to go to school. According to Father, Student made statements to the effect that other children were not nice to him at school. Student did not report to Father that transitions between classes or therapies at school were difficult for him. Father described Student as “prideful” and that it bothered Student to be different from other children and to have attention called to his differences. Father described Student as “anxious” about activities like school or sports, which were challenging for him.

32. When Father did take Student to school, he would walk Student directly to the RSP room or to the area where students and their parents would line up before being called to class. Father waited with Student until the classes were called. Father did not see Student greeting fellow students in the morning and perceived that other students did not want to talk to Student. Father never witnessed any bullying at school. When Father picked Student up from school at the end of the day, he perceived that Student was tired and anxious to leave. At home, Student adapted quickly to being out of school and would request activities like going to the park. Mother and Father needed to monitor Student to make sure that he did his homework, particularly reading, writing and math, which were more difficult for Student.

33. In December of 2006, Mother took Student out of his District-provided speech therapy, so that Student could keep a regular play date with one of his friends and so that Student’s younger brother, who also required speech therapy, could have Student’s time slot.

34. Maureen Soria (Soria) was a licensed speech and language therapist who had assessed Student and provided him with speech therapy. During the 2005-2006 school year, Soria provided Student with three, 30-minute group therapy sessions per week. In the 2006-2007 school year, Soria provided group speech therapy to Student one time per week for 30 minutes until Mother revoked her consent. Soria had over 15

years experience and her credentials included a bachelor's degree in psychology and a master's degree in speech pathology.

35. During the 2005-2006 school year, Soria saw Student make progress on his expressive language goal of using accurate question form. Student progressed from being unable to do this in a natural setting, to sounding more like typical children. Until Mother revoked her consent for speech therapy in December of 2006, Soria worked with Student on his articulation goal of accurately producing an /s/ sound. Soria thought that at the time, one, 25-minute speech therapy session as set forth in the October 18, 2006 IEP was appropriate for Student because his receptive abilities were in the average range and he had met his prior expressive speech goals. At the time Student's speech therapy services ended in 2006, Soria believed Student's greatest need was in the area of articulation and that his expressive language was not noticeably different from his typical peers.

36. Soria never saw Student appear anxious or stressed and he never resisted pull-outs for therapy. Although Mother had said that pull out services made Student uncomfortable, Student himself never said this. Student generally attended to speech therapy sessions and returned to class with only a verbal prompt. Soria explained that speech therapy on a pull-out basis was required to ensure a small group setting and to keep Student's attention. Soria also believed that exposing Student to interactions with typical peers was crucial for Student to generalize skills he learned in speech therapy. Soria had seen Student at lunch talking to another child.

37. On April 24, 2007, a parent volunteer in Shima's class announced that she would be moving and solicited new volunteers to help Shima with classroom preparation. The parent volunteer that was moving was the mother of one of Student's school friends. Another mother volunteered. Mother objected to the new volunteer working in the classroom out of fear that this person would see Student's school work

and gossip about it. Mother and Father exchanged e-mails with Shima regarding Mother's fear that the volunteer would see Student's work. The e-mail exchanges described Mother's anxiety and that the problem was between Mother and other parents. Shima assured Mother that the volunteer duties did not include access to Student work or records, and that the new volunteer would be working in the classroom at a time when the students were not present.

38. Mother's conflict with the new parent volunteer had arisen from an incident in the 2004-2005 school year in which a District classroom aide had been reassigned after discussing Mother's parenting and Student's health and educational issues with other parents. Mother and her attorney had met with District Special Education Coordinator Bowlby at the time to discuss the District's privacy policy. After the 2004-2005 school year incident, Mother felt ostracized by the other parents, who blamed her for the aide's reassignment. Mother felt that because of her conflict with other parents, Student was "under a microscope" from other students and their parents and that the prior incident caused Student to be socially ostracized outside of school. Mother perceived that the 2004-2005 school year incident was stressful to Student and affected his health.

39. Prior to the 2006-2007 school year, Mother had requested that Student be placed in Shima's class. Before the parent volunteer issue arose in April of 2007, Mother told Shima that she was happy with the placement and with Shima.

40. District Coordinator of Special Education and School Psychologist Bowlby participated in two meetings with Mother in May of 2007 regarding Mother's concerns about the parent volunteer in Shima's class. Bowlby was generally familiar with Student since his kindergarten year (2005-2006). Bowlby had 17 years experience in school psychology. At the first meeting with Mother, Bowlby assured her that parent volunteers do not have access to confidential student records. At this meeting, Mother

told Bowlby that Student would be removed from school in order to attend family functions associated with a sibling graduation. Mother did not mention that Student would be removed from a District program in order to be enrolled in a private placement.

41. Bowlby, Shima, and District Superintendent McClain attended the second meetings with Mother in May of 2007. Mother's privacy concerns about the parent volunteer were discussed again. Mother did not mention that Student would be disenrolled from a District program in favor of a private placement or that parents intended to seek reimbursement from the District for private services. Mother did not make any mention of Student's emotional health, Student's academic progress, or that Student's removal from the District was mandated by a pediatrician for health reasons. Instead, Mother was laudatory and supportive of Shima and expressed that he had done a lot for Student, but Mother was upset about the presence of another particular parent in the classroom. Mother requested that Student be educated on an independent study contract, which would allow him to miss school, but complete school work at home. However, when Mother was ultimately provided with independent study materials, she refused to sign.

42. Student told Shima that he enjoyed being in the class. The only time Shima saw Student appear sad or depressed was in the spring of 2007 after Mother made the decision that Student would be leaving the school. It was around this time that one of Student's friends (whose mother was the parent volunteer who needed to be replaced) moved out of state. Later, in June of 2007, when asked to fill out the Brown Attention Deficit Disorder scale by Student's experts, Shima noted "social withdrawal" based on his observation that Student's mood changed when it became apparent that Student would be leaving Shima's class.

43. On May 21, 2007, Student, through an attorney, requested that Student be assessed in all areas of suspected disability. On May 30, 2007, the District generated an assessment plan, which Mother signed on June 11, 2007. The assessment plan sought to assess Student in the following areas: academics, social and emotional development, motor ability, language/speech/communication, general ability, and health and development. Mother also wrote in "SCAN-C to determine how Student processes in the presence of background noise"; however, Student did not present evidence at hearing about why this particular assessment would have been required.

44. On May 29, 2007, Mother and Father's attorney sent a letter to the District stating that Student would not be returning to school effective May 24, 2007, because, "the District has failed to keep [Student] emotionally safe" and that Student's "removal from his current classroom was mandated by his pediatrician." No evidence was produced at hearing that Student's removal from school was required for medical reasons.

45. Student's pediatrician, Dr. Daisy Vinzon (Dr. Vinzon), testified on his behalf. Dr. Vinzon was a well-qualified, board certified pediatrician, but had no expertise about educational placements. Student first presented to Dr. Vinzon as an infant with an immune system disorder that caused him to be prone to infections of the mucosal linings, resulting in persistent ear infections, diarrhea, and allergies. In addition, Student had developmental delays, primarily in language and some delays in fine and gross motor abilities. Student was treated with increased vaccinations, prophylactic antibiotics and ear tubes as needed to drain fluid from infections. In Dr. Vinzon's general experience, children with chronic illness need more help and may have emotional issues related to being different.

46. Around May of 2007, Student was recovering from a perforated ear drum caused by an infection. At the time, Mother told Dr. Vinzon that she was looking at

other options for Student's schooling because she was unhappy about the prospect of other parents talking about Student and the impact it might have on Student. Mother perceived that Student was unhappy and not doing well in school. Although Dr. Vinzon was laudably supportive of any educational decision made by the parent of one of her patients, at no time did Dr. Vinzon form the opinion that there was any medical reason to remove Student from the District program. Moreover, Dr. Vinzon was unaware of any other medical opinion mandating that Student be removed from a District program.

47. At hearing, Father testified unequivocally that the reason Student was removed from school in May of 2007 was based on Mother's concern for Student's emotional health if a certain parent volunteered in the class and because of impending family events involving a sibling graduation and a visit by out of town relatives. Father confirmed that the notes to the November 29, 2007 IEP accurately reflected the history of Student's departure from the District school. In particular, Mother was concerned about the possible impact of the new parent volunteer revealing personal information about Student that would lead to him being teased. Mother felt that it was better for Student's physical health to be out of school. Mother and Father perceived that Student was not making progress in the District program.

48. In July of 2007, Mother filled out Student's application to Summit View for the fall semester of 2007. In it, she indicated that Student was a "happy, determined little boy" whose medical issues did not interfere with school attendance or his cognitive ability. Mother also indicated that Student was capable of participating in all school activities without limitation, such as sports and field trips. The reason given for seeking a new school placement was "hostile environment, thereby, failing to meet our son's needs."

49. At hearing, Mother testified that Student was removed from school because he was under an extreme amount of stress, did not feel good about his teacher

or what he was doing at school and was also physically sick as a result. According to Mother, teacher Shima was not implementing Student's accommodations. Mother's testimony at hearing about why Student was removed from school in May of 2007 was not credible in light of the correspondence with the District and the Summit View application, which reflected that the reason Student was removed from the District had to do with Mother's concerns about the parent volunteer and not any direct concerns about the provision of FAPE to Student. In addition, Mother was not credible because she had not complained to District employees at the time about the provision of FAPE, but instead had expressed only that she did not like the prospect of the parent volunteer being in class. Mother did not tell the District at the time that she was removing Student because of any concern over the provision of FAPE, but instead stated that Student would no longer be attending school because the family would be busy with plans for a visit by out of town relatives. Father confirmed that the November 29, 2007 IEP accurately reflected that this was the reason Mother gave to the District in May of 2007. Long recalled the only discussion that she had with Bowlby about Student leaving in May of 2007 related to Mother's privacy concerns about another mother volunteering in class and that Mother intended to home school Student due to the family vacation plans. Similarly, Student's physician, Dr. Daisy Vinzon, also recalled that Mother had told her that Student had been removed from school around May of 2007 due to Mother's concerns about other parents having talked about Student in the past. Dr. Vinzon verified at hearing that there was no medical reason that Student needed to be removed from school. Finally, the timing of Student's removal from school, coming after Mother did not feel that her concerns about the parent volunteer were addressed, also supports the finding that Student was not removed from school because the District failed to provide a FAPE.

50. Student did not attend summer school during the summer of 2007. In July of 2007, Mother informed the District that District assessments needed to be delayed because an ear specialist had stated that Student might require surgery. However, as discussed below, Student was subjected to private psychoeducational assessments during this time period. On August 7, 2007, another specialist stated that Student would require surgery to repair a collapsed ear drum; however, by the end of August, Student had improved. The family, including Student, went on numerous vacations between August 9 and August 22, 2007. Student was physically healthy other than the ear infection.

51. On September 7, 2007, the District sent Mother a letter attempting to get information about when the District's psychoeducational assessment, that Mother's attorney had requested in May and that Mother had consented to in June, could be completed. The District also requested that Mother execute a release for medical release information based on Mother's communications that Student's medical issues required delaying the District assessments. The medical release reasonably required Mother to fill in the physician information, as Mother had sent letters to the District about Student's medical conditions without making reference to specific physicians. At hearing, Mother testified that she would never sign a blank medical release and did not sign the release because it was not addressed to a specific physician. However, in context, the letter was clear that Mother was being asked to provide the name of the physician on the release because Mother had failed to do so in the past when referencing medical reasons why Student could not be assessed in the summer of 2007. Mother's testimony about being unwilling to sign a blank medical release was not credible because on September 4, 2007, she signed a blank release for all medical information about Student to be provided to Summit View, a private school that Mother wanted to enroll Student in. Given the contradiction in Mother's behavior, i.e., allowing

private assessments and permitting a private school to have unlimited access to Student's medical records, while delaying District assessments and not consenting to reasonable District requests for medical information, it can only be concluded that Mother intentionally delayed the District's assessment efforts.

52. On September 11, 2007, Mother sent the District a doctor's note, which was unclear as to the name of the physician generating it, that stated "no testing for balance or coordination (gross motor skills) until one month after ear surgery." The District sent another letter to Mother on September 20, 2007, reiterating the request for a medical release. Mother explained at hearing that she did not sign the releases sent by the District because they were not limited to specific doctors. Mother was not persuasive on this point because the District's letters were clear that the information was being sought regarding Mother's statements to the District that Student needed ear surgery and the forms sent to Mother included a blank space where Mother could have filled in the name of the relevant doctor who had information about such a surgery. Mother did not sign a release for the District to obtain medical information regarding Student until January 8, 2008, such that the District did not have complete medical information about Student prior to that time.

53. Mother completed Summit View's enrollment packet for Student on September 4, 2007. Consistent with Student having been removed from the District placement for reasons related to Mother's concerns about the parent volunteer, Mother listed "hostile environment" as the reason she was seeking a new school placement. Student started school at Summit View on September 10, 2007. Mother perceived that Student had difficulty transitioning to Summit View at first because he displayed more "stimming" behavior (bending over and rubbing his legs), which she attributed to anxiety. However, according to Mother, after about three weeks Student adapted to his new school. Mother believed that Student would be more comfortable in a school like

Summit View, which limited enrollment to students with learning disabilities.

54. On September 10, 2007, Mother and Father's attorney sent a letter to the District stating that Student would be attending Summit View, a non-public school, for the remainder of the 2007-2008 school year because the District had not offered a FAPE to meet Student's unique needs. The letter concluded "This notification shall serve as the requisite ten day notice as mandated by federal and state law."

55. On September 24, 2007, Student's Summit View teacher, Sarah Wheeler (Wheeler) wrote a letter "To Whom It May Concern" expressing her concerns about Student's classroom skills. The letter was provided to Student's attorney at the request of Mother and Father, who wanted some documentation about concerns regarding Student's speech such as failure to articulate /th/, /st/, /sh/ and /s/ sounds and difficulty with speech pragmatics and syntax. The letter also referred to Wheeler's observations of Student's motor abilities and perspective-taking in social situations. There was no evidence presented at hearing that the District was made aware of the letter prior to Student filing a request for a due process hearing.

56. Soria assessed Student's speech and language needs on October 13, 2007. On the Listening Test, Student scored within the average range on all subtests, indicating that he did not have receptive language needs. However, Soria's analysis of a spontaneous language sample lead her to conclude that Student had expressive language needs in the areas of syntax, pragmatics and articulation, in particular, initiating and maintaining an appropriate conversation that did not consist mainly of questions, and articulation of /s/ and /f/ sounds. Student's teacher at Summit View, Wheeler, agreed with Soria that these were Student's areas of need. Soria recommended a combination of speech therapy and prompting at home and in the classroom. Soria ultimately recommended, and a January 14, 2008 IEP addendum offered, two, 30-minute group speech therapy sessions per week on a pull-out basis

plus 30 minutes per month of consultation between the speech therapist and classroom personnel regarding social pragmatics in the classroom.

57. Student's adapted physical education (APE) needs were assessed by LACOE APE instructor Sheila Herbin-Jones (Herbin-Jones) on November 27, 2007. Herbin-Jones had 22 years of experience and possessed both a bachelor's degree in physical education and a master's degree in physical education for the disabled. Student was not assessed until November 27, 2007, because although Herbin-Jones had attempted to arrange the assessments earlier, Mother had stated a concern about having Student's balance assessed because of the possibility of ear surgery. Student was assessed through a combination of observation of Student and interview with Father. Student cooperated with the assessment, but complained or refused to do tasks that were difficult for him. Herbin-Jones believed that her assessment was adequate because Father's participation helped her to gather all of the information she needed. Based on her assessment, Herbin-Jones determined that Student had mild motor delays in gross motor, object control skills and recreation and leisure skills, as identified by weaknesses in completing combination gross motor movements, poor technique in activities involving a ball or bat, and poor form in activities like swinging or calisthenics. Herbin-Jones recommended that Student be exposed to a variety of motor activities and that Student participate in general education physical education as well as four, 20-minute, individual APE sessions per month plus one, 20-minute consultation between the APE instructor and classroom personnel.

58. Student's occupational therapy needs were assessed by the District on October 4, 2007, by occupational therapist Tarisa TenBrink of Pediatric Therapy Network (PTN). Bridget Fryer (Fryer), the coordinator of occupational therapy services at PTN, reviewed the resulting report and testified at hearing. Fryer was a state-licensed occupational therapist with 14 years experience in pediatrics. Fryer's testimony was

given great weight, particularly because Mother and Father used PTN to provide services to Student, demonstrating that Mother and Father had some measure of confidence in PTN. Student was assessed using a combination of parent interview, chart review, the Sensory Processing Measure – Home Form, and the Bruiniks-Osretsky Test of Motor Proficiency – 2 (BOT-2). Fryer explained that the assessment was appropriate to determine whether Student was eligible for occupational therapy services because the assessment included the BOT-2, which was the best instrument for determining occupational therapy needs related to school performance. The assessment concluded that Student had needs in the areas of fine motor control, dexterity, bilateral coordination and sensory integration. Fryer agreed with the recommendation of the IEP team at the November 29, 2007 IEP that Student receive one hour per week of occupational therapy in the classroom to work on Student’s fine motor and bilateral coordination issues. Fryer explained that having therapy on a “push-in” basis increased the opportunity for the student to generalize skills.

59. The District hired Dr. Jeffrey Owen (Dr. Owen) to assess Student. Dr. Owen possessed a Ph.D. in clinical psychology from the University of Southern California and had extensive expertise in assessments. Dr. Owen was licensed as both a school psychologist and clinical psychologist. In addition, Dr. Owen had worked as a director of special education for school districts and as a school psychologist. Although Dr. Owen primarily worked for school districts, he had also performed assessments on behalf of parents approximately 15 times. Dr. Owen’s opinions were given great weight based on his credentials.

60. Dr. Owen first met Student in September of 2007. Dr. Owen had attempted to assess Student beginning in July of 2007, however, Mother had told him that Student was not available during that time because Student: 1) was being assessed privately; 2) was on a family vacation; and 3) might need ear surgery. Mother was

cooperative when Student was ultimately presented for assessment in September of 2007.

61. In conducting his assessment, Dr. Owen used a variety of instruments including standardized tests, rating scales, interviews of Student and Mother, record review and classroom observation.

62. Dr. Owen gave Student the Comprehensive Test of Nonverbal Intelligence (CTONI), which assesses intellectual capability without the use of oral language or fine motor ability. Overall, Student scored in the "average" range based on his standard score of 102 (55th percentile). Dr. Owen chose the CTONI because Student's independently retained expert had previously administered two other cognitive tests, which Dr. Owen could not repeat. In addition, a non-verbal test was a good choice for someone who had displayed speech and language deficits in the past. No significant differences in ability were revealed by the subtest scores.

63. Dr. Owen also gave Student the NEPSY II-A Developmental Neurological Assessment (NEPSY-II), which is used to assess neuropsychological status. The NEPSY-II revealed that Student had deficits in the areas of attention and executive functioning. In particular, Student did poorly when faced with a task that required mechanically listening to rote auditory information (9th percentile), but did substantially better when asked to attend to a cognitively challenging task with a complex set of rules (50th percentile). Student did less well when asked to perform complex cognitive tasks with changing rules (9th and 16th percentile). Student showed a deficit in social perception, scoring in the second percentile on reading nonverbal facial cues and in the low-average range, between the twenty-sixth and fiftieth percentile, in Theory of Mind (understanding that other people's thoughts and perceptions are different). These deficits would cause Student to misinterpret people's facial expressions and effect Student's abilities in social pragmatics (understanding, predicting and influencing

others). Dr. Owen persuasively explained that deficits in this area should be addressed by placing Student in an environment where he would have typical peer interaction.

64. In visual and spatial processing, the NEPSY-II revealed that Student had average skills when faced with tasks requiring him to visualize the relationship of objects, but showed a deficit in fine motor skills such as block construction (2nd percentile) and design copying (5th percentile).

65. In the area of memory and learning, the NEPSY-II revealed that Student had an executive functioning deficit commonly associated with attention deficit disorder in that Student did poorly (9th percentile) in recalling information from a narrative, but did significantly better when given follow-up cues (25th percentile) and multiple choice questions (51st to 75th percentile). Student was also assessed using the Test of Memory and Learning (TOMAL). Student demonstrated average memory when given verbal tasks (37th and 50th percentile), but demonstrated lower scores on memory tasks such as facial memory (25th percentile), and a task called visual selective reminding, which required Student to remember the positions of six dots in a field of 24 dots (6th percentile). Student's difficulty with the visual selective reminding task was consistent with attention deficit disorder (ADD). Student did comparatively well with delayed recall (25th percentile) suggesting that, particular when given reminders and repetition, Student could learn even though his attention deficit interfered with his initial retention of information.

66. The NEPSY-II results showed that Student had a "significant impairment" in executive functioning, i.e., the ability to initiate, monitor, sequence and prioritize activities. As a result, Student needed frequent redirection and over time would need to learn strategies to keep himself on task. Dr. Owen believed that this deficit was not severe enough to require placement in a more restrictive environment such as a non-public school, but instead, that Student's needs could be met on a general education

campus with the support of a classroom aide.

67. In the area of academic achievement, Dr. Owen administered the Wechsler Individual Achievement Test – Second Edition (WIAT-2). Overall, Student was below average, having achieved a standard score of 83 (13th percentile). Student’s oral language standard score of 109 (73rd percentile), consisting of listening comprehension and oral expression tests, was higher than his academic standard scores, which were: Reading – 76 (6th percentile); Math – 82 (12th percentile); and Written Language – 83 (13th percentile). The math subtests showed that Student was more proficient in Math Reasoning (25th percentile), than in Math Calculation (7th percentile). Student’s Written Language subtest scores were relatively consistent between Spelling (14th percentile) and Written Expression (18th percentile). The reading subtests showed that Student had a relative strength in decoding, as demonstrated by a higher score in pseudoword decoding (19th percentile); however, Student’s word reading and comprehension were much lower (6th and 2nd percentile, respectively).

68. Further evidence of ADD, inattentive type, was provided by Shima’s completion of the Attention Deficit Evaluation Scales – Third Edition, which showed that Student was in the 9th percentile in the area of inattention.

69. Dr. Owen also concluded that Student had characteristics consistent with an autism spectrum disorder (ASD). In particular, Dr. Owen rated Student in the “mild-moderately” autistic range on the Childhood Autism Rating Scale, based on Dr. Owen’s observation that Student frequently appeared aloof, avoided eye contact, and engaged in some atypical actions such as staring at the ground when observed during the lunch period at Summit View, rocking, and rubbing pictures in a book he was reading, and perseverating during conversations. First grade teacher Shima completed the Gilliam Autism Rating Scale, second edition, which showed “an extremely high likelihood” that Student had an autism spectrum disorder based on his school behaviors such as

avoiding eye contact, stereotyped behaviors, echoing words, repeating words out of context and difficulties in social situations. However, on the Asperger Syndrome Diagnostic Scale completed by Mother and Father, the results were a “very unlikely” possibility of Asperger Syndrome based on responses indicating “likely” in the cognitive and sensorimotor domains, but “very unlikely” or “unlikely” in the language, social and maladaptive behavior domains.

70. On the Beck Youth Inventory, which involved Student rating himself in behavioral and emotional functioning, he was near average in self-concept, with no significant issues regarding anxiety, depression, anger or disruptive behavior. However, Dr. Owen did note at hearing that although Student did exhibit some anxious behavior such as rubbing his legs, in his opinion, Student would not meet the clinical definition for an anxiety disorder or have social-emotional needs that would require a non-public school placement.

71. Based on his assessments and observations, Dr. Owen concluded that Student had ADD and that it impaired his ability to focus and concentrate. Student’s “executive functioning,” i.e., the ability to initiate, monitor, sequence and prioritize, was also significantly impaired. Overall, Dr. Owen believed Student was eligible for special education based on his attention deficit, ASD characteristics, the discrepancy between his cognitive ability and his verbal ability, and on the basis of speech and language delays in pragmatics and syntax.

72. Dr. Owen observed Student at Summit View at the same time as Student’s expert, Dr. Christine Davidson (Dr. Davidson). However, Dr. Owen was specifically told by Summit View that he could not talk to the teacher and that the teacher could only ask questions posed by Dr. Davidson. Summit View notes show that this was at the request of Student’s attorney. The Summit View class that Dr. Owen saw had only six children.

73. Overall, Dr. Owen did not think that Student's needs warranted a non-public school because Student's need for redirection and focus could be accomplished through the provision of a one-to-one aide. The TOMAL demonstrated that although Student had difficulty with retention of information in the immediate term, his long-term retention could be improved with repetition of information by an instructional aide. Dr. Owen concluded that Student's academic deficits in reading and math could be addressed in a general education setting with the provision of one-to-one instruction and an instructional aide. The District classrooms that Student could be placed in had approximately 20 students. Although Dr. Owen appreciated that a District general education classroom could be more distracting for Student, in his opinion, the benefit of having Student in a less restrictive environment outweighed the possibility of Student being distracted. Dr. Owen was concerned that if Student were placed at Summit View, Student would not have typical peer role models because Summit View's student body was all special education students. Dr. Owen explained that the typical peer social and language modeling that would be available to Student in a District general education placement would help Student to generalize appropriate behavior in the community. Although Dr. Owen's report recommended reducing distractions, even by the use of headphones, and that a general education environment could be distracting to Student, Dr. Owen believed that Student would be more appropriately placed in a less restrictive environment with supports such as a one-to-one aide.

74. In contrast, Dr. Owen was critical of the Summit View placement based on Dr. Owen's information that Summit View did not have typically developing students enrolled. Dr. Owen was also critical of Summit View based on his observation of Student engaging in self-stimulatory behavior of pacing the playground while looking at the ground and making unusual arm gestures. Dr. Owen noted that Summit View staff did not redirect Student or encourage social interaction, even though Student shunned

a fellow student who attempted to engage him in conversation. Dr. Owen was also critical of Student's interaction with an aide at Summit View. In particular, Student was being tutored in math in a hallway and was not complying with the aide. Dr. Owen was aware by the time of hearing that Student had received "detention" at Summit View during the 2007-2008 school year. Dr. Owen interpreted Student's discipline incidents at Summit View, which consisted of resisting instructor requests, as demonstrating that Student had experienced a behavior regression. No such behavior was present when Student was enrolled in the District. Dr. Owen noted that Summit View imposed "detention" on Student for his misbehavior and that such a punishment was not appropriate for a person with an attention disorder, who instead required immediate feedback to correct inappropriate behavior. Detention at Summit View consisted of lunch detention during which the student had to talk about what had gone wrong and what the possible solutions were to the problem.

75. Mother, at the recommendation of her attorney, hired Dr. Davidson to perform a psycho-educational assessment of Student. Dr. Davidson was a state-licensed educational psychologist with a bachelor's degree in elementary education, a master's degree in counseling and a doctorate in "Educational Management" from the University of LaVerne. Dr. Davidson provided assessment and consultation services to parents and was under contract with some school districts to provide independent educational evaluations. Dr. Davidson had experience as a special education teacher, school psychologist, special education director and assistant superintendent in schools throughout southern California. Dr. Davidson was generally less credible than Dr. Owen because her doctoral degree was not in psychology, and unlike Dr. Owen, she was not a licensed clinical psychologist in addition to being a school psychologist.

76. Dr. Davidson assessed Student in her office on July 11, 12, and 22, 2007. Each office session lasted five to six hours. Student had good eye contact when talking

about a subject that was of interest to him, but had less eye contact and was resistant when given tasks that were more difficult for him. Dr. Davidson described that she used a token board during the assessment to reinforce Student with the promise of a visit to her boat and that he was generally attentive.

77. Dr. Davidson assessed Student's intellectual functioning using the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), which yielded the following standard composite scores: Verbal Comprehension – 99 (average); Perceptual Reasoning – 110 (lower limits of high average); Working Memory – 88 (upper limits of low average); and Processing Speed – 75 (borderline). Student's "borderline" score in Processing Speed was caused by Student's very low scaled score of 2 (with 8-12 being average) on the coding subtest, which required Student to copy designs within a time limit. Dr. Davidson attributed the low coding subtest score to a deficit in Student's fine motor abilities, which are required for success on this subtest.

78. Dr. Davidson assessed Student's information processing using the Woodcock-Johnson Tests of Cognitive Ability – Third Edition (WJ-III). Overall, Dr. Davidson determined that Student had strengths in verbal comprehension, general information, auditory attention and visual-auditory learning, with weaknesses in processing speed, memory, and visual motor integration. Dr. Davidson explained that her testing in these areas showed that Student had good auditory attention, even with background noise, but was slow to process, even with information that he knew.

79. Dr. Davidson also administered the Test of Pragmatic Language – Second Edition, on which Student achieved a standard score of 85 (below average, with average being 90-110). To Dr. Davidson, this score correlated with Student's reported social skills and conversational deficits.

80. To assess Student in academic achievement, Dr. Davidson administered the Woodcock-Johnson Tests of Achievement – Third Edition, which yielded the

following standard cluster scores: <sup>2</sup> Oral Language Extended – 117 (high average); Listening Comprehension – 111 (lower limits of high average); Oral Expression – 121 (lower limits of superior); Broad Reading – 71 (lower limits of low, 1.3 grade level); Reading Comprehension – 86 (low average); Basic Reading Skills – 80 (lower limits of low average, 1.6 grade level); Phoneme/Grapheme Knowledge – 92 (lower limits of average); Broad Math – 80 (lower limits of low average); Math Calculation – 67 (very low); Broad Written Language – 71 (lower limits of low, 1.1 grade level); Basic Writing Skills – 80 (lower limits of low average, 1.3 grade level); Written Expression – 73 (1.3 grade level); Academic Skills – 70 (lower limits of low, 1.1 grade level); Academic Fluency – 69 (very low, 1.0 grade level); Academic Applications – 86 (low average, 1.6 grade level); and Total Achievement – 67 (very low, 1.2 grade level). The results in the academic areas of reading, writing and math were consistent with the abilities reported to Dr. Davidson by Student’s first grade teacher in the District, Shima, and by Student’s second grade teacher at Summit View, Wheeler.

81. Dr. Davidson confirmed Student’s attention deficit difficulties both in school and at home by administering the Behavior Rating of Executive Functioning (to Mother/Father and a tutor at Loyola Marymount) and the Brown Attention Deficit Disorder Scales for Children (to Mother/Father, Shima and Wheeler).

82. As part of the assessment, Dr. Davidson had Mother and Father complete the Conners’ Parent Rating Scale – Revised in July of 2007. Mother and Father rated Student as “markedly atypical” in attention, which Dr. Davidson reported as “significant” and “should raise a concern” but only “slightly atypical” in the “anxious-shy” category, which Dr. Davidson reported as “should not raise a concern.” Mother and Father rated Student as “average” in psychosomatic complaints. Mother and Father also completed

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<sup>2</sup> Grade level equivalences are given only for scores that are below average.

the Behavior Assessment System for Children – Second Edition (BASC-2). On the BASC-2, Mother and Father gave answers that equated to “average” levels of anxiety, depression and somatization in Student, a “clinically significant” level of “withdrawal” and “at risk” levels in the areas of attention and atypicality. Otherwise, parents rated Student as “average” in areas like adaptability, social skills, leadership, activities of daily living and functional communication. Dr. Davidson called Mother to verify the answers given on the Conners’ and BASC-2, and as a result, Mother changed some answers. According to Dr. Davidson, this was consistent with the test instructions; however, the test instructions were not offered into evidence.

83. Mother and Father also completed the Burks Behavior Rating Scales – Second Edition (BBRS-2) in July of 2007, which showed that “emotional problems” (anxiousness, self-blame and emotional distress) and “social withdrawal” (withdrawal, isolation), were “not a concern.” Mother and Father did not report “poor self esteem” and only a “low to moderate” concern regarding “weak self-confidence.” Mother and Father also reported that Student had “moderate to elevated” and “elevated” ability and academic deficits.

84. District first grade teacher Shima and RSP instructor Long filled out the BBRS-2 in June of 2007. They reported “elevated” areas of concern in: attention and impulse control; “social withdrawal”; cognitive, academic and physical abilities; and “weak self confidence.” Emotional problems and disruptive behavior were not reported as a concern.

85. Summit View second grade teacher Wheeler completed the BBRS-2 on September 21, 2007, less than two weeks after Student began attending Summit View. Consistent with Shima and Long, she reported the same “elevated” areas of concern. Also consistent with Shima and Long, she did not report emotional problems or

disruptive behavior as concerns. Contrary to Shima and Long, Wheeler did not report "weak self confidence" or "social withdrawal" as concerns.

86. Student's overall functioning in various domains was assessed by Dr. Davidson using the Vineland Adaptive Behavior Scales – Second Edition, Survey Interview (Vineland). The adaptive behavior domains on the Vineland are: Communication, Daily Living Skills, Socialization Skills, Fine and Gross Motor Skills, Maladaptive Behavior, Internalizing Behaviors, and Externalizing Behaviors. Parents rated Student as "adequate" or "average" on all domains except Daily Living Skills, Motor Skills and Adaptive Behavior, on which Student was "moderately low." Shima and Long, and Summit View teacher Wheeler completed the Vineland Teacher Rating Form. Shima and Long rated Student as "moderately low" in Communication, Daily Living Skills, Socialization, Motor Skills and Adaptive Behavior. Wheeler's ratings were consistent with Shima and Long, with the exception of Adaptive Behavior, which she rated as "low."

87. Long reviewed Dr. Davidson's reporting of the Vineland teacher rating scales. Long explained that she had reported a "moderate" difference in Student compared to typical peers because Student appeared to have fewer friends than other students and parallel played with students he was not friends with. Long disagreed with the characterizations in Dr. Davidson's report regarding social skills (that were inaccurately attributed to her as an "instructional aide") that Student "never initiates conversations," "never shares toys," and "wants to boss others."

88. Student's school social behaviors were assessed using the Social Skills Rating System (SSRS). An "average" rating resulted from a standard score between 85 and 115. Parents rated Student in July of 2007 as having "average" social skills (98 standard score) and problem behaviors in the "lower limits of average" (86 standard score). Shima and Long rated Student in June of 2007 as "average" in social skills (90

standard score) and problem behaviors (108 standard score). Summit View teacher Wheeler rated Student in September of 2007 as “below average” in social skills (84 standard score) and “average” in problem behaviors (115 standard score).

89. Student rated himself on the Piers-Harris Self-Concept Scale- Second Edition as “average” in behavioral adjustment, intellectual and school status, popularity and happiness and satisfaction. Student rated himself as “above average” in freedom from anxiety and physical appearance and attributes. This assessment documented that Student did not express a self-image problem. Dr. Davidson’s explanation that it was “typical” for children to over-rate themselves was not persuasive because her written report acknowledged that both the inconsistent responding index and response bias index for the test showed that Student’s responses were not random or weighted toward one answer or another.

90. Wheeler, Student’s teacher at Summit View, completed the Conner’s Teacher Rating Scale – Revised Long Form on September 21, 2007. Wheeler rated Student as “markedly,” “moderately” or “mildly” atypical in areas relating to attention, perfectionism and social problems, but “average” in “anxious-shy” and “emotional ability.”

91. After receiving the rating scales in the mail, Dr. Davidson attempted to contact Shima and eventually did contact Long, to determine if some blank responses to the rating scales were intentional. Dr. Davidson recalled that Long answered a few additional questions on the ratings scale as a result of the phone call. According to Dr. Davidson, the manual for the BASC permits this type of follow-up.

92. In her written report, Dr. Davidson reported that Student had a full-scale score of 93 on the WISC-IV, demonstrating average intelligence. However, at hearing, Dr. Davidson testified that she believed that a more appropriate measure of Student’s intellectual functioning would be to look solely at Student’s “lower limits of high

average" score of 110 in the perceptual reasoning domain. According to Dr. Davidson, a publication by Jerome M. Sattler stood for the proposition that she could discount Student's processing speed score of 75 and substitute her clinical judgment in determining someone's intellectual functioning because it was unfair to factor the low score against someone with a discrepancy in abilities. Dr. Davidson's credibility on this point was eroded because she did not identify a specific publication in her testimony and the publication she was referring to was not offered as evidence at hearing. Dr. Owen disagreed with Dr. Davidson on this point because in his opinion, standardization of the test results required that all scores be factored, and more importantly, factoring the low score created a more accurate picture of the child's abilities. Dr. Davidson did acknowledge at hearing that the WISC-IV manual stated that the most accurate score was the full scale score. The evidence, both from Dr. Davidson's assessment and Dr. Owen's assessment, supports a finding that overall, Student had average intelligence with strengths in verbal comprehension and perceptual reasoning and weaknesses in memory and processing speed.

93. Dr. Davidson gave autism rating scales to parents and Student's teachers. Consistent with Dr. Owen, who believed that Student may have an ASD, Student was rated as having a "borderline" possibility of an ASD on the Gilliam Asperger's Disorder Scale by parents, Shima and Wheeler and "likely" on the Asperger Syndrome Diagnostic Scale. However, consistent with Dr. Davidson, who did not believe that Student had an ASD, parents rated Student in the non-autistic range on the Childhood Autism Rating Scale and "very unlikely" on the Asperger Syndrome Diagnostic Scale. Because the issue was unresolved through assessment, yet Student's unique needs were still well understood, the question of whether ASD was a correct diagnosis or eligibility category for Student does not enhance or detract from the credibility of either Dr. Davidson or Dr. Owen.

94. Dr. Davidson observed Student at Summit View on September 25, 2007, at the same time as Dr. Owen. Like Dr. Owen, she saw that Student was working one-to-one with an aide in the hallway when they first arrived. Student was working on his math outside the classroom because he was too far behind the other children in this subject and was not using the same textbook as the other children. Student required frequent redirection. During classroom observation, Student sometimes appeared not to be paying attention, but could respond correctly when asked a question by the teacher. Dr. Davidson had more access to Summit View than Dr. Owen, and unlike Dr. Owen, was allowed to interview Student's teacher, Wheeler. Based on her observations, Dr. Davidson believed Student had difficulty transitioning from preferred to non-preferred tasks.

95. Dr. Davidson concluded that a general education placement in the District was not appropriate for Student because of the discrepancy between his academic deficits, as reflected in the total achievement cluster score of 67 on the Woodcock-Johnson and his cognitive ability, which she considered to be near high average based on Student's score of 110 on the perceptual reasoning section of the WISC-IV. In particular, she recommended Summit View because she thought it would provide a more intense environment without "pull-outs" during which Student might miss some academics. The recommendation was also influenced by Dr. Davidson's perception that Long had related that Student had difficulty in the District placement, even with an aide. Moreover, she perceived that Student had failed to make adequate progress in the District program and Student had expressed to her that he felt that he could not keep up academically with other children in school. Dr. Davidson believed that Student would not feel "different" from the other kids at Summit View. Dr. Davidson believed that Student's anxiety would not manifest if he was comfortable in school. Dr. Davidson testified that she believed Student had typical peers at Summit View.

96. Dr. Davidson's opinion regarding placement was not persuasive. First, Dr. Davidson discussed the Summit View program with Mother while the assessments were being conducted. Before the assessment was even completed, Dr. Davidson discussed Summit View with Mother, and Mother listed Dr. Davidson on the Summit View application as having referred Student to the program. Although Dr. Davidson's assessment results were credible, her recommendation of Summit View cannot be considered to be objective when it appears that Summit View was selected even before the assessments were complete. Moreover, some of the premises behind Dr. Davidson's recommendation were incorrect. For example, Student would not have exposure to typical peers at Summit View, whose student body was composed entirely of students with learning disabilities. Similarly, Student did not fit in academically at Summit View and was actually behind his peers there. Dr. Davidson acknowledged that while it was her hope that Student would reach grade-level academic achievement, she was not sure that this was possible. Moreover, as discussed below, a pediatric neurologist saw Student in November of 2007, six months after Student left the District program and two months after Student had been enrolled at Summit View. The pediatric neurologist diagnosed Student at that time as having anxiety across all domains, demonstrating that the Summit View placement was also anxiety-producing for Student.

97. Further, Dr. Davidson admitted in her testimony that she did not have knowledge about what the District had done to address Student's deficits in reading and writing fluency while he was enrolled there. In particular, it appeared that Dr. Davidson was unaware that Student had been receiving RSP services in these subjects. Further, Dr. Davidson's rationale about Summit View providing an environment with fewer "pull-outs" was inconsistent with the testimony from Summit View representatives that Student's academic instruction in reading and math was outside of Wheeler's class and was organized by skill level and that Student still received services on a "pull-out" basis

at Summit View. At hearing, Dr. Davidson testified that she believed all of Student's instruction at Summit View occurred in the classroom that she observed, demonstrating that her recommendation was not based on a complete understanding of Student's program at Summit View.

98. Dr. Pantea Sharifi-Hannauer (Dr. Hannauer) was a well-qualified, board-certified pediatric neurologist who examined Student in November of 2007 based on a referral by Dr. Vinzon. As a pediatric neurologist, Dr. Hannauer does not administer any standardized psychological or educational testing, but instead forms clinical impressions. Dr. Hannauer interviewed Mother and Father, reviewed Student's medical records and interviewed Student for approximately 90 minutes. In general, children with chronic medical conditions are prone to developmental and behavioral difficulties, and Dr. Hannauer believed that Student's needs were related to his medical condition. Dr. Hannauer formed the clinical impression that at the time her evaluation, Student was suffering "moderate to severe" anxiety that manifested across all environments in the form of fidgeting, avoiding eye contact, and repetitive behaviors. In addition, Student was emotionally immature for his age and exhibited low muscle tone. At the time, Dr. Hannauer recommended educating Student in a smaller setting to ease his anxiety and that Student participate in physical therapy and/or occupational therapy for his low muscle tone. Dr. Hannauer acknowledged that in his medical history and presentation, Student had symptoms consistent with an autism spectrum disorder, but noted that Student had never been formally assessed for that disorder.

99. Dr. Hannauer's clinical impression was credible based on her level of expertise in the field. However, Dr. Hannauer did not ask Student about his past experiences in the District placement and acknowledged at hearing that she had no basis to form an opinion about Student's condition prior to the time of her assessment. Dr. Hannauer did not specifically ask Student about school and Student never expressed

any difficulty related to school. At most, Dr. Hannauer asked Student if he liked his current school. Dr. Hannauer had not visited the District placement or Summit View and had not spoken to any District personnel. In general, Dr. Hannauer opined that pupils like Student could succeed in general education with sufficient supports if they were sufficiently mature. Dr. Hannauer was not able to give a persuasive opinion about Student's past placement in the District or its future offer of placement, because she did not have sufficient information about either. In general, Dr. Hannauer noted that for a pupil like Student, exposure to typical peers would be beneficial but also noted that "pull-out" services could be anxiety producing, resulting in diminished ability to access education. Dr. Hannauer did not recall ever stating that Student should not have District assessments.

100. On November 28, 2007, District Special Education Coordinator and school psychologist Bowlby assessed Student's social functioning and wrote a report. Bowlby assessed Student by performing record review, interviews of staff from Student's last District placement, an interview with Mother, and Mother's completion of the Conners' Parent Rating Scale – Revised (Long Version). Student's last teacher, Shima, resource specialist Long, aide Tyrao and resource specialist Warner (who worked with Student from February of 2007 until his departure), reported the following: that Student was treated well by the other students; that Student had two close friends at school; that Student appeared to enjoy school; that although Student was more reserved in front of the whole class, he participated well during small group instruction; that Student followed routine without adult prompting; that although Student rarely initiated conversations with other children he had no trouble doing so, and that although he occasionally waved his arms when excited, he rarely engaged in unusual physical mannerisms at school. Mother reported that Student's behavior was generally age-appropriate, but immature when compared to peers. Mother reported that Student had

stress and anxiety at the District program, which Mother attributed to the “insensitivity and incompetence” of school staff. Mother’s responses on the Conners’ only revealed attention problems and not other problems such as anxiety, opposition or social problems. On the Conners’, Mother denied that Student had problems maintaining friendships.

101. The 2007 annual IEP team meeting was scheduled on November 29, 2007, instead of during October, in order to accommodate Mother and Father’s desire to have their attorney present. Mother and her attorney participated in the meeting by asking questions and making comments. Dr. Davidson attended and discussed her impression and recommendations, but did not present a detailed written report. Dr. Davidson, along with Summit View teacher Wheeler, provided input into some of the proposed goals. Student’s neurologist, Dr. Hannauer, also participated by telephone and discussed her diagnosis of anxiety and recommendation for small class size. Dr. Hannauer did not state that there was any medical reason why Student could not attend a District program. Summit View representative Nita Birnbaum also attended and reported that Student was doing well. A complete discussion of goals was put off at parent request. Dr. Owen attended and recalled that Mother participated by asking him questions, which he answered, and Mother was given an opportunity to provide her input. Mother disagreed with the District’s offer of placement.

102. The second grade placement offered to Student in the November 29, 2007 IEP would have been in a classroom taught by Gretchen Vizzi (Vizzi). Vizzi was the general education teacher at the IEP team meeting. Vizzi had 11 years experience in special education and was experienced in providing reading programs to children with learning disabilities as well as implementing any necessary accommodations. Vizzi’s general education class of 20 students had at least two other children with IEP’s. At least two or three other students in Vizzi’s second grade class were at the same reading

level as Student and students were separated into reading groups based on ability. Other academic instruction was done in small groups of six to seven children. In Vizzi's classroom, one-to-one aides were used in a way that made it appear like the aide was for the entire class. Although Vizzi had never met Student, she had reviewed his District file and had consulted with Shima. As a member of the IEP team, Vizzi recommended that Student be placed in a general education classroom, based on her experience successfully including students whose disabilities were more severe than Student's and her belief that inclusion was beneficial to encourage peer modeling.

103. Bowlby plausibly explained that the IEP team determined that the amount of "pull out" services offered to Student for the 2007-2008 school year should be increased in comparison to the 2006-2007 school year because the District's assessments showed that Student had lost some ground academically while the demands of a second grade class were greater.

104. The November 29, 2007 IEP listed Student's eligibility categories as other health impairment and specific learning disability based on Student's deficits in attention, processing speed, academic fluency and initiating and completing tasks in a timely manner. Student's unique needs were identified as: fine and gross motor delays; academic delays in reading, math, and written expression; speech and language delays; and social deficits. Parents expressed their concern that they did not think Student had made progress academically or socially while enrolled in the District.

105. Long reported her assessment results at the November 29, 2007 IEP. Long had assessed Student on September 24, 2007 and October 1, 2007 at a District school. On October 9, 2007, Long assessed Student at a local café. Long's assessment at the café cannot be faulted for being at an improper location, because this location was chosen by Mother and agreed to for Mother's convenience, and the District had preferred to conduct the assessment on District property. Regardless, Long reported

that Student was easily redirectable in the café and actually scored very well on all testing performed there. For example, Student did better reading a second grade passage when tested at the café than he did reading a first grade passage when tested in a school environment.

106. Long reported the following assessment results about Student's reading at the November 29, 2007 IEP team meeting: on Dolch site words, Student could read 73 percent of pre-primer, 55 percent of primer, 43 percent of first grade and 32 percent of second grade words; in fluency and comprehension, Student read 44 pre-primer words per minute with 100 percent accuracy, 29 primer words per minute with 83 percent accuracy, 18 first grade words per minute with 83 percent accuracy and 21 second grade words per minute with 66 percent accuracy. In math, Student scored 84 percent correct on the District's first grade math assessment. Long reported that Student's ability to write sentences was less than when she had last worked with him prior to April of 2007.

107. Long's assessment in September and October of 2007, when compared to assessments conducted in October of 2006, showed that Student improved his fluency in primer words by 22 words per minute. Student could not even read a first grade passage in the fall of 2006 and had improved to 18 words per minute by the fall of 2007.

108. The November 29, 2007 IEP listed assistive technology in the form of raised line paper, pencil grips, graph paper, concrete manipulatives and "move and sit."

109. To facilitate the transition back to a District placement, the IEP team proposed that Student would be able to visit his new school and meet his new teacher prior to transitioning, that Student tour all areas of his new placement prior to attending and that District staff who had a previous relationship with Student would be available to discuss his transition.

110. As a result of the IEP team meeting on November 29, 2007 (and a follow-up meeting on January 14, 2008, discussed below), Student was offered placement in a

District elementary school with the following related services: two hours of group RSP a day outside of the general education classroom plus 30 minutes of RSP/teacher consultation a week; one hour a week of occupational therapy in the classroom plus 30 minutes a month of occupational therapist consultation to develop a "sensory diet"; four, 20-minute APE sessions a month plus 20 minutes of APE consultation a month; two, 30-minute, "pull out" language and speech therapy sessions a week plus 30 minutes of speech-language consultation a month; and 30 minutes per week of "pull-out" psychological counseling services for a social skills group. The IEP estimated that the above would result in Student being in a general education environment for 51 percent of the school day.

111. The November 29, 2007 IEP listed the following accommodations and modifications to be provided to Student: breaking assignments down into smaller components; note taking support for far-point copying; use of visual placeholder for reading use of math manipulatives; peer tutor/staff assistance in the general education classroom; and additional time on writing assignments. The following organizational/behavioral supports were offered: preferential seating near the teacher or positive role model; sensory breaks, visual cues and visual schedules; use of sensory strategies, including allowing Student to stand if needed; and an instructional assistant in the general education classroom. The following instructional/grading strategies were offered: present one task at a time; repetition/rephrasing for understanding; extended time to complete assignments; and general education report card without special education notations. The following test strategies were offered: flexible seating, if needed in RSP, plus double time for testing; flexible test scheduling; and test items read aloud when needed.

112. The November 29, 2007 IEP contained academic goals that addressed Student's unique needs based on his present levels of performance at the time. The IEP

contained the following reading goals: a goal that Student increase his ability to read grade-level sight words; a comprehension goal of increasing Student's ability to comprehend a grade-level passage that does not interest him; and, a goal of increasing grade-level fluency. The IEP contained the following math goals: reading and determining how to break up single and multi-step grade-level math problems; a first grade money goal of learning the value of coins and being able to make coin combinations of the same value; a grade level time goal of telling time to the nearest quarter hour and five minute interval; and a goal of mastering grade-level math facts for multiplication of 2's, 5's and 10's. In writing, the IEP contained a goal that, following teacher-directed organizing activities, Student would independently write a correctly indented simple paragraph with a topic sentence, three supporting sentences and an a concluding sentence. For spelling, the IEP contained a goal of spelling ten, grade-level sight words from the High Frequency Basic Sight Vocabulary List. All of the academic goals were based on Student's present levels of performance, were understandable and measurable and would allow Student to progress in the state standard curriculum.

113. The IEP also contained the following goals that addressed Student's unique needs in attention: increasing Student's ability to attend to a non-preferred activity from 10 minutes to 20 minutes; and completing 7 out of 10 assignments with 70 percent accuracy in the time allowed.

114. The speech and language goals in the November 29, 2007 IEP were all measurable because they contained descriptions of what was necessary to meeting the goal such as reduction of prompting and/or a certain level of performance within a set time interval. The goals included an articulation goal regarding /s/ sounds, a social pragmatics goal of initiating and maintaining a conversation (drafted with input from Summit View teacher Wheeler), a syntax goal of using appropriate form when asking questions and a pragmatics goal of reducing the number of questions used in a

conversation. Soria attended IEP team meetings on November 29, 2007, January 14, 2008, February 19, 2008 and March 24, 2008. Soria believed that Student could meet the above goals with the speech therapy services offered in the IEP.

115. The November 29, 2007 IEP contained two measureable, achievable APE goals that were consistent with Student's unique needs: a goal that Student master three of four complex locomotor patterns that were specified in the goal, and a goal that Student improve his jump-rope skills to five consecutive times. Student did not introduce evidence contradicting Herbin-Jones' opinions about Student's APE needs.

116. The November 29, 2007 IEP contained three measurable, achievable, OT goals that were based on Student's present levels of performance and met his unique needs: a goal of increasing handwriting legibility; a goal of successfully using OT strategies such as a "move-n-sit cushion" and movement breaks to remain seated and on task for 20 minutes during a non-preferred task; and a goal of increasing upper body muscle tone as demonstrated by improved posture.

117. At hearing, Dr. Davidson was generally critical of the goals developed for the November 29, 2007 IEP for being too low, i.e., for using second grade standards and sometimes calling for 70 or 75 percent proficiency rather than 80 percent proficiency. This criticism was not persuasive because it was not supported by evidence that Student's progress would have been hindered, and if so, to what extent.

118. Dr. Davidson testified to more specific criticisms of the goals at hearing. However, her specific criticisms were not persuasive. Most importantly, the evidence did not show that Dr. Davidson made all of her concerns known to the IEP team, despite having an opportunity to do so. Dr. Davidson attended the November 29, 2007 IEP team meeting and no other, despite the District being willing to have her attend subsequent IEP team meetings. Dr. Davidson's written report was not provided to the District until after January 14, 2008, and although she had participated verbally at the

November 29, 2007 IEP team meeting, at no time did she expressly discuss her written report. On the reading comprehension goal of recalling facts from a passage, she would have modified the goal to have it apply to "wh" questions; however, this criticism was not persuasive because the goal as written would require Student to identify who, what, and where facts. On the reading fluency goal, she thought the target should have been 70 words per minute; however, this criticism was not persuasive because the goal of 31 words per minute was based on the most recent testing by Long. She believed that the math word problem goal should not have allowed for one clarification from the teacher; however, the goal was based on present levels of performance showing Student could only correctly answer 38 percent of second grade problems when given oral clarifications. She was critical of the behavior goal about attending to a non-preferred task for 20 minutes because it included one prompt; however, the goal was based on input from Wheeler regarding the amount of prompting Student currently needed within a ten minute period and included short-term objectives of reducing prompts while increasing the time Student attended. She was critical of the goal regarding work completion because it required timely completion of 7 out of 10 rather than 8 out of 10 assignments; however, considering that as of January 14, 2008, Wheeler reported that Student had timely completion of only 2 out of 10 assignments, Student would make huge progress in a year if he reached 7 out of 10. Dr. Davidson was critical of the spelling goal in that she testified that she was not specifically sure what the 10 words referred to in the goal were; however, the goal as written clearly is referring to any ten words chosen from the High Frequency Basic Sight Vocabulary List. Dr. Davidson was also critical of expressive speech and pragmatic language goals about using accurate question form and using an equal number of questions and comments. She would add that Student needed to maintain eye contact and stay on topic and she thought that the expectations were too low. However, her criticisms on these goals were not persuasive

because she was not testifying as an expert in the area of speech and language.

119. Dr. Davidson was not critical of: the writing goal; the time goal (which she proposed); and the math facts goal, which she proposed (although she testified at hearing that the goal should have indicated that Student had to commit the math facts to memory, the requirement that Student memorize the math facts is implicit in the goal).

120. All of the goals in the November 29, 2007 IEP and subsequent amendments expanded upon Student's known abilities at the time they were drafted. More importantly, during the IEP process, the District expressed its willingness and desire to have Dr. Davidson provide input regarding her written report. Had Dr. Davidson's concerns been aired at an IEP team meeting, the team could have easily addressed many of her concerns. Moreover, even if not changed at the time of the IEP, the goals could have easily been redrafted if Student had achieved them early. This is particularly true where Dr. Davidson's criticism of the expected measure of proficiency was that it was only five to ten percent under what she would have liked to have seen. Dr. Davidson's criticisms also lack force where many of the goals were implemented at Summit View. Dr. Davidson's criticism at hearing that the goals should have been written to the third grade level was undermined by Wheeler's testimony that she was concerned that Summit View might not be a good fit for Student because of his academic needs. Finally, the evidence did not support a finding that even if the proposed goals were not up to Dr. Davidson's standards, they would have resulted in a deprivation of educational benefit to Student.

121. In Dr. Davidson's opinion, the November 29, 2007 placement offer contained too many pull-outs. She generally believed that once the amount of pull-out time exceeded 49 percent, that a special day class should be considered. As to Student, she believed that Student might miss other academics if pulled out and that pull outs

would negatively impact his inattention, task completion and social skills needs. In particular, Dr. Davidson was concerned that Student also needed the intellectual challenge of the curriculum and would miss out on class discussions. Dr. Davidson's opinion, based on her general views, was not more persuasive than Dr. Owen's because Dr. Owen's opinions more fully considered the benefits of placement on a general education campus.

122. Dr. Owen believed that the District's offer of two hours of daily RSP services in a District general education placement was appropriate because Student would get the focused instruction that he needed in a way that would permit collaboration between the RSP teacher and Student's teacher and classroom aide. Dr. Owen concluded that Student could make progress with the goals set forth in the IEP.

123. Although Dr. Owen acknowledged that unexpected transitions could be difficult for Student, he persuasively explained that Student would not have difficulty with transitions if given sufficient warning through a combination of verbal warnings, visual schedules, such as that proposed in the November 29, 2007 IEP, and routine. In other words, Student would not have difficulty with routine transitions throughout a school day, but might have difficulty with unpredictable events. Dr. Owens' testimony on this point was corroborated by Long, Shima and RSP aide Tyrao.

124. Mother did not sign a release for the District to access Student's medical records until January 9, 2008, such that at no time before then did the District have access to accurate medical information about Student.

125. After Mother executed the medical release in January of 2008, Bowlby talked to Dr. Vinzon about Student. Dr. Vinzon told Bowlby that she was unaware of any medical reason, including anxiety, as to why Student could not attend school in a District placement. Dr. Vinzon told Bowlby that Student did not need a school health or medication plan.

126. To assess concerns about Student's hearing, audiologist Susan Gottlieb (Gottlieb) of the Los Angeles County Department of Education (LACOE) assessed Student on January 9, 2008. Gottlieb was a state licensed audiologist who had a certificate of clinical competence and a master's degree in audiology. Gottlieb reviewed Student's August 7, 2007 audiology report from UCLA that showed that Student had mild hearing loss in the right ear and borderline normal hearing in the left ear and also reviewed an earlier audiology report from UCLA showing that as of April 14, 2003, Student had normal hearing. Gottlieb assessed Student's eardrums and found them to be functioning normally. Gottlieb's audiology testing also showed Student's hearing to be normal as of January 9, 2008. Gottlieb plausibly explained, without contradiction from other experts, that Student sometimes exhibited a fluctuating hearing loss depending on whether there was a build-up of fluid in his ears. Gottlieb's results were consistent with the intermittent ear infections Student experienced as a result of his immune system condition.

127. A follow-up IEP team meeting was held on January 14, 2008. Mother attended without her attorney or Dr. Davidson. Mother had been offered numerous IEP dates prior to this time, but had declined them because of her attorney's schedule. A written report by Dr. Davidson was still not available at the time of the meeting. The team discussed conducting additional assessments in occupational therapy. Dr. Davidson had not rendered an opinion regarding all of the proposed goals prior to this meeting. The present levels of performance were based on input from Student's current teacher at Summit View, Wheeler, who also attended the meeting. Gottlieb's assessment results showing that Student had normal hearing were presented at the January 14, 2008 IEP team meeting. Mother and Father then requested an assessment for a central auditory processing disorders.

128. At the meeting on January 14, 2008, Mother expressed that she disagreed with the meeting notes from the prior meeting, specifically, the history of Student's removal from the District placement. A note was made that Mother wanted it put in the IEP record that Student was removed for his "emotional health." Subsequently, Bowlby sent Mother a letter on January 23, 2008, informing Mother that pursuant to Education Code section 49070, Mother could attach an addendum to the IEP team meeting notes expressing her disagreement. Mother did not do so.

129. Dr. Hannauer's written report was shared with the IEP team at the January 14, 2008 meeting. The January 14, 2008 IEP team meeting notes reflect that "the goals were reviewed and agreed upon." Long recalled that at the January 14, 2008 meeting Mother did not voice any disagreement with the goals, or ask that any goals be revised, but instead disagreed with the proposed placement in a District elementary school.

130. Bowlby, who had prepared the social functioning report regarding Student, believed that the District's offer of 30 minutes per week of counseling for social skills was appropriate. In particular, Student's needs were in discrete areas, as reflected by his social skills goals. In addition, Bowlby believed that to the extent Student had social skills deficits, they would best be addressed by exposure to typical peers.

131. Occupational therapist Fryer explained that as of the January 14, 2008 IEP team meeting, the IEP team did not have sufficient information to determine whether Student required clinic-based occupational therapy services. Accordingly, at that meeting, the team discussed having Student further assessed in the area of sensory processing. Student was subsequently assessed by occupational therapist Shay McAtee of PTN on January 20 and 27, 2008 using the Sensory Integration and Praxis Tests (SIPT). The SIPT revealed that Student had strengths in motor-free visual perception tasks and following verbal directions. However, the SIPT revealed that Student had deficits in the areas of tactile perception, awareness of body position, motor planning (praxis), and

also demonstrated a decreased ability to modulate sensory input to the vestibular system (the sensory system that responds to motion or change of head position).

132. Fryer formed the opinion that Student's sensory needs did not require placement in a non-public school and that the services offered by District would meet Student's needs. Fryer believed that the District's ultimate offer of one hour per week of push-in therapy in the classroom, one hour per week of clinic based therapy, and 30 minutes per month of therapist/teacher consultation would meet Student's occupational therapy needs. In addition, Fryer believed that push-in occupational therapy would be successful in implementing Student's goals because the District classroom was large and the offered one-to-one aide could also assist with the goals and any sensory issues related to transitions. Fryer's opinions were credible, particularly because at the time of hearing, PTN was providing services to Student under a private-pay arrangement with Mother and Father.

133. Mother completed the Sensory Processing Measure on January 20, 2008. Mother responded in the area of "social participation" that Student "frequently": played with friends cooperatively, interacted appropriately with adults, shared things when asked, participated appropriately in family outings, participated appropriately in family gatherings and participated appropriately in activities with friends such as parties, going to the mall, and riding bikes, skateboards and scooters. Mother responded that Student "occasionally" carried on a conversation without sitting too close to others, maintained appropriate eye contact during a conversation, and joined in play with others without disrupting the ongoing activity.

134. On February 1, 2008, audiologist Gottlieb attempted to perform a central auditory processing disorder assessment of Student. However, she was not able to complete assessment because Student was inattentive during the assessment, for example, by taking off the headphones or attempting to reach toys in the room.

Assessments for central auditory processing disorder are generally not valid for use on children prior to the age of seven, such that the District could not have attempted this assessment at an earlier time.

135. Audiologist Gottlieb viewed the District classroom that Student had been offered and concluded that it was acoustically appropriate for Student.

136. An IEP team meeting was held on February 19, 2008. Mother and Father attended without their attorney. Gottlieb's auditory processing assessment results and Fryer's occupational therapy assessments of sensory processing were presented at this meeting. The team discussed the District's audiology report, which showed that Student did not have as much hearing loss as was once thought. As to OT, the team discussed the SIPT test, whether clinic-based OT was appropriate, and whether Student needed to be assessed in the area of physical therapy. Mother asked questions and participated in the meeting. As of the February 19, 2008 IEP team meeting, Dr. Davidson's written report had not been presented to the IEP team and it was noted that an IEP team meeting needed to be held to consider the report. Another meeting was also required to discuss physical therapy assessments by Pediatric Therapy Network (PTN).

137. Student's physical therapy needs were assessed by the District on March 5 and 12, 2008 by physical therapist Rennie T. Lee of PTN. Supervising physical therapist Joan Jacobs (Jacobs) reviewed the resulting report and testified about it at hearing. Student was assessed by parent and teacher interview, record review, classroom and clinical observations and with the BOT-2 and the School Functional Assessment (SFA).

138. An IEP team meeting was held on March 24, 2008. Mother attended without Father or her attorney. Mother informed the team that Dr. Davidson would not be available by telephone or in person to discuss her written report and the team noted that another meeting should be scheduled to discuss Dr. Davidson's report. Physical therapist Jacobs attended the meeting and recommended, based on the recent

assessment results, that Student receive one hour of physical therapy per week based on Student's need to improve his strength, posture and inefficient running gait. Student was offered one hour per week of physical therapy to be provided outside of school in a clinic setting. Two appropriate, measurable, physical therapy goals that were based on Student's present levels of performance were added to the IEP to address Student's unique needs in developing shoulder and trunk strength.

139. On April 4, 2008, Mother's attorney sent a letter to the District stating that no further IEP team meetings needed to be held. In particular, Student took the position that Dr. Davidson had orally presented her report at the IEP on November 29, 2007 and that a hard copy of the report had been provided to the IEP team by the time of the March 24, 2008 IEP team meeting.

140. Summit View was a state-certified non-public school for students with learning disabilities. Summit View used the same curriculum as public schools in classes of no more than 12 students. Because Summit View's student population generally had difficulty with transitions, a significant number of transitions were built in to the school schedule so that students could learn to deal with them. Summit View faculty had to meet the minimum state credentialing requirements. Summit View served a total of 170 students, of whom, 40 were at the elementary school level. The school served a population of students with learning disabilities and offered small class sizes on a relatively small campus. Although District expert Dr. Owen did not think it was an appropriate placement for purposes of FAPE, he did concede that Student could get some educational benefit at Summit View.

141. Father believed that Student had made progress at Summit View, but had not made progress in the District program. Father felt that Summit View was appropriate to address Student's attention issues because of its small class size and focus on children with similar disabilities to Student. Father perceived that unlike the

District placement, Student would not be an “outcast” at Summit View. Father noted that the most significant change in Student was in his attitude toward school and that Student now went to school willingly. Unlike in the District placement, Father saw Student greet older students and faculty at Summit View. Student was less resistant to homework and attended homework club.

142. Nancy Rosenfelt, the Director of Summit View, knew Student from campus and described him as a happy student who interacted with many adults and older students on campus. Birnbaum, the Assistant Director of Summit View, described that when Student first arrived at the school, he was distracted and withdrawn and would flap his hands at his sides. Birnbaum had been told by Mother and Father that Student had been removed from the District program because he was unhappy and had been sick with ear infections. Birnbaum saw Student make social progress at the school, including initiating conversations, and also saw a reduction, but not an elimination, of the hand flapping movements. Birnbaum had also seen that Student required frequent redirection in class, to the point that Wheeler sometimes had difficulty keeping up with Student. Student took sensory breaks by himself in Wheeler’s class, which sometimes consisted of leaving class and walking the playground.

143. Wheeler taught Student at Summit View beginning in September of 2007. Wheeler earned a bachelor’s degree in psychology in 2005 and was teaching at Summit View on a mild to moderate disability intern credential. When Student enrolled, Wheeler’s class had two second graders and four third graders. Consistent with Summit View’s student body, all of Student’s classmates had mild to moderate disabilities, but did not require individual classroom aides. When Student started, he seemed happy to be at school. Wheeler described Student as sweet and friendly with academic deficits in reading, writing and math and social skills deficits in starting and maintaining conversations. Student never spoke to Wheeler about his enrollment in the District

program.

144. Wheeler taught Student for approximately 50 percent of his school day. Wheeler did not teach Student's reading program, but understood that Student was taught reading using Lindamood-Bell products such as the "LIPS" program for phonemic awareness. At Summit View, students transitioned to separate reading groups of four students that were organized by ability. Student had never expressed any difficulty or anxiety about transitioning. Student's main issue with transitioning was the time it took him to put his materials away before moving to a new activity.

145. A typical day for Student at Summit View had up to ten transitions including transitions out of his class to separate reading and math classes, transitions to OT, and transitions to recess, electives, gym, and sometimes community based instruction. Student's ability to transition successfully improved as the year progressed.

146. Student was resistant to the subjects and activities that were most difficult for him such as reading, writing, spelling or sports. Consistent with his behavior in Shima's class, Student would take a leadership role if he really knew a subject. Student needed adult prompting to participate in group activities when he first started at Summit View. A behavior plan was developed in February of 2008 to encourage Student to participate in class discussions. Social skills were part of the general curriculum taught to all students.

147. Wheeler noted that Student sometimes engaged in the "stimming" behavior of putting his hands on his thighs or rocking, but this decreased as the 2007-2008 school year progressed. Student participated in homework club, and required less prompting about homework as the year progressed.

148. Student was provided with sensory breaks in Wheeler's class, consisting of activities like jumping jacks, bouncing on a ball or walking, which he did both inside the school and outside on the playground. Student started receiving OT in October of 2007,

which was provided on a “pull-out” basis once a week at different times without warning, depending on the occupational therapist’s schedule. Student was allowed to use putty or other sensory items in class unless they became distracting.

149. At Summit View, failure to follow staff instructions resulted in Student getting a check mark, with three check marks resulting in detention. Student received lunch detentions three or four times, and each detention was used to talk to Student about what went wrong and strategies for changing behavior. At some point during the year, Student also started to receive counseling, which was implemented every other week on a pull-out basis.

150. Wheeler implemented some of the academic and behavioral goals proposed by the District in the November 29, 2007 IEP. Student’s progress was reported through periodic reports and worksheets.

151. Although there had been discussion among Summit View staff during the 2007-2008 school year about whether Summit View was appropriate because Student’s academic abilities were lower than most students at Summit View, at the time of hearing, Student was expected to continue his enrollment there for the 2008-2009 school year. Overall, Wheeler believed that Student made progress at Summit View. In particular, Wheeler felt Student made the most progress in classroom behavior, independence, and self-monitoring. Wheeler believed Student made academic progress as well, but had no specific information about his reading ability.

152. Mother and Father made the following payments to Summit View after placing Student there: \$26,460 for tuition between September of 2007 and June of 2008; \$2,360 for summer of 2008 tuition; \$3,465 for occupational therapy from September of 2007 through June of 2008; \$420 for summer of 2008 occupational therapy; \$950 for counseling at Summit View from January of 2008 through June of 2008 and \$190 for counseling during summer of 2008. Mother and Father paid \$1,250 (ten, one-hour

sessions at \$125 each) for clinic-based occupational therapy at Pediatric Therapy Network between March 22, 2008 and July 26, 2008. Mother and Father paid \$3,120 to Lifespan Therapeutic Services for 26, one hour speech therapy sessions between December 31, 2007 and July 30, 2008. Mother credibly testified that all claimed expenses were paid by personal check or credit card from family accounts.

153. The IRS business mileage rate was \$.485 per mile for 2007, \$.505 per mile for January through June of 2008 and \$.585 per mile after July 1, 2008. A round-trip between Student's home and Summit View was 27 miles. Assuming Student attended school every day, there were 180 regular school days at Summit View, plus 24 days of ESY. Applying a mileage rate of \$.495 (the average of the 2007 and 2008 rates in effect during the regular school year) parents had mileage expenses of \$2,405.70 for the 2007-2008 school year. Applying a mileage rate of \$.585 for travel after July 1, 2008, parents had mileage expenses of \$379.08 for the 2008 ESY.

## LEGAL CONCLUSIONS

### STATUTE OF LIMITATIONS

1. 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), 300.511(e) (2006)<sup>3</sup>; 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, Student has the

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<sup>3</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

burden of persuasion for the issues raised in OAH case number N2008040616 (Issue 1), and the District has the burden of persuasion for the issues raised in OAH case number N2008040039 (Issue 2).

#### ANALYSIS OF ISSUES ONE AND TWO<sup>4</sup>

3. In Issue One, Student contends that he was denied a FAPE from April 16, 2006, through the 2007-2008 school year because his educational program in the District required an excessive number of transitions and pull-outs; and his unique needs required placement in a non-public school. The District disagrees, contending that at all times Student was provided a FAPE and, in Issue Two, that it offered Student a FAPE in an IEP dated November 29, 2007, as amended January 14, 2008, February 19, 2008, and March 24, 2008. As discussed below, Student failed to meet his burden of persuasion on Issue One, whereas the District met its burden of persuasion on Issue Two.

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 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

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<sup>4</sup> Issues One and Two are being considered together based on the substantial overlap of evidence regarding the 2007-2008 school year.

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.)

6. 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.)

7. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the

requirement that children be educated in the least restrictive environment (LRE); 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

8. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) 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].) 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.)

9. An IEP providing for over 50 percent of the child's day to be spent outside of general education for academic instruction was held not to violate the child's right to be educated in the LRE where the evidence showed that the benefits of separate academic instruction outweighed the benefit of full inclusion. (See *Friedman v. Board of Educ. West Bloomfield* (E.D. Mich. 2006) 427 F.Supp.2d 768, 782-783 [cognitively impaired student contended that program should have been in general education 100 percent of the time].)

10. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

11. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be

set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

12. 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).)

13. 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 *Vasherresse 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); Ed. Code, § 56381, subd. (a)(1).)

14. 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).)

15. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

16. 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); 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].)

17. 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. (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, 85 L.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 student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).) Reimbursement may be denied if at least ten days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district's placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).)

18. Here, for the period beginning April 16, 2006 (two years prior to Student filing his complaint) through October 18, 2006 (the date of Student's next IEP), the preponderance of the evidence showed that Student was offered a FAPE. The 2005-2006 school year was Student's kindergarten year and Student began first grade in the

fall of 2006. Student's eligibility category was speech and language impairment and there was no evidence demonstrating that at the time this was incorrect. The evidence did not support findings that the District should have been aware of unique needs other than those listed in Student's operative IEP dated October 18, 2005, or that at the time the District should have been aware that the frequency and duration of related services such as speech therapy and occupational therapy should have been different. At no time did parents question Student's placement in a District general education classroom and to the contrary, for Student's transition to first grade in the fall of 2006, Mother expressly requested that Student be placed in Shima's general education class. While Student was enrolled in District programs, Mother expressed to District personnel that she was satisfied with Student's placement. The evidence did not support a finding that Student's educational progress was diminished by an excess number of "pull-outs."

19. Although Mother and Father generally testified that they did not believe that Student made any progress while enrolled in the District program, their testimony to this effect was not plausible in light of the evidence that Student made progress on his goals. In particular, the October 18, 2006 IEP included present levels of performance showing that Student had made progress: in using complete sentences, acquiring grade-level language skills and reducing "stimming" behavior. As credibly testified to by Long, although Student did not meet all of his academic goals, he made substantial progress. Similarly, Student's speech therapist saw progress throughout her work with Student. Although at the beginning of the 2006-2007 school year, Student showed some increased "stimming," this was explainable based on Student transitioning to a new classroom with a new teacher. In addition, in September of 2006, it was noted that Student was having difficulty with grade level reading, and this was addressed by his October 18, 2006 IEP. There was no evidence of facts that would have put the District on notice that Student had other, unmet unique needs, particular in the

social/emotional area. To the contrary, the October 18, 2006 IEP stated that Student "always seems happy" and "loves school and class." In sum, the evidence did not support a finding that Student was denied a FAPE and instead showed that during this time period, Student was properly placed in the LRE with appropriate related services and accommodations to meet his unique needs. (Factual Findings 1-9, 12, 34-36; Legal Conclusions 1, 2, 4-8, 11-16.)

20. For the period after October 18, 2006 (the date of Student's annual IEP during his first grade year) until Student left school in May of 2007, the evidence showed that Student was not denied a FAPE. As discussed above, the IEP team, including parents, agreed at the time that Student had made progress. The concerns of Mother, Father and first grade teacher Shima regarding Student's reading abilities were addressed by increasing Student's RSP time by 30 minutes per week. Student's IEP contained goals related to all of the unique needs identified in the IEP, including academic goals. Student made progress in reading, going from having trouble pronouncing and decoding at the beginning of the year to increasing his reading fluency and being able to read aloud by Memorial Day of 2007. Student made progress in math, progressing from the use of manipulatives to mastering some math facts and performing some calculations. Academic testing administered in 2007 as part of the testing by Dr. Owen, Long and Student's expert, Dr. Davidson, confirmed that Student had made progress in the District program.

21. Mother removed Student from speech therapy in the fall of 2006, even though he was making progress, such that the District cannot be faulted for failing to offer Student appropriate speech services. Expert testimony did not support a finding that Student was offered an inappropriate amount of speech therapy or occupational therapy in the October 18, 2006 IEP. Further, the evidence did not support a finding that Student was subjected to an inappropriate amount of "pull out" services. Long

accommodated Mother's request to provide Student with some RSP sessions prior to the beginning of the school day. Thus, even though Student's IEP estimated that he would be out of general education for approximately 12 percent of the school day, the amount of time was actually far less.

22. Further, the evidence showed that Student was generally successful in the least restrictive environment, i.e., Shima's general education classroom on a general education campus. Social skills were one of Student's unique needs relating to his disability. However, Student had two close friends at school, whom he played with at recess, and was seen playing with other children as well. Although Mother and Father thought having "only" two friends was unacceptable, it was actually a sign of Student's social success on a general education campus. Moreover, Student benefited from being around typical peers by learning to conform his behavior to expectations. Notably, Student transitioned without difficulty within the school day and had benefited from modeling the behavior of typical peers such as using "indoor voice" and how to properly get the teacher's attention. None of the school personnel who worked with Student saw anything that would indicate that Student was in any way anxious, overwhelmed, fatigued or unhappy in his placement.

23. Student's removal from the District program in May of 2007 was not required for medical reasons or because Student was being denied a FAPE. Student's pediatrician, Dr. Vinzon, testified unequivocally that at no time was there a medical reason that Student could not attend school in a District placement. The evidence showed that Mother was upset about the parent of another student volunteering to assist teacher Shima with clerical work. In particular, Mother was concerned, based on a previous incident, that the parent volunteer might discuss Student's medical and/or special education needs with other families, which, in turn, might cause Student to be socially excluded or picked on. Just prior to the parent volunteer issue arising, Mother

had told Long and Shima that she was happy with Student's participation in Shima's class and that her only concern was for Student's progress in spelling. At the time Student was removed from school by Mother, Mother told the District that it was for family reasons related to a graduation and vacation, further demonstrating that the District was not on notice of facts that would demonstrate that at the time Student's operative IEP was inappropriate. Shima credibly explained that around May of 2007, he observed Student to be sad when it appeared that Mother had made the decision to withdraw Student from school and that prior to that time, Student had expressed his happiness to Shima about being in Shima's class.

24. Student's neurologist, Dr. Hannauer, did not offer any opinion about Student in the May of 2007 time frame, but instead limited her opinion to how Student presented to her in November of 2007. Dr. Hannauer's November of 2007 diagnosis of anxiety, while credible, does not support an inference about Student in May of 2007. Dr. Hannauer's diagnosis came six months after Student had been removed from the District program without completing the school year and at no time had Dr. Hannauer discussed the District placement with Student. Student presenting with anxiety across all domains in November of 2007 appears to be consistent with events in Student's life such as being removed from school prior to the end of the school year, not attending school during the summer of 2007, being assessed multiple times by multiple experts and having just started a new school in September of 2007. (Factual Findings 1, 7-49, 53, 98-99; Legal Conclusions 2, 4-8, 11-16.)

25. Student was not denied a FAPE between May of 2007, when he left school, until the next IEP team meeting on November 29, 2007. As discussed above, by May of 2007, the District was not on notice of any change in Student's unique needs that would warrant amending the October 18, 2006 IEP. Although Mother requested that Student be assessed by the District in May of 2007, and consented to an assessment plan in early

June of 2007, the District, through no fault of its own, was not able to begin assessing Student until September of 2007. The only additional information about Student conveyed to the District during the summer of 2007 was Mother's perception that Student could not be assessed by the District during that time due to the possibility that Student would have an ear surgery. It was not until September 10, 2007, the day that Student started at Summit View, that the District received notice of his unilateral enrollment there. Accordingly, Student was not denied a FAPE during this time period. (Factual Findings 1, 7-52, 54-57, 60, 72, 101; Legal Conclusions 2, 4-8, 11-16.)

26. Student was offered a FAPE in the November 29, 2007 IEP and its amendments. First, Student was properly assessed in all areas of suspected disability throughout the process of drafting the IEP. Notably, the standardized assessments given by Dr. Owen and Dr. Davidson generally indicated that Student's needs were now more pronounced in the areas of attention and academic fluency, while Student continued to have language, motor movement and social needs. The District pursued additional assessments of Student's hearing, occupational therapy and physical therapy needs based on discussions and exchange of information at the IEP team meetings. Although an auditory processing assessment was unsuccessful, the IEP team had information about Student's abilities in this area based on the cognitive testing by Dr. Owen and Dr. Davidson. The IEP that resulted reflected the most complete understanding of Student's needs to date.

27. The November 29, 2007 IEP team meeting and the subsequent amendment meetings were also procedurally proper. The evidence showed that at all times, the District accommodated parents' scheduling requests to ensure the participation of their attorney, expert and Student's current teacher. Parents were not denied an opportunity to participate in the meetings and input from Dr. Davidson and Student's teacher at Summit View was included in the IEP.

28. Further, the November 29, 2007 IEP and its amendments were designed to meet Student's unique needs and were reasonably calculated to provide Student with some educational benefit. The District's offer in this IEP accurately identified Student's attention, processing speed, and executive functioning delays and the need for related services in motor skills, speech and language, and social skills. Related services at appropriate frequencies and durations were offered in all identified areas of need. Appropriate, measurable, and achievable goals that were based on Student's present levels of performance were proposed to address all of Student's areas of need.

29. Finally, the November 29, 2007 IEP and its amendments offered Student a placement in the least restrictive environment. The fact that Student was ultimately offered an IEP that provided for 49 percent of his time outside of the general education environment does not demonstrate that he was denied a FAPE. The appropriateness of Student's placement must be determined by examining his unique needs as well as the IDEA's preference that children be educated in the least restrictive environment. Here, the provision of two hours of daily RSP services offered to Student on a "pull-out" basis was appropriate based on Student's present levels of academic performance and attention deficit as measured just prior to the November 29, 2007 IEP team meeting. These "pull-outs" were intended to provide Student with the type of focused instruction recommended to address his attention issues, which, as well as Student's academic deficits in reading and math, had become a higher priority than language delays. The provision of "pull-out" RSP services offered Student the attention he needed in academics, while maintaining the positives of being educated in the least restrictive environment for Student, i.e., a general education campus with supports and related services. The evidence showed that when not in RSP or receiving services, Student's classroom would operate by dividing the class of 20 into smaller groups, which would lessen the possible distraction for Student, particularly when Student was offered the

support of an adult assistant to help keep him on task. Further, Student's general education class would include other children with IEP's, lessening any stigmatizing effect of "pull-out" instruction. Student's speech and language needs, which consisted of needs in pragmatics and syntax, would be appropriately met on a general education campus where Student would learn from exposure to the language of typical peers. None of the experts who testified at hearing in the fields of OT, speech therapy, physical therapy or adapted physical education formed that opinion that Student could only be appropriately educated in the more restrictive environment of a non-public school. Dr. Davidson's opinion about placement was not persuasive because it was not based on any information about the District's program and instead was based on inaccurate perceptions about the Summit View program. (Factual Findings 1, 56-151; Legal Conclusions 2, 4-17.)

30. In sum, Student was not denied a FAPE prior to Mother and Father unilaterally enrolling Student at Summit View, nor afterward. Accordingly, Student is not entitled to reimbursement for educational expenses his parents incurred after they removed him from the District program. Having found that Student was provided with a FAPE at all relevant times, this decision need not reach the issues of whether Student provided an appropriate ten-day notice to the District prior to Student's unilateral placement or whether the Summit View placement was "appropriate" for purposes of eligibility for reimbursement.

## ORDER

1. All of Student's requested relief is denied.
2. The IEP dated November 29, 2007, as subsequently amended on January 14, 2008, February 19, 2008 and March 24, 2008, offered Student a FAPE.

## 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, the District prevailed on all 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: October 10, 2008

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RICHARD T. BREEN  
Administrative Law Judge  
Office of Administrative Hearings