

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008110569

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on March 16, 17, 18, 19, 23, 24, 25, 26, 27, and May 12, 13, 14, 15, 26, and 27, 2009, in Clovis, California. At the request of Student's Parents (Parents), the hearing was open to the public.

Karen Samman, Attorney at Law, represented the Clovis Unified School District (District). Kay Lenheim, the Special Education Local Plan Area (SELPA) Director, and also the Special Education Director for the District,<sup>1</sup> was present most days of the hearing. When Ms. Lenheim was unable to attend, Lisa Hansen, a program specialist for the District, attended in her place.

Student's Mother represented Student and his Parents on all hearing days. Student's Father was also present during the majority of the hearing. Student was only present for a portion of the hearing on May 26, 2009, when he testified.

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<sup>1</sup> The Clovis Unified School District is the only school district in its SELPA.

The District filed a due process hearing request (complaint) in the instant case on November 17, 2008 and an amended complaint on December 5, 2008. OAH set the matter for hearing to begin on February 3, 2009. On February 2, 2009, Parents filed a complaint with OAH in Case No. 2009020064. On February 3, 2009, ALJ Charles Marson convened the hearing in Case No. 2008110569. At that time, all parties agreed to consolidation and continuance of the two cases. On February 5, 2009, ALJ Marson issued his decision consolidating the two cases and granting the parties request for continuance. The hearing began as scheduled on March 16, 2009. However, on March 17, 2009, the second day of hearing, Parents moved to withdraw their complaint without prejudice in Case No. 2009020064. The ALJ granted their motion and the hearing proceeded solely on the issues raised by the District in its amended complaint in Case No. 2008110569.

At hearing, oral and documentary evidence was received. The following witnesses testified at hearing: Parents, Student, Student's aunt, Kay Lenheim, Lisa Hansen, Melinda Adolph, Sasha Johnson, Wendie Huerta, Jennifer Puentes, Amanda Fisher, Manuel Nunez, Kathleen McNamara, Jeanne Hatfield, Patricia Carpio, Dr. Ananda Aspen, Brooke Bell, Angela Kalashian, Theresa Pafford, Dr. Blythe Corbett, and Sarah Katz.

At the request of the parties, the record remained open until June 10, 2009, for the submission of written closing arguments, at which time the record was closed, and the matter was submitted.

## ISSUES

1. Did the District's interim placement offer of August 25, 2008, offer Student a free appropriate public education (FAPE), even if it did not provide a program comparable to Student's June 4, 2008 individualized education program (IEP) from Fresno?

2. Did the District's IEP offer of September 24, 2008, provide Student a FAPE for the 2008-2009 school year?

3. Did the District's IEP offer at the November 12, 2008 addendum IEP meeting provide Student a FAPE for the 2008-2009 school year?

## PROCEDURAL ISSUE

The District's amended complaint, filed on December 5, 2008, raised only the first two issues described above. Every pre-hearing conference statement filed by each party in this case references only the first two issues as those being addressed in the complaint brought by the District. All orders issued by OAH following the pre-hearing conferences with regard to Case No. 2008110569 refer only to the issues one and two above. The only reference to the IEP convened on November 12, 2008, and the resulting IEP offer made by the District, is in Student's complaint filed in Case No. 2009020064, which Parents withdraw on the second day of the due process hearing. However, the District and Parents both treated the instant case as if the District's amended complaint encompassed the November 12, 2008 amended IEP offer. Both parties fully litigated the issue by presenting extensive testimonial and documentary evidence of that IEP at hearing and both parties argued the merits of that IEP in their closing briefs. Significantly, whenever the matter of what time period was at issue in the instant litigation arose during the course of the hearing, both parties agreed that the period encompassed August 2008, to the IEP of November 12, 2008, and neither party objected to testimony or evidence that encompassed the time period between September 24, 2008, and November 12, 2008. Therefore, although not specifically alleged in the District's amended complaint, the ALJ finds that the issue of whether the November 12, 2008 IEP constituted an offer of FAPE to Student was fully litigated by all parties, was not objected to by either party, and she will therefore address it as part of this decision.

## REQUESTED RESOLUTION

The District requests an order that its IEP offers of August 25, 2008, September 24, 2008, and November 12, 2008, constituted a FAPE for Student.

## CONTENTIONS OF THE PARTIES

The District contends that when Student transferred into the District from the Fresno Unified School District (FUSD) between the 2007-2008 and 2008-2009 school years, it was not legally obligated to adopt in full the IEP that FUSD had developed for Student. Rather, the District argues that its only obligation to Student, as a child transferring between school years from one SELPA to another, was to offer him a 30-day interim educational program that provided him with a FAPE. The District contends that its interim placement met all procedural and substantive legal requirements. It further contends that its IEP offer of September 24, 2008, as reviewed at the addendum IEP it convened at Parents' request on November 12, 2008, also procedurally and substantively provided Student with a FAPE.

Student contends that the District was obligated to offer him a 30-day interim educational program comparable to the one FUSD had developed for him in an IEP dated June 4, 2008, when he transferred to the District prior to the beginning of the 2008-2009 school year. Student further contends that the District failed to permit Parents to meaningfully participate in the development of any of the IEPs at issue in this case, and that the District predetermined its offers of placement and services, particularly with regard to the District's refusal to offer Student a specific intensive reading program to address his reading comprehension deficits. Student also contends that the District improperly failed to have an assistive technology specialist in attendance at any of the IEPs. Student moreover contends that each IEP is substantively deficient because it failed to properly identify Student's present levels of performance,

did not include sufficient goals and objectives, did not provide Student with necessary assistive technology, and did not provide Student with appropriate related services or extended school year instruction. Student also claims that the District IEP team failed at all times to address his needs as a student designated as an English language learner (ELL). Finally, Student claims that the District's IEP offers failed to address his unique needs in the areas of reading comprehension by failing to provide him with adequate specialized instruction in that area.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a twelve-year-old boy who was a sixth grade student during the 2008-2009 school year. He resides with Parents within the boundaries of the District. He qualifies for special education and related services as a student with autism. Student has a history of delays in receptive and expressive language, social difficulties, reading comprehension and writing. While Student has significant deficits in reading comprehension, he has excellent spelling and reading decoding skills and has been reading since age three. He also has above-grade level skills in mathematics. Student has progressed from grade to grade at normal pace.

2. Student resided with Parents within the boundaries of the FUSD until the summer of 2008. Student had first been found eligible for special education and related services by FUSD in 2000, and the FUSD IEP teams developed and implemented a series of IEPs for Student since that time.

3. Both of Student's parents are educators. Father has a master's degree in business and teaches college level classes. Mother is a credentialed elementary school teacher who also has a bilingual credential. She is a third grade teacher in FUSD. Although not an assistive technology specialist, Mother has a very strong background in

technology and is technology and computer savvy. Since Student was diagnosed with autism, Parents have educated themselves in all aspects of the disorder and have become active in the autism community where they live. Mother has been a co-presenter on autism issues at various programs and seminars over the last few years.

4. Student received intensive reading intervention services from FUSD for many years, including the Fast ForWord program, a reading program called Orton-Gillingham, and several programs developed by the LindaMood Bell Reading Centers, including its visualization and verbalization program (commonly referred to as "V & V").

5. FUSD referred Student to Dr. Blythe Corbett of the University of California, Davis Medical Center's Medical Investigation of Neurological Disorders Institute (commonly referred to as the M.I.N.D. Institute) for a neuropsychological assessment<sup>2</sup> on August 1, 2006. Dr. Corbett had also assessed Student in 2004. Since Student had satisfactory receptive and expressive English language skills, Dr. Corbett administered the assessment in English. Dr. Corbett's assessment was the only multidisciplinary assessment administered to Student between 2006 and late 2008 when the District herein was able to administer its own assessments to him.

6. As part of her assessment, Dr. Corbett reviewed Student's records and conducted clinical interviews with Student and his Mother. She also administered the following testing tools: Child Development Clinic Questionnaire; Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV); Behavior Rating Inventory of Executive

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<sup>2</sup> Dr. Corbett's report refers to the assessment as an "evaluation." The terms "assessment" and "evaluation" are synonyms. Federal statutes and regulations generally use the term evaluation. California statutes and regulations generally use the term assessment. This decision will use the term "assessment" since that is the common usage in California.

Functioning (BRIEF); Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-IV); Beery-Buktenica Developmental Test of Visual Motor Integration (VMI); Memory for Faces from the NEPSY; Adaptive Behavior Assessment System (ABAS); Short Sensory Profile; and the teacher and parent rating scales from the Behavior Assessment System for Children (BASC). Dr. Corbett is not an assistive technology (AT) specialist and did not administer an AT assessment to Student. She did not observe Student at school.

7. Dr. Corbett noted that Student's speech was marked by articulation problems, that he showed difficulty with receptive and expressive language skills, and that he was easily distracted, but responded to prompts redirecting him to the tasks at hand.

8. In order to assess Student's cognitive abilities, Dr. Corbett administered the WISC-IV to him. The results of the testing indicated that Student had a notable discrepancy between his verbal and perceptual abilities, with strengths in perceptual reasoning and weaknesses in verbal comprehension.

9. On the CELF-IV, which measures receptive and expressive language skills, Student's scaled scores were all below average, indicating that he had continued deficits in those areas.

10. To assess Student's ability to integrate visuoperceptual skills with motor functioning, Dr. Corbett administered the VMI to Student. Student's score of 83 was in the below average range.

11. The ABAS measures a child's adaptive functioning. This assessment is based upon a parent interview and questionnaire designed to assess a child's ability to perform daily activities designed for personal and social sufficiency. Student's overall standard score of 106 placed him well within the average range indicating that Student had no problems with social communication, self-care and overall adaptive functioning.

12. To assess Student's behavioral and emotional functioning, Dr. Corbett administered the BASC, which consisted of a parent rating sheet and a teacher rating sheet that assess 18 different areas of functioning. Student's scores did not indicate any clinically significant areas of concern.

13. Dr. Corbett also had Mother prepare a Sensory Profile questionnaire relating to Student's sensory sensitivity in different environments (or domains). The results of this assessment indicated that Student had very few areas of sensory sensitivity.

14. Based upon the results of her assessment, Dr. Corbett made several recommendations concerning Student. She indicated that Student would continue to benefit from a supportive, structured educational program that provided him with access to typically developing peers for social interaction and to help him practice social skills and develop friendships. She recommended that he continue to receive speech and language services, as he was presently receiving.<sup>3</sup> Dr. Corbett noted that Student was at or above grade level in all academic areas except reading; she therefore recommended that he continue to receive assistance in that area. With regard to educational strategies to assist Student in the classroom, Dr. Corbett recommended that visual reinforcements, such as charts, be used in his classroom. She also felt that classroom technology, such as the use of a digital camera to record curriculum concepts, as well as educational computer software, would assist Student in the classroom.

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<sup>3</sup> Student was receiving five hours a week of individual speech and language services at the time of Dr. Corbett's assessment although Student's IEP team was recommending a decrease in that amount.

15. Given Student's problems with attention and his high distractibility,<sup>4</sup> Dr. Corbett recommended strategies that would benefit him at school and in the home. The strategies are accommodations that would assist Student in the classroom and included repetition and clarification of information, a quiet environment, and redirection of activity such as being able to manipulate a soft toy while he was listening to instruction as an outlet for his hyperactivity. Dr. Corbett also recommended that a "shaping" technique be used for helping Student to increase his ability to retain information. Basically, the technique requires that the amounts of information given to Student gradually be increased so that he could learn to retain larger pieces of information. Dr. Corbett also recommended that Student be given increased time to complete work and that his teachers provide outline notes for him in advance of lessons. She also made recommendations regarding using nonverbal cues for Student, such as pointing and facial expressions, to help convey information, and that visual aides such as pictures, graphs, calendars, diagrams, and charts be used to help organize written material and to simplify information. Dr. Corbett also recommended that Student be able to write down answers rather than giving verbal responses, that instructions should be repeated, that visual and verbal prompts be used, and that Student be helped in focusing on the context in which things occur.

16. Other than suggesting the use of a video camera to take a photograph of curricula content to make a visual image for Student and stating that Student continued

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<sup>4</sup> In her assessment report, Dr. Corbett also made a provisional diagnosis of attention deficit hyperactivity disorder (ADHD) for Student. However, there is no present contention that the District should have found Student eligible under that eligibility category or that the District's IEP offers failed to offer FAPE because they did not specifically address ADHD.

to benefit from unidentified educational computer software, Dr. Corbett did not indicate that she believed Student required specific assistive technology in the classroom.

Furthermore, while Dr. Corbett found that Student continued to suffer from deficits in reading comprehension and expressive language, she made no recommendations as to what type of intervention should be provided at school to address those deficits. Rather, the focus of her report is on accommodations that could be implemented for Student in the classroom and on his need for visual cues and visual aides to help him understand and retain information.

17. Student's IEP team at FUSD developed IEPs for him that incorporated suggestions made by Dr. Corbett in her August 1, 2006 report. Student's IEP dated January 1, 2007 included speech and language services through a non-public agency (NPA) for 100 to 125 minutes per week, 30 minutes per month of special education support services, a one-on-one aide (called a "classroom support assistant" by FUSD) for six hours a day, and undefined supplemental educational services from the Cullinan Center, an NPA provider with which FUSD contracted to provide intensive reading intervention services for Student. The number of hours per week of Cullinan services is not specified in this IEP.

18. The IEP also included assistive technology (AT) to be provided to Student in the form of a digital camera to "strengthen his comprehension skills and curriculum concepts," computer software, and laptop [computer] and a Smartboard "for the classroom teacher." A Smartboard is a large interactive whiteboard that is connected to a laptop computer which can both project images from the computer and which can, itself, be used as a writing board on which a student can directly write and create other images. Student was taught to use the Smartboard. There is no indication in the IEP of why the Smartboard technology was necessary for Student to access his education or why his IEP team chose it for Student's use. None of Student's witnesses addressed

those issues through their testimony. Student's fifth grade teacher from FUSD, Patricia Carpio, testified that she was a member of Student's IEP teams at the end of his fourth grade and during his fifth grade, but she was not aware of why any of the specific assistive technology was chosen for Student and she was not aware of why the team awarded specified amounts of reading services to Student through the Cullinan Center. Student witness Kathleen McNamara, who is a regional instructional specialist for FUSD, and who was present at Student's FUSD IEP meeting on February 7 and June 4, 2008, did not address the issue of AT during her testimony at hearing.

19. Student's January 17, 2007 IEP from FUSD also included four annual goals for Student: one in the area of social needs, one in the area of social perceptions, one in the area of receptive and expressive language, and one in the area of reading comprehension. The reading comprehension goal proposed to work on Student's ability to make and confirm predictions about text that he read. Other than indicating that Student is an ELL and in a parent-requested dual immersion class, the IEP contains no other reference Student's English/Spanish needs. Nor does it contain any goals specific to Student's status as an ELL.

20. FUSD convened another IEP meeting for Student on June 7, 2007, at the request of Parents to review an assessment of Student done by LindaMood Bell, an NPA that specializes in intensive academic intervention in reading and mathematics. The primary addition in this IEP from the previous one was the specification of 120 hours of reading services to be provided by an independent contractor over the following 12 months. Although not identified in the IEP, the independent contractor was the Cullinan Center. FUSD contracted with Cullinan because it did not have the in-house expertise to provide Student with a reading program other than the standard reading curriculum already provided in his general education classroom. The IEP did not add any new goals.

21. Student's FUSD IEP team convened again on October 12, 2007, at Parents' request. This IEP added another 100 hours of Cullian Center reading services to the 120 hours that had already been approved the previous June. There is no indication of why the additional hours were provided, other than it would permit Student to continue the eight hours of reading services he was then getting. No other changes were made to the IEP.

22. Parents independently paid for Student to be assessed by the Lindamood Bell NPA on June 5, 2007, and January 1, 2008. By the time of the second Lindamood Bell assessment, Student had received at least 220 hours of reading instruction from the Cullinan Center. After approximately 220 hours of intensive reading instruction for eight hours a week, Student's scores on the Peabody Picture Vocabulary Test-III had gone down, from an 8.2 age equivalent to a 7.0 age equivalent, between the two tests. His scores on the Woodcock Reading Master Test had also gone down, from a 10.0 grade level to a 9.3 grade level. Student showed improvement on the subtests of the Detroit Test of Learning Aptitude, and on the Wide Range Achievement Test in spelling and mathematics. On the Gray Oral Reading Test (GORT), Student showed growth in all subtests. In his primary area of need, reading comprehension, Student showed growth from having initially scored at less than a first grade level to testing at grade level 2.2. On January 4, 2008, the Lindamood Bell Director recommended that Student receive another 120 hours of intensive reading program in its V & V program.

23. The Lindamood Bell Center explained in its assessment report that its V & V program for Language Comprehension and Thinking provides sensory-cognition development of "Concept Imagery." Basically, the program breaks up oral and written language to images to create what the program defines as a visual "gestalt" or "whole" to improve a student's oral language comprehension, reading comprehension, reading recall, problem solving, critical thinking, ability to follow directions, and to aide in "self-

monitoring and correcting decoding errors." At hearing, District witness and reading expert Sarah Katz, who was a Lindamood Bell instructor prior to becoming a credentialed teacher and who has received advanced training in V & V, explained that the program works with students to teach comprehension by making visual pictures of what they see and then has them verbalize to assist in comprehension. The program consists of a series of steps, starting with setting the climate of what the child is reading, then advancing to visualizing a single word or picture, and working up through visualizing nouns, single sentences, multiple sentences, whole paragraphs, multiple paragraphs, and, finally, a page of text.

24. Student's FUSD IEP team met on February 7, 2008, for his annual IEP review. In addition to carrying over the four goals from Student's previous IEP, Student's FUSD IEP team developed six English language development (ELD) goals for him. The Cullinan Center also developed four reading and writing goals for Student, to be accomplished in the 50 hours remaining in his V & V program, but none of the goals described Student's present levels of performance in the area of need on which each goal focused. The IEP team noted that Student was still only about half way through level four out of ten levels of the V & V program although he was showing progress. The team noted that Student's written language skills had progressed to about a third grade level (from about a first grade level when he began receiving instruction from Cullinan). Noting that Student was still weak in [reading] comprehension, the FUSD IEP team determined that Student needed another 120 hours of reading services, to be provided by Cullinan two hours a day, five days a week, after Student's school day, with an agreement that the team would reconvene in June 2008 to determine if Student still required more reading intervention from Cullinan. Based upon the recommendation from Parents, the FUSD IEP team determined that Student no longer required direct speech and language services. The IEP therefore only provided for 30 minutes a month

of consultation between the speech and language pathologist (SLP) and Student's general education classroom teacher. The FUSD IEP team continued the 30 minutes per month special education support services consultation with Student's classroom teacher. The one-on-one classroom aide six hours a day was also continued.

25. Student's FUSD IEP team met again on June 4, 2008 at Parents' request and developed another IEP for Student (referred to herein as the June 4 IEP). This IEP meeting was for the purpose of transitioning Student from fifth to sixth grade at FUSD. The June 4 IEP indicates that Student's native language is Spanish and that he is designated as an English learner. The IEP notes that Student has strengths in visual/spatial reasoning, math computation, spelling, word reading and in respecting and working with others. The IEP notes that Student's California Standards Testing scores were proficient in math but below basic in English/Language Arts. The IEP notes that Student had scored a "3" or "intermediate" range on the listening, speaking, reading, and writing sections of the California English Language Development Test. The IEP indicated that on his last writing sample score, dated December 31, 2007, Student had scored a "3" (proficient) in writing conventions, but only a "2" (approaching proficiency) in writing content. The IEP further noted that on the GLAS test (an assessment test developed by FUSD), Student's scores were advanced in math but below basic in English Language Arts.

26. The June 4 IEP also indicated that writing skills were still a weak area for Student. It specifically indicates that Student's diagnosis of autism created difficulties for him in reading comprehension, receptive and expressive language, written expression, and social skills. The IEP notes that Student's English writing sample scores were still below passing and that his reading comprehension skills still needed improvement and continued to be an area of concern.

27. The June 4 IEP also included numerous classroom accommodations to support Student in accessing the general education curriculum. These consisted of adapting assignments to his level, reduced or shortened assignments as needed, the use of visual place holders, use of the notebook tablet, Smartboard, LCD projector, and digital camera, and minimizing extraneous stimuli as needed. Strategies to assist Student with organization in the classroom consisted of preferential seating as needed, the use of an assignment notebook planner, short breaks between assignments, redirection of Student's attention and the use of nonverbal cues, supervision during unstructured time such as lunch, provision of opportunities to practice social skills, and positive reinforcement to encourage positive behaviors.

28. The IEP also included the following instruction strategies: Presentation of one task or direction at a time, repetition and rephrasing of instructions as needed, having the instructor check Student's understanding as needed, extension of time to complete assignments as needed, the use of graphic organizers to organize written material, and the use of verbal cues for commencement of activities as needed.

29. The June 4 IEP indicates that Student would be provided with a notebook tablet (which is an interactive piece of equipment which is attached to a laptop computer and which permits what is written on the tablet to be transferred to the laptop or to be projected from the laptop to a projector screen) and that he also would have the use of the Smartboard technology with a projector. However, the IEP does not specify details of when and how the Smartboard was utilized by Student and does not explain why he needed any of the technology in order to access his education.

30. The June 4 IEP designates Student as an ELL, but does not state how, if at all, Student's language needs related to his IEP. Unlike the February 2008 IEP, the June 4 IEP does not contain any English language development goals for Student.

31. The June 4 IEP contains a service page detailing the special instruction and related services offered to Student. These consisted of 30 minutes per month of specialized academic instruction and 30 minutes per month of speech and language services, both provided in Student's general education classroom as consultation services with Student's general education teacher. The IEP team also continued the provision of a one-on-one aide for Student for 300 minutes a day (his entire academic day at school). The June 4 IEP also provided Student with 120 minutes per day, five days a week, of specialized reading services after school at the Cullinan Center.

32. FUSD developed only four goals for Student in the June 4 IEP: in reading, written expression, class participation, and peer interaction. Representatives from the Cullinan Center also attended the IEP and developed goals and objectives for Student's continued receipt of both V & V services and writing and grammar services. For the latter, Cullinan broke writing and grammar into curricular components that hoped Student would master. For example, for the first reporting period, which included Summer 2008, Cullinan wanted Student to master adjectives, linking verbs, verb phrases, tenses, pronouns, conjunctions, interjections, functions in a sentence, punctuation, and sentence types, none of which had baselines and none of which gave any specific directive for how much Student would master during the identified time period. However, with regard to understanding the structure of a paragraph, Cullinan indicated that its goal was for Student to master that function with 85 percent accuracy. With regard to creating an outline and writing a multi-paragraph composition, Cullinan indicated it hoped Student would do so at a fourth grade level by the end of the identified time period. With regard to self-editing, Cullinan indicated that its expectation was that Student would be able to do so with 80 percent accuracy although Student's present accuracy rate was not indicated. The contract between FUSD and Cullinan merely incorporates the FUSD written language and reading comprehension goals as

the hoped-for results of providing Student with the Cullinan services. There is no indication in this IEP that the curricular components of the Cullinan reading program were meant to be specific IEP goals for Student.

#### THE AUGUST 25, 2008 INTERIM IEP OFFER

##### Student's Reading Comprehension and Writing Needs

33. In July 2008, Student and his family moved into the jurisdictional boundaries of the District.

34. On August 19, 2008, Student's Father hand-delivered a letter from Parents to the District introducing themselves and their three children, including Student, to the District. The letter informed the District that Student was entering sixth grade and that he was a general education student who had an IEP from FUSD. Parents requested the continued provision of services including the use of the Smartboard, a laptop, digital camera, an LCD projector, a full day instructional aide, DIS,<sup>5</sup> and Cullinan Center intervention services. Parents did not specify which services and technology applied to which of their children. Parents gave the District permission to contact Kathleen McNamara at FUSD to obtain a copy of Student's IEP. Parents requested to meet with the full District IEP team to review Student's IEP and discuss his transition to the District. Parents did not provide the District with a copy of Student's IEP at that time or any of Student's educational records.

35. Father also filled out a District home language survey on August 19. In it, he indicates that Student learned English when he first learned to speak, that Student most frequently used English at home, that he most frequently spoke English to Student,

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<sup>5</sup> In California, DIS refers to "designated instruction and services." It is the term interchangeably used to describe related services offered to a child with an IEP.

and that English was the language most often spoken by the adults at home. The home language survey is for the purpose of determining whether a language other than English is spoken in a child's home. If so, a school district is required to do further assessments of the child to determine if they have English language learner needs. The answers to the questions on the survey would trigger that assessment process. None of Father's responses to the questions indicated a reason for the District to suspect that Student was an ELL.

36. As discussed below in Legal Conclusions 12 and 13, since Student transferred from one SELPA to another between school years rather than during a school year, the District was not required to implement Student's FUSD IEP or to offer comparable services. Nor was the District required to hold a full IEP team meeting, with all of Student's required IEP team members present. The District's obligations with regard to a 30-day interim offer was to consult with Parents with regard to the offer and to provide Student with a FAPE during the 30-day interim period before it held Student's first District IEP team meeting.

37. District program specialist Lisa Hansen was given responsibility for developing a 30-day interim placement offer for Student. Ms. Hansen was a special education teacher for many years, specializing in teaching the deaf and hard of hearing. She has been a resource specialist teacher as well. She has been a program specialist with the District for a couple of years. Her duties include working with special education and general education teachers as well as school administrators and other staff. She oversees the special education programs at seven district schools, including the program at Ft. Washington Elementary School, where Student is enrolled in the District. Ms. Hansen helps develop IEPs, attends IEP meetings, and helps train other staff with regard to IEP procedures. She was able to review the framework of Student's FUSD IEP from June 4, 2008, through the Special Education Information System (SEIS) which

permits school districts using the system to access a child's prior IEPs upon request. The version of Student's IEP on the SEIS system did not include the progress report/curricular components from the Cullinan Center. However, Parents provided a hard copy of the entire June 4 IEP to the District, including the Cullinan attachment, on August 22, 2008.

38. After reviewing the letter from Parents, Ms. Hansen called them and set up a meeting for the first day of school on August 25, 2008. She reviewed the June 4, IEP by accessing the SEIS program and then, pursuant to the letter from Parents, contacted Kathleen McNamara to discuss Student's FUSD IEP with her. Ms. McNamara was unable to give her any particular reason why Student required the specific assistive technology identified in his June 4 IEP in order to achieve his goals. Ms. Hansen also spoke with District assistive technology specialist Amanda Fisher who also did not feel that Student's IEP indicated that he required direct assistive technology in order to access his education or achieve his educational goals.

39. Ms. Hansen also reviewed Student's present levels of performance and goals from the June 4 IEP. Like Kay Lenheim, the District's Special Education Director who also reviewed the IEP, Ms. Hansen could not understand what Student's present levels of performance were based on a review of the IEP because no baselines were given for any of Student's goals. For example, Student's reading goal was that by February 2009, after completing a first draft (of a written assignment), Student was supposed to be able to edit and revise the draft for coherence and progression of the writing process by adding, deleting, consolidating, and /or rearranging text to produce an edited version scoring at least a three on the writing rubric as measured by student work samples. However, all that the baseline said was that Student needed to continue improvement in written expression. There was no present level of ability for Student and therefore no indication of how far he would need to progress in order to reach his goal.

40. Ms. Hansen and resource specialist program (RSP) teacher Wendie Huerta met with Parents on August 25, 2008, to formalize a 30-day interim placement offer. Even though Parents had wanted to meet with Student's full IEP team, since this meeting was only for the purposes of providing a 30-day interim offer, there was no requirement that the District convene a full IEP team before the end of the 30 days.

41. Ms. Hansen prepared an interim offer of placement for Student based upon the District's review of his IEP. The interim offer incorporated all aspects of Student's June 4 IEP from FUSD as to the following: placement of Student in a general education classroom with 30 minutes of RSP consultation per month, 30 minutes of speech and language consultation per month, the provision of a full time one-on-one aide, and implementation of the four goals and objectives. However, the District did not offer Student any specific assistive technology and did not offer Student any specialized reading services to address his reading deficits or to substitute for the 10 hours a week of reading intervention that Student was receiving from the Cullinan Center through his FUSD IEP. It was the District's position that it would be able to implement Student's goals solely through the sixth grade general education curriculum.

42. At the meeting, Parents attempted to discuss the reasons why Student was receiving the Cullinan services, the depth of Student's reading comprehension deficits and why they believed Student required intensive reading services. Ms. Hansen, speaking for the District, told Parents that the District believed that Student's reading and writing goals could be met through the provision of 30 minutes of consultation between Ms. Huerta, the RSP teacher, and Jennifer Puentes, the sixth grade teacher to whose class the District had assigned Student.

43. The information available to the District as of the August 25 meeting was admittedly sketchy; the only documentation regarding Student which the District had consisted of Student's June 4 FUSD IEP and the progress reports from Cullinan. The

District did not have Dr. Corbett's assessment or the Lindamood Bell assessments. However, from the June 4 IEP, as well as from input from Parents, the District knew that Student had a unique need in the area of reading comprehension that FUSD was addressing through an extremely intensive reading intervention course taught after school for 10 hours a week, and that the 30 minutes per month of RSP consultation provided by the June 4 FUSD IEP was to *supplement* the reading course. The June 4 IEP specifically indicated that Student was scoring below basic in English language arts on standardized tests, that he scored below proficient in writing content, and that he scored below basic on internal FUSD English language arts testing. While the June 4 IEP stated that Student had received a "C+" in reading and a "C" in written language, those grades should not have been read in isolation. Student received those passing grades in conjunction with having received many hours of reading intervention from the Cullinan Center, all of which information was part of Student's FUSD IEP. Even if the District was perplexed by why Student would have required the extent of reading intervention FUSD had provided, it was under sufficient notice that Student had a significant reading comprehension and writing deficit and that it was a unique need which the District was required to address in order for Student to benefit from his education.

44. The Cullinan Center report attached to the June 4 IEP informed the District that Student had entered the Cullinan program with a first grade writing level and that after 138 hours, he had progressed to a third grade writing level. Parents concurred with the Cullinan report. The District was required to evaluate Student's needs based upon the information it had at the time, not based upon whether it disagreed with a previous district's level of services. Therefore, although the District may not have agreed that Student required 10 hours a week of after school reading intervention, it was aware on August 25, 2008, that Student had recently been found to still be at a third grade reading level. It was inappropriate of the District to propose an interim educational

program that did not address in any way the unique need in reading comprehension and writing that was plain on the face of Student's FUSD IEP. While the District was neither required to implement the FUSD IEP nor required to offer a comparable program, it was required to recognize Student's unique needs and offer him some type of specialized educational instruction that would meet those needs. The District has not met its burden of proof that providing Student with 30 minutes of RSP consultation a month met Student's needs on August 25, 2008, based upon the information known to the District at the time.

#### Assistive Technology

45. However, the District has met its burden of proof that Student did not require specific access to a personal laptop computer, digital camera, notebook tablet, or Smartboard. There was nothing in Student's June 4 IEP to indicate why the technology was necessary in order for Student to access his curriculum, particularly given that he was a general education student who was able to speak, read and write without the assistance of any technology. Additionally, the District recognized that Student's June 4 IEP focused on accommodations in the classroom such as visual supports, and the District therefore placed Student in the sixth grade classroom taught by Jennifer Puentes.

46. Ms. Puentes has been a sixth grade teacher for almost nine years. She also has a Cross-Cultural Language and Academic Development (or "CLAD") credential. Based upon her highly structured teaching style and classroom, Ms. Puentes' classroom has been a preferred placement for students with disabilities who can be mainstreamed in a general education classroom. In past years, Ms. Puentes has had multiple special needs children in her classroom, including autistic children like Student. One of her autistic students had been non-verbal, using a picture card system to communicate. Her classroom structure includes maintaining a daily schedule on the wall, maintaining a

daily routine so that all her students know what to expect from hour to hour during the school day and from day to day during the week. Aside from special programs, Ms. Puentes maintains a consistent routine and schedule for the students, which is of particular benefit to autistic children such as Student who become anxious and upset when routines are modified. She uses other visual aides such as maps, student organizers, and a document camera when available.

47. Ms. Puentes also utilizes an explicit instruction model for teaching: responsibility is slowly moved from the teacher to the students over the course of the year as the students become more knowledgeable about class routines and expectations and can begin making their own decisions. For both mathematics and writing exercises, Ms. Puentes uses guided practice or examples; she models examples of what her expectations are from the students, using the whiteboard to lay out the model, or using an overhead projector. This allows the students to see examples of what they are expected to produce, not just hear verbal instructions which not all students understand. Ms. Puentes also re-teaches information if a student does not appear to be capturing it. To highlight information, Ms. Puentes uses a visual model called a "foldable" which is a piece of paper folded to contain information in different sections that is easily accessed by the student to learn the material and confirm if they know the information.

48. Ms. Puentes' classroom incorporated the vast majority of accommodations and supports developed for Student in his June 4 FUSD IEP. The District met its burden of proof that it could meet Student's unique needs without the use of the higher level of technology provided to Student by FUSD. Student in turn failed to demonstrate that he required the technology in order to benefit from his education.

49. Parents brought a Smartboard and notebook tablet to hearing and Student demonstrated how they work. He was very proficient with the technology. It

was obvious that the use of the technology would enhance any student's educational experience. However, there was no testimony and no documentary evidence that supported Student's contention that he requires the technology in order to access his education, or that the use of other visual reinforcements, such as what is used by Ms. Puentes in her classroom, does not adequately provide the support Student requires. Notably, Dr. Corbett's assessment, on which FUSD appears to have based much of its IEP offers subsequent to August 2006, neither identifies nor recommends specific assistive technology as being required in order to support Student's needs in the classrooms. At hearing, Dr. Corbett's testimony did not attempt to expand upon the recommendations she had made in the assessment. Rather, she testified that her recommendations were made based upon things that she believed Student already had access to or which had been recommended by school staff itself. She is not an assistive technology specialist and testified that her assessment did not purport to be an assistive technology assessment. Additionally, none of the technology ultimately provided by FUSD in Student's classrooms there was utilized by the Cullinan Center during its reading intervention classes provided to Student. There is no contention that Student was unable to access the Cullinan lessons without the aide of assistive technology.

50. Other than Parents, the only FUSD IEP team members who testified at hearing were Student's fifth grade teacher Ms. Carpio and FUSD regional instructional specialist Kathleen McNamara. Neither Ms. Carpio nor Ms. McNamara was able to offer a rationale for the use of the AT by Fresno or why the FUSD IEP teams determined that Student needed the technology; rather, they both confirmed the testimony of Parents that the technology enhanced Student's ability to access his education. The District, however, was not required to maximize or otherwise optimize Student's access to the curriculum.

## Speech and Language, ELD, and Social Skills Needs

51. There is an inference in Student's closing brief that the District failed to offer him a FAPE in the 30-day interim offer because the District did not provide any goals or services to address Student's speech and language needs, his English language development needs, or his social skills needs. However, the District fully incorporated all portions of Student's June 4 FUSD IEP with regard to those areas in the 30-day interim offer it made to Student. As will be more fully discussed below in the context of the September 24, 2008, and November 12, 2008 IEP meetings, there was no evidence presented that indicated that the District's offers did not meet Student's needs in each of those areas by adopting the provisions of the FUSD IEP and offering the same services. Additionally, Parents presented no evidence that the District should have been aware on August 25, 2008, at the 30-day interim meeting, that Student had needs in these three areas that the District was not meeting by adopting the FUSD IEP. There is no evidence that Student's parents ever informed the District that the FUSD IEP was not sufficient to address those needs or that they had additional information that would have put the District on notice that Student's needs in these three areas had changed in the two and a half months since FUSD had developed the June 4 IEP to the extent that he required additional goals or services.

### THE SEPTEMBER 24, 2008 IEP

#### The District's Efforts to Assess Student

52. Fresno USD did not provide Student's records to the District in any coherent fashion. The records apparently appeared in different batches and the District was unclear as to when it finally had the full panoply of Student's special education records and his cumulative education file. However, it was clear from the records received that FUSD had not assessed Student itself for many years. The District received

a copy of Dr. Corbett's August 2006 neuropsychological assessment, but it was two years old by the time Student enrolled in the District. There was no recent speech and language assessment, and no occupational therapy assessment, and no multidisciplinary assessment. And, although Student's FUSD IEP contained assistive technology accommodations, there was no indication that FUSD had administered an assistive technology assessment to Student.

53. The District first mailed an assessment plan to Parents on September 9, 2008. The District had assembled an assessment team and was prepared to assess Student prior to the 30-day interim IEP meeting. However, Parents did not consent to the plan prior to the IEP meeting the District convened on September 24, 2008. At the meeting, the District again presented Parents with a copy of the assessment plan. In response to Parents' concerns, the District added additional specific alternative means of assessments to the plan so that the assessors would specifically incorporate observations of Student, records review, and interviews into their assessment process. Parents still would not consent to the plan at the IEP meeting.

54. On September 26, 2008, Mother signed the assessment plan. However, she hand-wrote in the following conditions: that while she consented to all areas of assessment, the assistive technology assessment was to include assistive technology consultant Michelle Austin from the Fresno County Office of Education (FCOE) and that the assessment process had to include FCOE autism specialist Ananda Aspen. Under the assessment designation of social/emotional/adaptive behavior, Mother also hand-wrote that the assessment was to be "per individual parental notice of assessment." On October 3, 2008, Ms. Lenheim wrote to Parents asking them to consent to the assessment plan without conditions because the District had to be free to use its best judgment regarding which assessment instruments it would use and with regard to the

personnel it would designate to conduct the assessments. On October 14, 2008, Ms. Lenheim again wrote to Parents requesting that they sign the original assessment plan.

55. Although Parents maintain that they were not placing conditions on the District's assessments of Student, the hand-written statements Mother wrote on the assessment plan do not support that position. At best, the statements created confusion as to whether Parents were consenting fully to the District's proposed plan. On October 15, 2008, Parents wrote to Jeanne Hatfield, an area superintendent for the District, asking for a meeting with her. Parents stated that a review of Student's FUSD IEP records would show that FUSD had agreed to include the Fresno County Office of Education autism consultants at Student's FUSD IEP meetings. The implication of the letter is that the District here should do the same. There is no indication in Parents' letter to Ms. Hatfield that they were consenting to the District's assessment plan.

56. On October 23, 2008, Mother met with Ms. Hatfield and Ms. Lenheim. Mother's sister was also present. Ms. Lenheim told Mother that while she understood now that Mother was not insisting that the District include the FCOE consultants before the District could assess, the District required that Mother state that in writing so that her hand-written comments would be clarified. Mother agreed that she would write a letter stating that her consent to the plan was not conditioned on the District including the FCOE consultants as part of the assessment process. Mother agreed to deliver the letter by October 27, 2008. She did not. On October 29, 2008, Ms. Lenheim again wrote to Parents requesting that they give unconditioned consent to the assessment plan. Finally, on November 3, 2008, Parents' then legal counsel wrote to the District stating that Parents were giving unconditional consent to the District's assessment plan. Parents signed a copy of the assessment plan, without added conditions, on November 6, 2008.

57. Because of Parents' delay in giving written unconditioned consent to the District's assessment plan, the District was unable to assess Student prior to the

September 24, IEP team meeting or the November 12, 2008 addendum IEP team meeting.

#### Alleged Procedural Violations

58. On September 24, 2008, the District held a 30-day IEP meeting to review its interim offer and to determine Student's educational program for the remainder of the 2008-2009 school year. At the end of the IEP meeting, the District's offer mirrored the 30-day interim offer made to Parents on August 25, 2008: placement of Student in Ms. Puentes' general education sixth grade classroom, 1500 minutes a week of services of a one-on-one instructional aide, 30 minutes per month of consultation between Student's general education teacher and an RSP teacher, and 30 minutes per month of consultation between Ms. Puentes and the speech and language pathologist. Parents declined the offer.

#### Failure to Have Appropriate Personnel at the IEP Meeting

59. An IEP team must include an individual who can interpret the instructional implications of assessment results. Parents contend that because Student's June 4 IEP from FUSD contained assistive technology components, the District was required to have an assistive technology specialist attend the September 24, 2008 IEP meeting. The District has met its burden that it was not required to have such a specialist attend the meeting.

60. At the time of the meeting, the only assessments that had been administered to Student over a more than two-year period of time were the Lindamood Bell reading assessments and Dr. Corbett's neuropsychological assessment. FUSD had not administered an assistive technology assessment to Student and neither Dr. Corbett nor Lindamood Bell had included one as part of their assessment process. The District had attempted to get Parents' consent to an AT assessment, and it had intended to

complete an AT assessment before the September 24 meeting, but Parents delayed providing their consent and thus no AT assessment had been completed by the time of the IEP meeting. There was thus no assessment for an AT specialist to interpret. The only information before the IEP team on September 24 was the fact that FUSD, for reasons not explained on the face of their IEP, had provided Student with AT in the classroom. The fact another school district made a decision to provide an accommodation that is not explained by that district's IEP does not compel the new district to provide a specialist at an IEP meeting before the new district can complete an assessment of the Student in the disputed area of need. There was nothing at the September 24 meeting for an AT specialist to interpret. The District had no obligation to bring an AT specialist to Student's IEP meetings until it had an opportunity to complete its AT assessment in light of the fact that no other AT assessment was part of Student's records.

#### Fair Consideration of Parents' Views / Predetermination of IEP Offer

61. A school district must comply both procedurally and substantively with the IDEA. A school district may commit a procedural violation of the IDEA if it comes to an IEP meeting without an open mind and several options to offer for discussion with all team members, or refuses to consider the input of a student's parents or other relevant data his parents may have. Although an IEP is not required to include methodologies a district may use in the course of providing instruction to a child, a district is still required to suggest different potential placements, and to discuss and consider any suggestions and/or concerns a parent has concerning the child's placement. Participation by the parents must not be mere form over substance; participation in the IEP process must be meaningful. The test is whether the school district comes to the IEP meeting with an open mind and several options to discuss, and discusses and considers the parents' placement recommendations and concerns before the IEP team makes a final recommendation.

62. Parents maintain that the District merely gave lip service to their views and did not fairly engage them in the IEP process or consider their views. The District contends that they spent considerable time listening to Parents' views and concerns, and that it modified the IEP in accordance with some of the concerns Parents voiced. The most significant issue at the September 24 IEP was how the District was going to address Student's acknowledged reading comprehension and writing deficits. While the District was open to discussing the provision of a one-on-one instructional aide, which it agreed to continue to provide for the full extent of Student's school day after discussion with Parents, with regard to the majority of the IEP meeting held on September 24, the weight of the evidence supports Parents' claims that the District predetermined how it would address Student's reading comprehension and writing needs.

63. Parents spent considerable time at hearing, in their documentary evidence, and in their closing brief, focusing on the fact that the District IEP team members communicated concerning Student's progress in class and what the District might offer at the IEP meeting. District IEP team members special education director Kay Lenheim , program specialist Lisa Hansen, RSP teacher Wendie Huerta, school psychologist Brooke Bell, and SLP Melinda Adolph communicated through email concerning the progress Student was making in Ms. Puentes' class and what his current needs were. At some point, Ms. Lenheim and Ms. Hansen met to discuss Student's progress. However, the ALJ does not conclude that the mere fact that District staff met without Parents in attendance results in a finding of predetermination.

64. The issue however, is more complex than whether district staff engaged in preliminary discussions concerning a student's IEP before actually meeting with the student's parents. A district's internal discussions are supposed to be communicated to parents and the discussions are supposed to be continued with them at the formal IEP team meetings. By the time of the September 24 meeting, the District had knowledge

about Student's reading comprehension and writing needs from several sources. It had Dr. Corbett's assessment, it had the Lindamood Bell assessments, it had the FUSD IEPs and all the Cullinan reports and recommendations, it had Parents' input and concerns, and it had the results of Student's progress in Ms. Puentes class, where informal assessments showed that he was still at about a 4.3 grade level in language arts. In spite of this wealth of knowledge about Student's continued reading deficits, there is no indication in the notes of the September IEP, and there was absolutely no testimony at hearing from any District IEP team member, that the District discussed any placement options to address Student's reading and writing deficit other than continuing to provide him with only 30 minutes of RSP consult in his general education classroom. There was no discussion of whether a special day class might be needed to address Student's needs, no discuss of either pulling him out of class for RSP reading assistance or bringing that type of support into his classroom, no discussion of what type of reading and writing program might assist him, and no discussion or consideration of any other available options, be they from District reading specialists or from an outside provider.

65. There is evidence that Parents were permitted to ask questions and to present a lengthy presentation using a computer and a projector, to discuss what they felt Student's needs were and how they should be addressed. However, as Parents stated, there was no dialogue concerning what Parents had presented, none of their questions were answered, and there was no ensuing discussion about why or why not any placement option available on the continuum of placement options should or should not be considered to address Student's acknowledged need. As Parents indicated, other than stating what each knew about Student, the IEP team members did not engage in a dialogue about what the District could do to meet Student's needs. In spite of knowing that Student had been receiving 10 hours a week of after-school

reading assistance, and in spite of Parents' entreaties that something more than the general education curriculum was needed to assist Student to progress from a fourth grade level in reading comprehension to a sixth grade level, the District did not propose any other option than 30 minutes a month of RSP support, the model used by Student's former school district to *supplement* his specialized education program, rather than compose the entirety of his reading program.

66. District staff appeared sincere in their belief that they could serve Student's reading and comprehension needs. However, while they may ultimately decide on an offer that does not comport to the wishes of a student's parents, they are still required to engage in discussion over options. While Parents spoke in length at the IEP meeting about their concerns and what they believed Student needed, District team members did not question them or engage in dialogue with them; District members remained silent even after Parents' computer presentation. At hearing, upon questioning from the ALJ, the District team members who were asked indicated that they had not considered any other placement options for Student.

67. The District argues that Parents were only focused on persuading it to provide the Cullinan services and that it was under no obligation to accede to Parents' choice of provider or program. The District is correct that it was not under any obligation to offer Cullinan or any specific program sought by Parents. However, the District *was* under an obligation to come to the table with different options that it was prepared to discuss. Parents testified that they were prepared to discuss and consider other reading intervention options. There is no evidence that Parents would not have considered another reading intervention program had one been offered.

68. The issue of the IEP's goals and objectives is another example of how the District predetermined its offer. A review of the September 24 IEP indicates that it was basically a continuation of the 30-day interim placement, which, in its turn, had been

based upon the June 4 FUSD IEP. The District offered only three goals, and the three that it offered were almost identical to the FUSD goals. Parents pointed out that the FUSD IEP goals were only part of the goals developed for Student because the Cullinan Center had developed its own goals for him with regard to his reading program and FUSD had incorporated the Cullinan goals into Student's IEP. At the September 24 IEP, Parents attempted to have the Cullinan goals either incorporated fully by the District as goals, or have the District's expand its goals to include areas addressed in the Cullinan Goals. The District refused to make any modifications to the goals it had drafted. In other words, the District arrived at the IEP meeting with a draft IEP and offered basically the IEP it had drafted, without being open to modify or add to it based upon input from Parents.

69. The weight of the evidence therefore supports a finding that the District committed a procedural violation at the September 24, 2008 IEP meeting by failing to fairly consider Parents' views that Student needed a reading intervention program above and beyond 30 minutes a month of consultation between Student's regular education teacher and the RSP teacher, and by predetermining the amount and type of support it would offer Student. As discussed below, the ALJ finds that the District's offer of FAPE with regard to Student's reading comprehension and writing needs was insufficient. Therefore, the failure to fairly consider Parents' views and the fact that the District predetermined its offer of placement denied Student educational opportunity. Because Parents' views were not fairly considered and because there was no dialogue concerning placement or program options, the Districts' actions also substantially impeded Parents' right to participate in the decision-making process.

## Failure to Discuss and Consider Peer-Reviewed, Research-Based Methodologies

70. Parents generally contend that the District violated Student's right to a FAPE because it failed to specify what methodologies the District intended to use to address Student's reading comprehension and written expression deficits. The District, however, is correct in its assertion that it is not under an obligation to discuss methodologies at an IEP meeting and that there is no requirement that an IEP contain the specific methodology that the District was going to use in Student's instruction. The choice of methodologies lies with the school district. The District's failure here to specify a particular methodology therefore did not deny Parents an opportunity to participate in the IEP process and did not deny Student a FAPE.

### THE SEPTEMBER 24, 2008 IEP: ALLEGED SUBSTANTIVE VIOLATIONS

#### Goals and Objectives

71. An annual IEP must contain a statement of measurable annual goals designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general curriculum. It must also contain a statement of the student's present levels of academic achievement and functional performance (present levels of performance, or PLOPs) in order to establish a baseline for measuring the child's progress throughout the year. Knowledge of a student's progress from his PLOPs in one year toward his annual goals is essential for drafting appropriate goals for the next year. Unless a student's progress toward meaningful annual goals is accurately measured, new PLOPs cannot accurately be derived and new goals cannot adequately be written. The District contends that its PLOPs and goals and objectives were legally adequate. Parents appear to contend that the goals offered Student in the September 24 IEP did not contain adequate PLOPs, and that the goals offered were insufficient to meet Student's needs.

72. Since the District did not have the benefit of formal assessments for Student, it developed Student's PLOPs based upon information from RSP teacher Wendie Huerta, Student's classroom teacher Ms. Puentes, and SLP Melinda Adolph, through classroom observation, collaboration with teachers, benchmark tests, and work samples.

73. Melinda Adolph has been a speech language pathologist for the District for almost 30 years. She has a bachelor's degree in communicative disorders and a master's degree in speech pathology. She has been licensed as a speech pathologist in California since soon after obtaining her master's degree. She also has two teaching credentials: one to teach grades K-12 and another in special education whereby she is credentialed to teach communicatively handicapped children. She has been part of the IEP process for hundreds of children, including being instrumental in the development of PLOPs and goals and objectives.

74. In preparation for the IEP meeting on September 24, 2008, Ms. Adolph reviewed Student's records from FUSD, including Dr. Corbett's assessment. She also conducted a classroom observation of Student; and spoke with his teacher Ms. Puentes and RSP teacher Ms. Huerta, as well as with Student's instructional aide. Ms. Adolph corroborated the opinion of every District witness who testified at hearing that the June 4 FUSD IEP did not contain appropriate baselines. Therefore, District staff had to "fill in the blanks" based upon their own knowledge of Student over the short month he had attended a District school.

75. Based upon all the information to which Ms. Adolph had access regarding Student, she determined that he still had deficits in the areas of social pragmatics, including class participation. Ms. Adolph noted that Student made inconsistent eye contact, changed topics frequently, but that in her observations of Student and discussions with his instructors, Student was adjusting well to his new school. He

appeared to be motivated to participate in class, was enthusiastic, and appeared to connect with his peers. Ms. Adolph developed the goal in class participation and social/pragmatic language to address Student's needs as she was aware of them at the time. Since Student had a one-on-one instructional aide to prompt him in class and to assist during class breaks, Ms. Adolph believed 30 minutes a month of consultation between herself and Student's instructors would address his needs.

76. Parents appear generally to contend that the goal developed by Ms. Adolph was not adequate. However, they offer no specifics as to what else should have been included in the goal and what information that the District had that should have alerted it that the goal was inadequate. The goal was very similar to the goals from the FUSD IEP. It established a baseline for Student, was measurable, and was designed to meet Student's unique needs.

77. Similarly, the two goals developed by the District with regard to Student's needs in reading and written language, were developed based upon the information known to the District at the time it developed the goals. Parents generally criticize the goals as not being specific enough. They proposed incorporating the 53-odd curricular components from the Cullinan Center's goals and objectives as specific goals for Student in the District's September 24 IEP. However, as the District witnesses all pointed out, most of what Cullinan defined as goals were actually just curricular components of a writing program and were the parts of writing that a child needed to focus on in order to become competent in writing. For example, Cullinan stated that Student would master limiting adjectives and linking verbs. District witnesses persuasively stated that working with verbs, adjectives, nouns, etc. are part of any writing curriculum and are incorporated into Student's goal of being able to create multiple paragraph compositions. None of Parents' criticism established how the District's two goals failed to meet legal requirements. While the District could have been more specific in its goals,

barring a showing that Student did not know what nouns, verbs, adjectives, etc. were, it was unnecessary for the District to create goals specifically directed toward Student's addressing each part of speech or each part of his writing curriculum.

78. The District has met its burden of persuasion that the PLOPS and goals and objectives in the September 24 IEP were legally adequate.<sup>6</sup>

#### Student's Need for Intensive Reading Intervention

79. As of September 24, Student had only been in attendance in the District for a month. As of the time of this IEP meeting, the District had received many more of Student's records from FUSD and his District IEP team members had had the opportunity to review Dr. Corbett's assessment; the Lindamood Bell assessments; the Cullinan Center testing results, progress reports, and goals; and the FUSD IEPs. Additionally, the District had Student's state testing scores in English Language Arts, which placed Student at the 4.3 grade level, approximately two years behind his present grade level. Internal testing by the District using its language arts formative test (LAFT) indicated that Student was struggling with reading comprehension. His writing strategies score was at 24 percent and his literary response and analysis was at 27 percent. In their internal emails prior to the IEP meeting, District staff noted that Student could not identify writing errors independently; rather, he required constant prompting to check his writing. They noted that when Student lost focus, he would repeat his sentences in his writing, something which occurred three to four times every writing

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<sup>6</sup> Since the 2004 amendments to the IDEA, the requirement to develop short-term objectives or benchmarks only concerns children with disabilities who are assessed using alternate assessments aligned to alternate achievement standards. (See, 20 U.S.C. § 1414 (d)(1)(A)(i)(I)(cc).) With other students, states and their districts have the option to continue to use objectives, but are not required to do so.

session, even with the assistance of an instructional aide. The September 24 IEP notes that writing was extremely difficult for Student. Student had completed only one major writing assignment independently at the time of the IEP meeting: a description of his summer vacation. However, Student's sample lacked paragraph formatting, lacked subject-verb agreement, and lacked appropriate punctuation. The only other writing assignment Student had done was one the entire class produced jointly using an overhead projector.

80. The District focuses on the fact that Student was maintaining a "C" average in reading. However, its argument is unpersuasive for several reasons. First, at the time of the September 24 IEP meeting, Student had still not received any report card grades. Second, as noted below with regard to the November 12 IEP meeting, there are no samples of Student's class work to support the "C" grade. The District produced no graded assignments, tests, or writing samples that would indicate Student was earning a "C" grade. Finally, Student's grade is a composite of his ability to decode reading, which was very high, and his ability to comprehend what he was reading, which was very low. The C is thus an average grade and obscures the fact that Student just was not able to comprehend what he read.

81. The District presented no evidence that demonstrated that Student had made progress toward raising his reading comprehension abilities. As of the IEP meeting, there is no evidence that Student had increased from his level from the 4.3 grade level noted in his state testing scores. Parents presented evidence that the California Department of Education requires that a school district provide intensive reading intervention for any student who is two or more years behind grade level, as was Student in this case. Certainly, if a district is required to address the needs of a general education student who is so far behind grade level, it ipso facto must be required to provide at least the same sort of intervention to a student who has special

education eligibility and has demonstrated needs in the area of reading comprehension and writing.

82. The District presented considerable evidence that Parents had stymied the assessment process by failing to consent unconditionally to the District's assessment plan, thus preventing the District from having a clear picture of Student's needs. The District appears to argue that it therefore was not under an obligation to provide Student with individual specialized instruction beyond the consultative model it proposed because it had been prevented from obtaining updated information on Student. This argument is unpersuasive for several reasons. First, as of the date of the September 24 IEP meeting, Parents had just received the assessment plan. Therefore, although the District had hoped to finish assessing Student in time for the meeting, it is highly doubtful that assessments could have been finished in time. Nor did the District demonstrate at hearing that the assessments would have changed the knowledge of Student that the District did have from other sources at the time of the IEP.

83. Moreover, the District is bound by the "snapshot in time" concept that an IEP is evaluated in light of the information that it *did* have at the time. Ms. Puentes, Student's teacher, acknowledged at the IEP meeting that Student was demonstrating significant difficulties in his writing, especially in figurative language, and that Student struggled to complete a writing prompt story, and that comprehension continued to be an area of weakness. Ms. Puentes was a very convincing and sincere witness. It is obvious that she puts considerable effort into teaching and into creating a dynamic atmosphere of learning in her classroom. However, she has 37 students. There was no convincing evidence that she has the time to spend to give Student the intensive instruction he needs if he is going to be able to reach grade level in reading comprehension. Given that there is no evidence that Student is not capable of eventually reaching grade level – and all indications are that the District expects Student

to be able to graduate with a high school diploma, which means he will have to be on or near grade level in basic reading comprehension and writing – the District was required to offer Student some type of individualized instruction to address his reading comprehension and writing deficits. Based upon the information known to the District as of the IEP meeting, the District should have been aware that Student required some sort of reading intervention instruction beyond what he was provided in the core sixth grade curriculum. The District failed to show by a preponderance of the evidence that the 30 minutes a month of RSP consultation offered at the IEP meeting, which provides no direct instruction to Student, would meet his needs. The District’s offer of 30 minutes of RSP consultation therefore failed to offer Student a FAPE.<sup>7</sup>

#### Speech and Language Services

84. Parents generally appear to contend that the District should have offered direct speech and language services to Student. As stated above, SLP Melinda Adolph reviewed Student’s records, interviewed his instructors, and observed Student in class before making her recommendation that the 30-minute a month consultation model developed under Student’s June 4 FUSD IEP was still appropriate for Student as of the time of the September 24 IEP meeting with the District. The only evidence that Parents offer to contradict Ms. Adolph’s recommendation is that Student was recently diagnosed by his orthodontist with a condition called “tongue thrust.” SLP Adolph and SLP Theresa Pafford both explained that tongue thrust is a medical term referring to the

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<sup>7</sup> Nothing in this Decision is intended to state that Student requires 10 hours a week of after school reading intervention as provided in his June 4 FUSD IEP. There are many other options available to address Student’s reading comprehension needs, such as push-in or pull-out RSP services, that Student’s IEP team can discuss in determining what would be appropriate to address Student’s deficits.

tongue being pushed forward, often against the teeth, which may impede swallowing or may cause a lisp. Ms. Pafford and Ms. Adolph stated that it is a myofunctional or muscular issue that is considered a medical rather than educational problem. They both noted that Student's communication and speaking abilities were not affected by his tongue thrust, but that, even if they were, it was a medical issue that would not be addressed in school but rather by a student's dentist or orthodontist. Parents did not present any evidence in support of their assertion that the District was obligated to have addressed Student's tongue thrust issue or that Student required direct speech and language services.

#### Assistive Technology, Accommodations, Modifications, and Supports

85. Student contends that he requires the assistive technology provided to him under his June 4 FUSD IEP in order to gain meaningful benefit from his education. A school district is required to consider whether a child needs assistive technology devices and/or services in order to receive a FAPE. In this case, the District has met its burden of showing that its decision to provide Student only with supports and other accommodations in lieu of specific AT did not violate Student's rights.

86. Both speech and language pathologists who observed Student, Melinda Adolph and Theresa Pafford, found that Student was accessing the curriculum in his classroom without the use of any AT devices. As stated above, Student's June 4 FUSD IEP does not give any explanation to support the provision of the advanced technology FUSD decided to provide to Student and none of Student's witnesses at hearing were able to elucidate the matter. While Parents frequently referenced the technology in their testimony, and Student demonstrated the technology at hearing, the evidence Student presented did not address why he would not be able to progress in his curriculum without it.

87. The September 24 IEP proposed extensive accommodations, modifications, and supports to be implemented in all of Student's classrooms. Those accommodations, modifications, and supports include: visual enhancements through pictures and graphic organizers, the use of color coding for multi-step procedures, frequent checks to ensure Student's understanding of concepts, repetition of instructions, reduction in the amount of words for directions, additional time for written and verbal responses, preferential seating, chunking or breaking up into smaller parts of assignments, extra time allotted on tests and assignments, use of a keyboarding device or computer, summarization of topics, and the support of visualization of directions and instructions. Additionally, as stated above, Ms. Puentes' classroom was constructed in such a way that visualization of schedules and assignments was integrated into her normal classroom teaching model.

88. There appears to be no dispute that these accommodations, modifications, and supports were appropriate for Student. Testimony from witnesses including Ms. Pafford, Ms. Adolph, Ms. Puentes, and assistive technology specialist Amanda Fisher, established that several of these accommodations, modifications, and supports allowed Student to benefit from his education in various ways, such as by allowing him to visualize assignments. Certainly, the advanced technology FUSD provided to Student helped to maximize Student's potential, but the District here was not required to do so. While additional AT may have been beneficial, there was no persuasive evidence that Student needed any additional AT that he was not already receiving. The District has therefore met its burden that its decision not to incorporate the AT provided by FUSD did not deny Student a FAPE.

#### Failure to include ELD goals and a Specific ELD program

89. Student alleges that the District denied him a FAPE because it did not review his status as an English language learner at the IEP meeting, did not develop ELD

goals, and did not take into account Student's ELL status in formulating his IEP. The evidence however does not support Student's contentions.

90. Mother's first language was Spanish; Father's first language was English. Both Parents are bilingual in English and Spanish. For Student's first three years of life, his Mother spoke to him in Spanish and his Father spoke to him in English. However, after Student was diagnosed with autism at age three, Parents decided to concentrate on speaking to him in English since they surmised that services for autistic children in the area in which they resided would not likely be available in Spanish. Although English became the predominant language of the home, at least with regard to Student, Student was designated as an English language learner under California law for purposes of his education when he began school at FUSD. Parents enrolled Student in what is known as a dual-immersion program when he began attending kindergarten at FUSD. A dual immersion classroom is taught in two languages; in Student's case, the class was taught in English and Spanish, with half the curriculum taught in one language and the other half of the curriculum taught in the other language. The purpose of a dual immersion program is to develop full oral, reading, and written fluency in both languages. Student was enrolled in dual immersion classes the entire time he was enrolled at FUSD. All were general education classrooms. It is unclear from the record whether the District has dual immersion classrooms. In any case, Parents did not seek to enroll Student in a dual immersion class at the District when Student transferred there.

91. As stated above, Father filled out a District home language survey on August 19, 2008, when he enrolled Student in the District. In it, he indicates that Student learned English when he first learned to speak, that Student most frequently used English at home, that he most frequently spoke English to Student, and that English was the language most often spoken by the adults at home. The home language survey was specifically for the purpose of alerting the District that a student might be an English

language learner and therefore, under state law, entitled to additional English instruction. Since Father indicated that English was the language Student spoke and the language primarily spoken in Student's home, there was no reason for the District to believe that it needed to assess Student's English language needs.

92. However, the District realized when it reviewed Student's June 4 FUSD IEP that it identified Student as an English language learner, although there was no specific reference in that IEP to ELD goals or to a specific ELD program. Therefore, at the September 24 IEP meeting, the District IEP members sought to clarify the issue. Student's parents informed the District that Student was, in fact, an ELL. The District noted that on the IEP and, in the IEP notes, stated that Student's ELL status needed to be evaluated. The District subsequently administered the California English Language Development Test (CELDT) to Student and began providing him with additional English language learner instruction. Given that the June 4 FUSD IEP did not contain any goals for ELD or contain any reference to specific ELL instruction for Student, and the fact that there is no evidence that Parents contended at the IEP meeting that Student required goals in that area or ELL instruction, the District had no reason to believe that it should proceed in any other manner: it referred Student for a CELDT assessment to determine his needs. In any case, ELL standards are state-mandated and, once Student was assessed and determined to still be eligible for ELD services, they were provided pursuant to the state mandate, irrespective of whether he had an IEP.

93. Additionally, the weight of the evidence at hearing supports the District's position that Student substantively did not require ELL services in order to receive a FAPE. Student's primary written and spoken language was English. He scored lower on state testing in Spanish than he did in English. Although he had been in a dual-immersion class in fifth grade at FUSD, Ms. Carpio, his fifth grade teacher, testified that

Student's weaker language was Spanish. For that reason, she had directed him to read more in Spanish so that his reading and writing skills in Spanish would improve.

94. The weight of the evidence therefore supports a finding that once Parents clarified Student's eligibility for ELD services, the District immediately moved to assess Student and provide the state-mandated instruction. The District appropriately addressed Student's English language needs throughout the time period covered by this decision.

#### The November 12, 2008 Addendum IEP

95. As stated above, the District continued its efforts after the September 24 IEP meeting to obtain unconditional written consent from Parents to assess Student. When Parents requested a meeting between Mother and area superintendent Jeanne Hatfield, the District interpreted that request as one for another IEP meeting. Since Parents did not write to state that they were *not* requesting an IEP meeting, the District convened a meeting on November 12, 2008, within 30 days of Parents' request, as mandated by statute.

96. For the reasons stated in Factual Findings 62 and 63, the District was not required to have an assistive technology specialist at this meeting. Parents did not sign unconditional consent to permit the District to assess Student until November 6, 2008, less than a week before the meeting. No AT assessment had yet been administered to Student and there was no prior AT assessment in his file to review. All statutorily mandated IEP team members attended this meeting.

97. The District made no change in its offer of education program and services to Student as a result of this meeting. The IEP notes stated that Student continued to have difficulty with reading comprehension. The IEP noted that Student's overall average grade level in reading comprehension was still 4.3. Student still required significant assistance from his teacher and instructional aide in order to comprehend his grade

level textbooks for science and social studies. Additionally, Student continued to experience the same difficulties noted six weeks earlier in organizing his thoughts and transferring his thoughts to paper. For the reasons detailed in Factual Findings 37 through 44 and 71 through 83, the District has failed to meet its burden of proof that its continued offer of only 30 minutes of RSP consultation failed to offer Student a FAPE because it did not provide Student with educational benefit with regard to addressing his reading comprehension and written language deficits.

## APPLICABLE LAW

### BURDEN OF PROOF

1. As the petitioning party, the District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

### ELEMENTS OF A FREE APPROPRIATE EDUCATION (FAPE)

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)<sup>8</sup> A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The fact that a student excels academically does not mean he does not require special education. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500-1501.)

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<sup>8</sup> All statutory citations to the Education Code are to California law, unless otherwise noted.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Rowley, Id.* at p. 201.) The Ninth Circuit refers to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (hereafter *Adams*)). Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or "at least meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

## THE IEP

4. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is

to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

5. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § (d)(1)(A)(ii); Ed. Code § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.347(a)(2)(i)(ii); 34 C.F.R. part 300, Appendix A, Q.1 (2006); Cal. Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

6. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with educational benefit, and must comport with the student's IEP. (20 U. S.C. § 1401(9).)

7. The Ninth Circuit has endorsed the "snapshot rule," explaining that "[a]n IEP is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable... at the time the

IEP was drafted." (*Adams, supra*, 195 F.3d 1141, 1149, quoting *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1041 (3d Cir. 1993); *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative preferred by the Parents. (*Gregory K. v. Longview School Dist.* (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.*) Moreover, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.)

8. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3) (2006); Ed. Code, § 56345, subds. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school

personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii) (2006); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

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

#### RELATED SERVICES

10. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 *Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.) [104 S.Ct. 3371; 82 L.Ed.2d. 664].) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

#### PROCEDURAL VIOLATIONS

11. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in

the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

#### RIGHTS OF TRANSFERRING STUDENT

12. 20 U.S.C., section 1414, subdivision (d)(2)(C)(i)(I), provides: "In the case of a child with a disability who transfers school districts *within the same academic year*, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law." (Emphasis added.) Education Code section 56325, subdivision (a)(1) sets forth similar procedures for the transfer of a special education student with an IEP from one California district to another in a different SELPA. During the first 30 days the transferring student is in the transferee district, that district must provide the student a FAPE, including services "comparable" to those described in his previously approved IEP. Within those 30 days, the transferee district must adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with federal and state law. However, that obligation only applies in the case of a special education student with an IEP who "transfers into a district ... *within the same academic year*" that he was in the previous district. (Ed. Code, § 56325, subd. (a)(1); see, 20 U.S.C. § 1414(d)(2)(C)(i)(I). (Emphasis added).) There are no federal or state statutory provisions

addressing the situation where a student transfers *between* school years, such as during summer vacation. OAH case law has interpreted these sections to require that the new school district is only required to provide a FAPE to the transferring student. The new district is not required to implement the former district's IEP or give the student "comparable" services. (*Acalanes Union High School Dist.* (OAH 2008) OAH No. 2007100455, 51 IDELR 232, 108 LRP 55665.)

13. The language of the Federal Regulations, 34 C.F.R., part 300.323(e) (2006), mirrors the requirements as section 1414, subdivision (d)(2)(C)(i)(I), and applies to transfer students "who had an IEP that was in effect in a previous public agency in the same State" and who transfer to a new school district in the same state "within the same school year." In the official comments to the 2006 Federal Regulations, the United States Department of Education addressed whether it needed to clarify the Regulations regarding the responsibilities of a new school district for a child with a disability who transferred during summer. The Department of Education stated that the IDEA, (20 U.S.C. § 1415(d)(2)(a)), is clear that each school district must have an IEP in place for a child at the beginning of the school year. Therefore, the new district's responsibility is just to ensure that it develops an IEP for the child, not that it fully implements the prior district's IEP. The Department of Education explained that the new district had the option of adopting and implementing the previous IEP, or developing, adopting, and implementing a new IEP that met all legal requirements for an IEP. (71 Fed.Reg. 46682 (August 14, 2006).)

#### MEANINGFUL PARTICIPATION BY PARENTS/ PREDETERMINATION OF IEP OFFER

14. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*Target Range, supra*, 960 F.2d at p. 1485.) Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v.*

*Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1079 (hereafter *Shapiro*) citing *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Parents play a “significant role” in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904]; 20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her 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, supra*, 993 F.2d at p. 1036.)

15. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (34 C.F.R. § 300.501(a), (c); Ed. Code, §§ 56304, 56342.5.) School officials and staff can meet to review and discuss a child’s evaluation and programming in advance of an IEP meeting; that does not constitute predetermination of the IEP. (*A.E. v. Westport Bd. of Educ.* (D. Conn. 2006) 463 F.Supp.2d 208, 216-217.) Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the school board comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made. (*Doyle v. Arlington County School Board* (E.D. Va 1992) 806 F.Supp. 1253, 1262; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) Where a school district predetermined the child’s program and did not consider the parents’ requests with an

open mind, the school district denied the parents their right to participate in the IEP process. (*Ibid.*)

#### INSTRUCTIONAL METHODOLOGY

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

#### MANDATORY MEMBERS OF THE IEP TEAM

17. An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher of the pupil, (4) a representative of the local education agency (LEA), (5) an individual who can interpret the instructional implications of the assessment results, (6) at the discretion of the parents or LEA, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate, and (7) the individual with exceptional needs. (Ed. Code, § 56341, subd. (b)(1-7).) Participants on the IEP team are expected to be knowledgeable as

to the student's disability and educational history. (*Shapiro, supra*, 317 F.3d at pp. 1076, 1078.)

## DETERMINATION OF ISSUES

ISSUE ONE: DID THE DISTRICT'S INTERIM PLACEMENT OFFER OF AUGUST 25, 2008, OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE), EVEN IF IT DID NOT PROVIDE A PROGRAM COMPARABLE TO STUDENT'S JUNE 4, 2008 INDIVIDUALIZED EDUCATION PROGRAM (IEP) FROM FRESNO?

Was the District required to implement the June 4 FUSD IEP or offer a comparable placement?

18. Based upon Factual Findings 36, and Legal Conclusions 12 and 13, because Student transferred to a new school district in a different SELPA between school years, the District was not required under either state or federal statute to implement the June 4 FUSD IEP or to offer services comparable to what FUSD had provided. The District was only obligated to have an interim IEP in effect for Student when its new school year began that offered Student a FAPE, and to convene a full IEP meeting within 30 days of the start of the school year to develop a new IEP for Student.

Did the District's 30-day interim IEP substantively offer Student a FAPE?

19. Based upon Factual Findings 22, 24, 25, and 39 through 44, as well as Legal Conclusions 1 through 8, the District failed to prove by a preponderance of the evidence that its 30-day interim offer of 30 minutes of RSP consultation services addressed Student's need for intensive reading instruction to address his reading comprehension and written language deficits. However, based upon Factual Findings 29, 38, and 45 through 50, and Legal Conclusions 1-8, 10, and 17, the District has proven by a preponderance of the evidence that its failure to provide Student with specific assistive technology, such as a Smartboard, a digital camera, and a notebook computer, did not deprive Student of a FAPE. Additionally, the weight of the evidence supports a finding

that except for the offer of 30 minutes of RSP consultation to address Student's reading comprehension and written language deficits, the remainder of the District's 30-day interim IEP offer provided a FAPE to Student.

**ISSUE TWO: DID THE DISTRICT'S IEP OFFER OF SEPTEMBER 24, 2008, PROVIDE STUDENT A FAPE FOR THE 2008-2009 SCHOOL YEAR?**

Was the District required to have an assistive technology specialist present at this IEP meeting?

20. Legal conclusion 17 outlines the mandated members of a Student's IEP team. As stated therein, one of the mandated members is an individual who can interpret the instructional implications of a Student's assessment results. As demonstrated in Factual Findings 59 and 60, Student's educational file did not include a specific assistive technology assessment and Dr. Corbett's neuropsychological assessment did not purport to include an assistive technology section or specific assistive technology recommendations. Therefore, the District was not obligated to include an assistive technology specialist at this IEP meeting as there was no assistive technology assessment to interpret.

Did the District fairly consider Parents' view and/or predetermine its IEP offer?

21. Based upon Factual Findings 61 through 69 and Legal Conclusions 14 and 15, the weight of the evidence supports a finding that the District did not fairly consider Parents' views concerning Student's need for an intensive reading intervention program and that the District predetermined its offer of 30 minutes of RSP consultation as the method of addressing Student's reading comprehension and written language deficits.

Was the District required to discuss specific methodologies or to include specific methodologies in the IEP document?

22. As stated in Factual Findings 70 and Legal Conclusions 16, the District was not under any legal obligations to discuss specific instructional methodologies at the IEP meeting or to include the instructional methodologies used in Ms. Puentes' sixth grade classroom in the IEP document itself.

Did the September 24, 2008 IEP include appropriate present levels of performance and goals?

23. Legal Conclusions 1 through 9 lay out the requirements for a legally-adequate IEP. As demonstrated by Factual Findings 71 through 78, the weight of the evidence supports a finding that the present levels of performance and goals and objectives developed by the District met all appropriate legal standards.

Did the District's offer of 30 minutes a month of RSP consultation provide Student with a FAPE as it related to his reading comprehension and written language deficits?

24. As stated in Factual Findings 79 through 83, and based upon Legal Conclusions 1 through 9, the District has failed to prove by a preponderance of the evidence that its offer of 30 minutes of RSP consultation provided educational benefit to Student. Based upon the information that the District had at the time of the IEP meeting, including the panoply of assessments administered to Student by Dr. Corbett, the Cullinan Center, and Lindamood Bell, as well as the results of Student's California standardized tests, the internal District LAFT tests, and Student's difficulties in the classroom, the District was under notice that an offer of 30 minutes of RSP consultation without any specialized individual instruction, would not provide educational benefit to Student.

Was the District required to provide direct speech and language services to Student?

25. Based upon Factual Findings 84 and Legal Conclusions 10, the weight of the evidence demonstrates that the District had no reason to believe that Student required direct speech and language services in order to receive a FAPE. Specifically, although Student has a tongue thrust problem, it is a medical issue and not an educational issue. The District therefore was not under any obligation to address or otherwise cure Student's tongue thrust problem through District-provided speech and language therapy.

Was the District required to provide AT to Student?

26. Based upon Factual Findings 85 through 88 and Legal Conclusions 1 through 9, the District has proven by a preponderance of the evidence that Student did not require any specific AT in order to derive benefit from his education. The District has met its burden of proof that the accommodations and modifications provided to Student in the District's IEP offer were legally sufficient in order to assist Student in accessing his education.

Did the District fail to address Student's needs as an English language learner?

27. As stated in Factual Findings 89 through 94 and based upon Legal Conclusions 1 through 9, the District adequately addressed Student's needs as an English language learner once Parents clarified Student's eligibility. Any delay or confusion was due to Parents' conflicting information regarding whether Student had ELD needs or qualified as an ELL. Once the District became aware of Student's eligibility, it referred Student for the CELDT testing and began providing him with the statutorily mandated ELD instruction.

ISSUE THREE: DID THE DISTRICT'S IEP OFFER AT THE NOVEMBER 12, 2008 ADDENDUM IEP MEETING PROVIDE STUDENT A FAPE FOR THE 2008-2009 SCHOOL YEAR?

28. Based upon Factual Findings 95 through 97 and Legal Conclusions 1 through 9, the District's IEP offer at the November 12, 2008 Addendum IEP meeting suffers from the same deficiencies as did its September 24, 2008 IEP offer. The 30 minutes per month of RSP consultation services was not reasonably calculated to provide Student with educational benefit. The offer therefore did not provide a FAPE to Student.

ORDER

The District's request for relief is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed in substantial part on the issues heard in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: June 24, 2009

\_\_\_\_\_/s/\_\_\_\_\_  
DARRELL LEPKOWSKY  
Administrative Law Judge  
Office of Administrative Hearings