

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

BONSALL UNION SCHOOL DISTRICT.

OAH CASE NO. 2008120150

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on February 2 through 5, 2009, and February 18, 2009, in Bonsall, California.

Student was represented by Mara C. Allard, Attorney at Law, of the Law Office of Mara C. Allard. Student's father (Father), and Student's mother (Mother), (sometimes referred to herein as Parents), were present on all hearing days.

Bonsall Union School District (District) was represented by Lauri LaFoe, Attorney at Law, of Sansom Willis LaFoe, LLP. Cathy Myhers, Director of Pupil Services, Bonsall Union School District, was present on all hearing days.

Student's Due Process Hearing Request (Complaint) was filed with OAH on December 3, 2008. Pursuant to stipulation of the parties, Student filed his amended Complaint (Amended Complaint), on January 23, 2009. On February 3, 2009, the parties agreed, in writing, to waive the resolution session.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties requested the opportunity to file written closing

briefs by no later than 5:00 p.m. on February 20, 2009. The parties timely filed their written closing briefs on February 20, 2009, at which time the record was closed and the matter was submitted.¹

ISSUES

Whether the District denied Student a free appropriate public education (FAPE) as a result of the Individualized Education Program (IEP) meetings held on November 3, 2008, November 17, 2008, and November 18, 2008, by reason of the following:

- (a) Discontinuing an ongoing discussion of goals and objectives at the November 18, 2008, IEP meeting, thereby halting discussion of five parent-drafted goals and objectives pertaining to written expression and literary analysis;
- (b) Failing to consider Parents' request for a math reasoning goal, and failing to develop such a goal;
- (c) Failing to modify a social skills goal, labeled # 7, at the November 18, 2008, IEP meeting, to provide for Student to maintain independent peer interaction in a classroom/ small group setting for three minutes;
- (d) Failing to have Student's general education teachers present at the November 18, 2008, IEP meeting, when parent-drafted goals for reading and literary analysis, social skills goal labeled # 7, and placement were discussed;
- (e) Failing to include benchmarks in the IEP with respect to the annual goals;
- (f) Predetermining placement;
- (g) Presenting a vague and ambiguous placement offer of "general education and resource programs" and possible "special day classes" in the IEP; and

¹ Student's closing brief contains several references to exhibits that were not marked or admitted at hearing. Those exhibits have not been considered.

- (h) Offering an inappropriate placement and a placement that is not in the least restrictive environment (LRE).

REMEDIES REQUESTED

Student's requested remedies include (1) Payment of tuition and fees incurred by Student at The Winston School (Winston); (2) Payment for fees incurred by Student for Lindamood-Bell services; (3) Payment of transportation costs associated with these placements and services; and (4) Development of appropriate IEP goals and benchmarks, with input from Student's general education teachers.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. At the time of hearing, Student was a 13 year-old boy who was in seventh grade at Winston. Winston is a California certified nonpublic school, located in Del Mar, approximately an hour away from Student's residence. At all relevant times, Student has resided in the District. His local school is Sullivan Middle School (Sullivan), which he attended during the first part of the 2008-2009 school year. Student is eligible for special education and related services under a primary eligibility of autism with a secondary eligibility of specific learning disability (SLD).

2. Student was diagnosed with Asperger's Syndrome (Asperger's) at a high-functioning level, in approximately April 2003, when he was 8 years old and in second grade. The family was living in the Chicago area at that time and Student had been receiving special education services, including speech and language services, from his school district in the Chicago area since pre-school. While the family was living in the Chicago area, Student was also diagnosed with an anxiety disorder, for which he was medicated on Prozac.

3. In May 2004, when Student was in third grade, Parents enrolled Student in a

12-week intensive Lindamood-Bell program in Oak Park, Illinois, because he was regressing academically. The purpose of the program was to improve Student's language comprehension skills, critical thinking and problem solving skills, and ability to follow directions. A comparison of results of assessments administered by Lindamood-Bell from that period demonstrated improvement in some, but not all, skills between the time he enrolled in the Lindamood-Bell program and 12 weeks later, when he left the program. Later in 2004, the family moved into the District from the Chicago area. Student repeated third grade in the District when he was 9 years old, during the 2004-2005 school year. District did not then assess him for special education services and he received no special education services at that time. Starting in January 2005, Student began to see Dr. Patel, a psychiatrist, every two to three months to manage medications for major depression and Asperger's. Student's behaviors deteriorated toward the end of the 2004-2005 school year, so Parents placed him at Old Mission Montessori school (Old Mission), a private school in Oceanside, California. Parents thought that Old Mission would be appropriate, as it was a small school, with a good reputation for academics. Student attended Old Mission for fourth, fifth, and sixth grades. He received no special education services while at Old Mission. During the 2007-2008 school year, when Student was in sixth grade, Student was intensively bullied by his fellow students.

4. Parents removed Student from Old Mission prior to the end of the 2007-2008 school year, due to the bullying. The bullying had negatively affected Student's academic performance and his emotional state. Parents felt that Student was so fragile at this time that they did not engage him in the summer home studies program that they customarily engaged in with their children during the summer. Parents attempted to enroll Student in a charter school for the 2007-2008 school year, but were unsuccessful, as charter schools would not admit him without a more current IEP than the ones that were implemented when he lived in the Chicago area. Therefore, Parents home-schooled

Student during the beginning portion of the 2007-2008 school year, and planned to continue the home-schooling until the District could formulate an IEP. After a short period of home-schooling, Student's relationship with his Parents deteriorated, and he began to "act out." Student preferred to be enrolled in school rather than be home-schooled. Student's psychiatrist also recommended school enrollment. Consequently, Parents decided to enroll Student at Sullivan and seek special education services for him from the District, pending an IEP placement offer.

PSYCHOEDUCATIONAL ASSESSMENT OF STUDENT AND STUDENT'S ENROLLMENT AT SULLIVAN

5. On or about August 29, 2008, Parents requested that District assess Student for special education. District prepared an assessment plan, and on September 8, 2008, District received the assessment plan executed by Mother. On September 24, 2008, District commenced its psychoeducational assessment of Student, which continued through October 2008, and resulted in a report dated October 31, 2008, which is further described below.

6. In October 2008, while the psychoeducational assessment was in progress, but prior to Student enrolling at Sullivan, Father met with Lauren Schmidt, Sullivan's school counselor, and Cathy Myhers, the District's Director of Pupil Services, who administered Sullivan's special education program. Ms. Myhers has a B.A. in Speech and Language, an M.A. in Communication Disorders, a California credential in Speech and Language and a California administrative credential. She has been employed by the District for 16 years and has held her current position for 9 years. Ms. Myers toured the campus with Father, and showed him several classes, including a study skills class, a general education science class, a Special Day Class, and a pre-algebra class. Father discussed bullying issues with Ms. Myhers and Ms. Schmidt, advising them of Student's experience at Old Mission, and that Student was a target for bullying because of his Asperger's. Father emphasized that he and

Mother were highly concerned about Student's social-emotional status.

7. On October 20, 2008, Student began attending Sullivan, which has a population of approximately 600-800 students. Student was enrolled in a general education program, and his classes included: Study Skills (for two periods), Science, Math (pre-Algebra), Literacy, Language Arts, and Social Studies. Student was assigned to Study Skills for two periods, instead of one period of Study Skills and one period of Physical Education (P.E.), because Parents did not wish to enroll Student in P.E. at first. Student's schedule was also somewhat unusual, in that he was assigned to Ms. Megan Smith's class for Language Arts and Social Studies, which she taught as part of a "core" block of classes with Literature. Since there was no separate class designated as "Literature" on his schedule, Student's teachers could not access the Accelerated Reader computer program to test his reading. This situation was discovered prior to the November 17, 2008, IEP meeting, which is further discussed below, and was remedied shortly after the November 18, 2008, IEP meeting by changing the name of his first period Study Skills class to "Literature." This change in the name of the class was apparently sufficient for the computer program to operate successfully.

8. From October 23, 2008, through October 27, 2008, shortly after he began to attend Sullivan, and during the assessment process, Student was hospitalized for suicidal ideations and depression. Parents did not attribute Student's symptoms to his attendance at Sullivan. Parents did not notify the District of the reason for Student's absence from Sullivan during that period. District did not learn that Student had suicidal ideations until District received the Complaint, which mentioned them. The Complaint did not mention Student's psychiatric hospitalization, and District only learned of Student's psychiatric hospitalization during the pendency of this action.

9. On October 28, 2008, Ms. Myhers and Mother had a telephone conversation, during which Mother explained to Ms. Myhers why each of the classes that Ms. Myhers

had shown Father was unsuitable for Student, and that Sullivan was not an appropriate school for Student. Mother did not think that any public school in the District could meet Student's needs.

PSYCHOEDUCATIONAL ASSESSMENT RESULTS

10. Tiffany Knight, the school psychologist, participated in conducting a psychoeducational assessment of Student, and wrote the report of the assessment. Ms. Knight received her B.A. degree from the University of California, Irvine, and her M.A. in School Psychology from National University. She has been a school psychologist for approximately five years. She worked at an NPA while in graduate school that primarily served children with Asperger's, severe developmental delays, and emotional disturbance. The assessment team also consisted of April Klingelhofer, a resource specialist (RSP) teacher, and Debra Casserly, a District speech-language pathologist (SLP). The assessment was administered on September 24 and September 29, 2008, and October 20 and October 29, 2008.

11. Ms. Knight introduced her report by noting that the assessment was to help determine whether Student manifested a disability, his present levels of educational functioning, and whether he required special education and related services to succeed in the educational environment.

12. Ms. Knight was unable to report Student's school history in its entirety, as she did not have all of his records. In this regard, she had sent a questionnaire to Ms. McGuirk, one of Student's teachers at Old Mission, but Ms. McGuirk had not returned it as of the time Ms. Knight wrote her report. She noted Student's educational history in Chicago, including Lindamood-Bell services, his attendance in the District for third grade, and his attendance at Old Mission. She had no records of previous standardized testing, attendance history, or disciplinary history. When she requested assistance in obtaining records from Father, he told her that she had what she needed, and that Parents were

interested in the District assessing Student without pre-conceptions.

13. Ms. Knight reported on Student's developmental and medical history as reported by Mother on the health and developmental questionnaire Mother completed. Ms. Knight noted that Student's developmental milestones were delayed. She noted his Asperger's and severe social withdrawal. She reported that at the time of the assessment he was receiving physical therapy to address his gross motor skills, and that, in the past, Student had received psychiatric care and had been prescribed Prozac, Ritalin, and Risperol. She noted he was no longer taking medications.

14. On October 10, 2008, Ms. Knight conducted a telephonic interview with Father. During this conversation, Mr. Smith expressed his concerns about Student's academic, social, and cognitive ability. He told Ms. Knight that previous teaching and bullying of Student had affected Student mentally and academically. Father related to her his concern that if he continued to be ridiculed by his peers, Student's overall academic progress would suffer. Father also reported that Student tended to do well initially, and his attention can be limited, and he became confused when tasks became more complex. Father reported that Student preferred and learned best in a highly structured environment.

15. Ms. Knight summarized Student's previous report cards from the District and Old Mission. She interviewed Joseph Precht, his Pre-Algebra teacher at Sullivan, who reported that Student volunteered in class and followed classroom rules. She also interviewed Ms. Klingelhofer, who taught one of Student's Study Skills classes in his general education curriculum. (Later in the semester, Ms. Klingelhofer became Student's general education Literature teacher.) Ms. Klingelhofer stated that Student volunteered answers during class and completed his assignments. Occasionally he became frustrated and required redirection. Verbal prompts and clarification of directions assisted him in staying on task.

16. Ms. Knight assessed Student over three sessions, for several hours. She reported that he was friendly and cooperative during the sessions, and exhibited adequate/good effort. He attempted each task requested. He had difficulty initiating and sustaining conversations. His thought processes were logical and coherent, but he had difficulty understanding jokes and riddles. His attention varied during the testing sessions. On occasion, he appeared to be distracted by outside noises, and he was observed to stare blankly at the wall, rock back and forth in his seat, and flicking his fingers onto his cheeks. He had difficulty maintaining eye contact, and walked with a slightly awkward gait.

17. Ms. Knight reported on her classroom observations of Student during the first four periods of his first day at school. He complied with teacher directions, was occasionally distracted or restless, appeared somewhat confused by an assignment that he attempted in science class, and volunteered correct answers in math class.

18. Ms. Knight reported Student's scores on the Woodcock-Johnson Tests of Cognitive Abilities, 3d Edition (WJ-III), an assessment tool used to measure a student's intellectual ability in many specific cognitive areas. Student's General Intellectual Ability extended Standard Score was 67, placing him in the well below average to below average range. In Cognitive Performance, his standard score of 81 in the Verbal Ability cluster placed him in the low average to below average range. Ms. Knight concluded that his knowledge and comprehension was limited. His standard score of 80 in the Thinking Ability cluster placed him within the below average to low average range. His standard score of 63 in the Cognitive Efficiency cluster placed him in the well below average range. Considering his subtest scores, she noted that his processing abilities, specifically when visual scanning was involved, were an area of significant weakness, and that he may have difficulty performing on timed academic tests. She also found that awareness of phonemes was advanced, and he would probably be easily able to apply phonemic information in age-level tasks. She also concluded that his working memory capacity was limited,

suggesting that he may find the complex processing of information in immediate memory very difficult.

19. Ms. Knight also administered the Comprehensive Test of Nonverbal Intelligence (CTONI), which is a visual, multiple-choice intelligence test to assess Student's nonverbal cognitive abilities. Student's scores on the CTONI were higher than on the WJ-III. His standard Nonverbal Intelligence Quotient and Pictorial Nonverbal Intelligence Quotient scores of 94 were in the average range, and his Geometric Nonverbal Intelligence Quotient score of 96 also placed him in the average range. Ms. Knight concluded that Student's intellectual skills were much stronger when language/verbal information was minimized.

20. Ms. Knight administered and reported on the Beery-Buktenica Visual Motor Integration 5th Edition (VMI-5), which measures how well a student can integrate their visual perceptual and fine-motor abilities. Student obtained standard scores of 84 (low average) on the Visual-Motor Integration subtest of the VMI-5; of 79 (below average) on the Visual Perception subtest of the VMI-5, and of 87 (low average) on the Motor-Coordination subtest of the VMI-5. She concluded that Student demonstrated weak visual-motor integration and visual perception skills.

21. Ms. Knight administered and reported on the California Verbal Learning Test(CVLT-C), which measures Student's ability to encode, store, and retrieve verbal information. She described his results, and concluded that Student had mild to moderate difficulty learning verbal information, and had difficulty retrieving information from memory.

22. Ms. Knight evaluated Student's visual perceptual abilities using the Test of Visual-Perceptual Skills, 3rd Edition (TVPS-3). His scaled scores ranged from 6 (Low Average) on the Sequential Memory subtest, to 7 (Low) on the Visual Closure subtest, to 12 (High Average) on the Figure Ground subtest. Overall, she concluded that Student fell within the average range of ability, but he may have difficulty remembering information

when presented visually, or remembering something he had recently seen. Additionally, he would have difficulty recognizing an object when only parts of it were visible.

23. Ms. Knight also reported on the Woodcock-Johnson III Tests of Achievement (WJ-III-ACH) administered by Ms. Klingelhofer. Ms. Klingelhofer administered Form A of 12 subtests. Student's standard scores of 84 on the Reading Fluency subtest, 73 on the Math Fluency subtest, 9 on the Writing Fluency subtest, 1 on the Passage Comprehension subtest, 5 on the Applied Problems subtest, and 7 on the Writing Samples subtest, indicated areas of significant weakness.

24. Ms. Knight evaluated Student's Social Emotional/Adaptive Skills using the Piers-Harris Children's Self-Concept Scale (Piers-Harris), Sentence Completion, the Gilliam Autism Rating Scale-2 (GARS-2), the Asperger's Syndrome Diagnostic Scale (ASDS), and the Adaptive Behavior Assessment System-II (ABAS-II). Student's scores on the GARS-2, and the Asperger's Syndrome Diagnostic Scale, both of which consist of rating scales which Mother completed, were consistent with Student's previous diagnoses of Asperger's. On the Piers-Harris, Student scored much above average, indicating a strong, positive self-perception. Student's responses on the Sentence Completion test, which is designed to reflect Student's thoughts and concerns, did not show any specific anomalies. The ABAS-II measures the ability of an individual to perform daily skills so as to function independently. Teacher rating scales were not completed, because Student had been home-schooled prior to attending Sullivan, however Mother rated Student as significantly below average in every area. Ms. Knight added to the evaluation by summarizing information from Student's 6th grade report card from Old Mission, which indicated that Student's social skills were an area of weakness, and he demonstrated difficulty with managing frustration or handling constructive criticism.

25. Debra Casserly, the District's speech/language pathologist (SLP), performed the speech and language (LAS) evaluation and prepared a report dated October 17, 2008,

which was relied upon by Ms. Knight in her psychoeducational assessment report. Ms. Casserly received her B.A. and M.A. degrees in Speech Pathology from California State University, Los Angeles. At the time of the hearing, she had worked in the District for five and one-half years. She has always had children with autism spectrum disorder on her caseload, including middle school students with Asperger's. She has had training in Applied Behavioral Analysis (ABA) for young children, and TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children) methodology. She has attended conferences and read books regarding teaching children with autism. In the background information of her report, she noted that she did not know whether Student had received LAS services in the past.

26. Ms. Casserly administered the Comprehensive Assessment of Spoken Language (CASL), which assesses language process systems in various areas. Ms. Casserly reported that Student's CASL scores were below average in every area. His core language composites standard score of 60 was more than two standard deviations below the mean, indicating a significant language delay. The Nonliteral Language subtest revealed that Student had difficulty interpreting spoken messages with indirect requests, sarcasm, and figurative language. Student failed to answer either one task item or sample item correctly on the Meaning from Context subtest, which suggested that he had difficulty with verbal reasoning and the ability to learn language from the language he already knows. He had difficulty with portions of the Pragmatic Judgment subtest pertaining to inquiry, expressing regret, and requests to join or for help. His standard score of 40 suggested an inability to generalize information to use language effectively.

27. His lowest index score was in the supralinguistic area, which required comprehension of complex language. Student's ability to process language deteriorated when he was required to determine the inferred meaning of a word or sentence, or the ambiguities of language. He was most successful on the Antonyms subtest, achieving a

standard score of 89, which indicated a relative strength in understanding word meaning.

28. Ms. Casserly also administered the Test of Pragmatic Language (TOPL), an in-depth screening of Student's social language skills. Student's score of 70 on the TOPL was "very poor." Student demonstrated significant delays in his pragmatic language abilities, and the score indicated that Student had difficulty using the social rules of language to interpret or convey the intent of what was being communicated. His results on the Pragmatic Judgment subtest on the CASL correlated with his results on the TOPL, and indicated social language delays.

29. Ms. Casserly also administered the Peabody Picture Vocabulary Test (PPVT) to assess Student's understanding of vocabulary words. His standard score of 87 placed him in the average range. Student's score on the Antonyms subtest of the CASL was consistent with Student's average range scores on the PPVT.

30. Ms. Casserly observed that Student was cooperative, and put forth his best effort during testing. He had difficulty maintaining eye contact, and appeared more at ease when he had something to manipulate in his hand during testing. When walking to the room, Student kept his distance from Ms. Casserly. She noted that his articulation presented no concerns, and that his oral structures functioned adequately for speech.

31. Ms. Casserly concluded that Student was eligible to receive LAS services in the areas of supralinguistics (comprehension of complex language), core language (overall language), lexical/semantic (word knowledge and meaning) areas, as well as pragmatics, and suggested that areas of need focus on supralinguistic, lexical/semantic, and pragmatics. She drafted goals for the IEP team to consider relating to these areas of need. At hearing, Ms. Casserly noted other goals in the IEP that she could work on with Student, even though she had not drafted them, because they addressed vocabulary development and pragmatics skills. She described how she would collaborate with the counselor and teachers to address Student's social skills and communication deficits.

32. Ms. Knight did not include the results of Ms. Casserly's speech and language evaluation in her report; rather, she referred to Ms. Casserly's separate report. Based upon the results of the assessments administered by Ms. Knight, Ms. Klingelhofer, and Ms. Casserly, Ms. Knight concluded that Student met the eligibility criteria of placement in special education under the primary disability category of Autism. Ms. Knight concluded her report with nearly three pages of recommendations, including that the IEP team consider RSP services, Designated Instruction and Services (DIS) group counseling with the school counselor, and LAS services. She also made recommendations relating to the areas of writing, math, attention, auditory, reading comprehension, sequencing, organization, and vocabulary.

33. At hearing, Ms. Knight expanded upon her report. She testified that none of Student's test results reflected that Student required NPS services to have his needs met. He presented as an average Asperger's child, with an average IQ, with some processing and social weaknesses that could be accommodated at Sullivan. She knew that he had received psychiatric care, but she did not consider that unusual for a child with Asperger's. Student had recently approached her, greeted her, and advised her that it was his last day at school. He asked her to tell Mother that he wanted to stay at Sullivan.

IEP MEETING OF NOVEMBER 3, 2008

34. Mother, Ms. Allard (Parents' attorney), Ms. Myhers, Lauren Schmidt (the school counselor)² Ms. Knight, Ms. Pearne (Student's Literacy teacher) Ms. Klingelhofer,

² Ms. Schmidt has been a school counselor for eight years. She received a B.A. in psychology from California State University, Long Beach. In 2001 she received an M.A. in Educational Counseling from National University. She has held a Pupil Personnel Services credential since 2001. At the time of the hearing she had been a school counselor at Sullivan for over seven years. Her caseload currently includes 4 to 5 children on the autism

(RSP), Ms. Smith (Student's Language Arts and Social Studies teacher), Ms. Casserly (SLP), and Ms. LaFoe (attorney for the District) attended the November 3, 2008, IEP meeting. During the meeting, the team primarily discussed Ms. Knight's psychoeducational report, which had been sent to Parents prior to the meeting, and Mother agreed with the educational and medical history. Mother shared Student's statewide assessment results from third grade, and agreed to provide Student's assessment results on the Iowa standardized tests that Student had taken previously. The SLP also shared her report, and Mother contributed that she has noticed the same strengths and weaknesses at home. Student's general education teachers reported on Student's classroom behavior and performance. One of his general education teachers noted that Student participated in class and was getting along well with his classmates, but that he needed support to start an activity. Another teacher noted that Student had performed well in a small group, and, with guidance, he followed class rules and had reduced his blurting out in class. Ms. Schmidt, the counselor, stated she had not observed any negative peer interactions. Mother reported that the Student had not reported any negative feelings about school.

35. Prior to the end of the meeting, Mother excused the school counselor and the SLP. The team continued to review the assessment report, and the RSP teacher shared academic assessment results. The team created a written assessment plan to assess Student's motor/psycho-motor development, including a sensory profile, and Mother signed it at the meeting. The meeting was continued to November 17, 2008, at 1:00 p.m., to continue the discussion and to allow time for the team to answer Parents' questions.

spectrum, including Asperger's. During her career, she has worked with 20 students who were identified with Asperger's. Numerous of the children she has worked with had Asperger's-like social skills deficiencies, even though they were not identified as children with Asperger's.

Mother asked the District to consider a private school placement.

IEP MEETING OF NOVEMBER 17, 2008

36. After the November 3, 2008, IEP meeting, Parents provided to District Student's scores on the Iowa Tests of Basic Skills (Iowa tests) which he had taken while in 4th, 5th, and 6th grades at Old Mission, as well as reports of evaluations that had been administered to Student when he lived in Chicago. On November 10, 2008, Ms. Knight received information from Mrs. McGuirk, one of Student's 6th grade teachers at Old Mission, that she had unsuccessfully sought while assessing Student. Ms. Knight also received a report from the Lindamood-Bell Center that Student had attended while living in the Chicago area. Ms. Knight recorded these scores and materials in an addendum to the psychoeducational report, dated November 17, 2008.

37. Additionally, during the period between the November 3, 2008, and November 17, 2008, IEP meetings, District and Parents exchanged proposed IEP goals. Parents spent one week drafting 21 proposed goals in areas of math, reading, and organization and study skills. They drafted the proposed goals using a guide they had found on the Internet. Parents had no formal training in assessments. At hearing, Father stated that Parents "had lots of experience with the IEP process." Ms. Myhers distributed Parents' proposed goals to Ms. Klingelhofer and Ms. Schmidt for their input. Students' general education teachers were invited to the meeting.

38. The team re-convened on November 17, 2008, at approximately 1:00 p.m. The meeting was attended by Parents, Ms. Allard, Ms. Myhers, Ms. LaFoe, Ms. Pearne, Ms. Smith, Mr. Prectl, Ms. Klingelhofer, Ms. Knight, and Ms. Schmidt. The meeting was recorded. At the outset of the meeting, Ms. Myhers mentioned that the meeting could last until 5:00 p.m., and that, if the IEP had not been completed by then, the team would consider when they could meet again.

39. The team continued its review of the psychoeducational assessment,

beginning at the social/emotional evaluations. Ms. Knight also reported on her addendum to the psychoeducational report. Parents disagreed with the comments that Ms. McGuirk, one of Student's teachers from Old Mission had transmitted to Ms. Knight regarding Student's relationships with his peers. Parents requested that those comments be stricken, and Ms. Myhers offered Parents the opportunity to put their disagreements with Ms. McGuirk's comments in a writing to be included with Ms. McGuirk's statement. Parents preferred to include any such comments in the oral statement they wished to make to the team about Student's academic experiences and social emotional background. Parents gave an oral report, which consumed approximately two pages of the transcript of the meeting, regarding Student's academic history, his ability to perform well academically when given a high standard, his social struggles, the bullying he had endured which affected his academic performance and his home life, and his performance on standardized tests. They reported that he was currently under the care of a psychiatrist, who had diagnosed Student with severe depression, and reported that Student was taking Zoloft. Parents expressed their desire that Student be in an environment with high expectations and typical peer role models, to show him the way socially and academically. They advised the team that Student would model other children's behavior, even if that behavior was not the best. Therefore, it was important that he be with typical peers and not behaviorally-impaired ones.

40. The team discussed eligibility criteria, and determined that Student qualified for special education services under the primary eligibility of autism and the secondary eligibility of specific learning disability. Parents asked questions regarding the eligibility categories and the interpretation of the assessments. The team, including Parents, their attorney Ms. Allard, and the general education teachers, engaged in a lengthy discussion of Student's present levels of performance. Additionally, Ms. Smith described her core classes, and mentioned the possibility that Student be placed in all three portions of her

core: Language, Literature, and Social studies. Parents and Ms. Allard questioned the teachers during their reports.

41. The team, including Parents and Ms. Allard, and the general education teachers, engaged in a detailed discussion of appropriate goals for Student. The goals suggested by Parents and the District were discussed, and some of them were modified and adopted. For example, Parents' proposed reading comprehension goal contemplated that Student would make three years' of progress in one year. After discussion, the team adopted the goal and compromised at two years of progress. The District writing goal was discussed and adopted, with modifications suggested by Parents. Math goals suggested by Parents were discussed, modified, and adopted, including goals pertaining to telling time,³ counting money, and a math reasoning goal (Goal Number 16) that required Student, when working on a word problem, to document the calculation method needed and apply math reasoning to solve addition, subtraction, division and multiplication problems. In discussing the math goals, Mr. Prechtel also discussed placement options and supports regarding math classes.

42. Parents and Ms. Allard suggested modifications to certain of the Districts' goals, and, in certain instances, those modifications were also adopted. There were disagreements. For example, Parents requested that benchmarks (objectives) be included in the goals, and Ms. Myhers and Ms. LaFoe (counsel for District) explained that the law no longer required benchmarks for pupils such as Student, but that progress would be reported, in writing, for each goal at the time that Student received his report card. (Indeed, Student's IEP provided that Parents would be informed of Student's progress each

³ The goal to teach Student to tell time was drafted by Parents as a math goal, and was discussed with the other math goals, but was designated in the final IEP as a social skills goal.

trimester, by annotated goals.) Parents, Ms. Allard, and Ms. Myhers engaged in a lengthy discussion on this issue. Throughout the meeting, Parents and Ms. Allard questioned and challenged Ms. Knight, Ms. Myhers, and Student's teachers. However, even when they disagreed with Parents, the other members of the team consistently treated Parents and Ms. Allard with respect, sought their input, attempted to answer Parents' and Ms. Allard's questions, attempted to explain their own positions, and attempted to explain the various components of IEPs and their implementation.

43. The team discussed goals for approximately two and one-half to three hours of the four-hour meeting. Then the team considered adjourning and meeting again. Ms. Allard suggested that another meeting to discuss the goals was not necessary, and the goals could be discussed through written correspondence. This suggestion was not accepted, and the parties attempted to agree on dates for the next meeting. Mother maintained that the meeting should take place the next morning at 9:00 a.m., because that is when Parents were available, and she was concerned that Student did not yet have an IEP and was not enrolled in a daily English class.⁴ Ms. Myhers expressed concern that the general education teachers could not attend the meeting because she could not obtain substitute teachers on such short notice. She also stated that the meeting would have to conclude at noon, because she had a previous commitment. The team agreed to convene the meeting the next morning at 8:00 a.m., so they could meet for four hours. Mother agreed to excuse Ms. Knight's attendance at the meeting the next day, as Ms. Knight was

⁴ Mother's concern about Student's lack of instruction in English was based upon her view of Student's curriculum as a general education student. The sufficiency of the specific content of Student's curriculum at Sullivan as a general education student is not subject to the IDEA or the special education requirements of the Education Code, and therefore is not addressed in this Decision.

unavailable. The team agreed that the general education teachers would be called into the meeting when needed.

IEP MEETING OF NOVEMBER 18, 2008

44. The IEP team re-convened on November 18, 2008, at 8:00 a.m. The team included Mother, Ms. Allard, Ms. Myhers, Ms. Schmidt, Ms. Klingelhofer, and Ms. LaFoe. The meeting was recorded. The team continued to discuss the IEP goals, and Mother and Parents' attorney participated in this discussion. District proposed Goal Number 7, a social-emotional goal, which was directed at Student's conversational and peer-interaction skills. As proposed, the goal required that, with adult prompting, Student would initiate a conversation with a peer for three minutes. The goal was based on Ms. Schmidt's observations and input from teachers that Student had a difficult time maintaining a peer interaction. Ms. Schmidt had never seen Student engage in a peer interaction for more than 20 to 30 seconds. Mother and Ms. Allard disagreed, saying that the goal should not include an adult prompt, because, with adult intervention, he was currently able to accomplish the goal, and he had done it in the past, while at Old Mission. The team engaged in a lengthy discussion of the goal, encompassing more than 7 pages of the 50 page transcript of the meeting, with Mother and Ms. Allard fully participating in the discussion. At the end of the discussion, the other team members did not agree with Mother and Ms. Allard, and they adopted the goal with adult intervention. The goal was included as Goal Number 7 in the IEP, and it provided that Student will maintain peer interactions (conversational turn-taking), within a structured small group setting with adult cues (re: nonpreferred topics of discussion, verbal prompts), for a three-minute time period on four of five occasions as measured by teacher and counselor records. At that time, Mother expressed that she felt that the team's refusal to write the goal as she suggested was due to the team's desire not to provide Student with a sufficiently intensive service, as opposed to looking at Student's capabilities.

45. The team discussed other goals, including Parent-drafted goals, and Mother and Parents' counsel actively participated in the discussion. The team adopted goals and, including the goals adopted at the meeting the previous day, 21 goals were adopted in all of Student's areas of need: Reading Comprehension, Reading Fluency, Mathematics, Writing, Semantics, Pragmatics, Supralinguistic, Social Emotional (including a goal regarding bullying), and Study Skills. Several goals proposed by Parents remained to be discussed, when, approximately two hours into the meeting, the team agreed to take a break. During the break Ms. Myhers conferred with other District team members and they realized that goals had been adopted in all areas of need. When the meeting resumed, the team started to discuss additional Parent-drafted reading comprehension goals. The District members of the team did not believe those goals were necessary, as they included skills and areas that were already included in the curriculum or were addressed by other goals, or involved methodology. Mother and Ms. Allard disagreed and felt that additional goals should be discussed, but they did not identify any areas of need that the agreed-upon goals did not address. At that point, Ms. LaFoe stated that the team had agreed upon approximately 18 goals, which addressed all of Student's areas of need, that the disagreement as to whether more goals should be added would be noted, and that the team should discuss other matters. After this statement, the team, including Mother and Ms. Allard, engaged in a discussion that consumed almost three pages of the transcript of the meeting regarding whether additional goals were necessary. Again, Mother and Ms. Allard did not identify any areas of need that the goals already adopted did not address. The team then proceeded to discuss accommodations. Mother participated briefly in this discussion, and her recommendation was adopted. The team agreed upon the following accommodations: extended time to complete tests and flexible setting, structured social lunch groups, preferential seating, planning for long term projects, collaboration between school staff and case manager, communication of bullying to Parents weekly, access to

copies of lecture notes and to word processor, organizational materials to achieve goals, and pairing visual with auditory instructions. The IEP provided that Student would participate in California Standards Tests with specified accommodations and modifications.

46. Ms. Myhers assured Mother that the team wanted her input, and specifically asked for her input. Mother decided not to speak further until the very end of the meeting. However, Ms. Allard participated briefly in subsequent discussions regarding the RSP class, and PE. After discussing accommodations, the team discussed placement. During the placement discussion, Ms. Klingelhofer suggested that the team consider whether Student should be placed in RSP Literature/Language Arts, rather than Ms. Smith's Literature and Language Arts core class, as Ms. Smith had suggested the day before. Ultimately, District proposed the following placement, which was written in the IEP notes: LAS services, twice a week, 30 minutes each session; Counseling, twice a week, 30 minutes each session; RSP support to address goals, with collaboration in general education Science and Social Studies; RSP Language Arts and Literature, general education Pre-Algebra,⁵ and a math support class in lieu of APE, pending completion of the APE evaluation. Neither Mother nor Ms. Allard asked any questions about the placement offer, although they were invited to do so.

47. Ms. Allard requested an after-school program at Lindamood-Bell for one-to-one services in reading comprehension using visual techniques, as well as transportation; individual tutoring two hours per day, with reading and writing; as well as a private school placement at Balboa City School (Balboa), Winston, Institute for Effective Education, or Excelsior. Ms. LaFoe stated that the District would consider these placements and give

⁵ At hearing, the evidence showed that an RSP teacher was already assigned to collaborate in Student's pre-algebra class, independent of Student's enrollment in that class.

written notice to Parents regarding the District's decision. She did not mention it at the meeting, but by this time Ms. Myhers had commenced investigating the NPS's requested by Parents. She had researched them on the Internet, and consulted with other personnel in the Special Education Local Plan Area (SELPA).

48. The team agreed to produce a clean copy of the IEP to send home to the Parents prior to Thanksgiving, and probably within the next day or so. Prior to concluding the meeting, Ms. Myhers asked Mother whether she would agree to the District's placement offer, and Mother replied: "Absolutely not. Which you also knew before we started." Then Mother and Ms. Allard both expressed their disagreement with the placement offer and the goals, and their disappointment with the District's failures and shortcomings, which they specified. After they finished speaking, the meeting concluded. As at the previous day's meeting, the other team members consistently treated Mother and Ms. Allard with respect, sought their input, attempted to answer Mother's and Ms. Allard's questions, attempted to explain their own positions, and attempted to explain the services offered and the IEP process.

49. On November 18, 2008, after the meeting, Ms. Myhers wrote an e-mail in response to an e-mail inquiry by Father regarding Student's schedule, to clarify that Student was seeking an after-school Lindamood-Bell program with transportation, private after-school tutoring for 2 hours per day, and an NPS placement at Balboa, Winston, Institute for Effective Education, or Excelsior. Mother responded to Ms. Myhers by e-mail, clarifying the Parents' request, and noting that it included summer school at the NPS, transportation to the NPS and Lindamood-Bell, a two hour after-school Lindamood-Bell program, and weekly tutoring.

50. District gave Mother a copy of the IEP notes containing the written offer of placement at the end of the November 18, 2008, IEP meeting.⁶ On Friday, November 21,

⁶ At hearing, Parents denied receiving a complete copy of the IEP until January 2009,

2008, Mother wrote an e-mail to Ms. Myhers, referring to the goals and notes of the IEP meeting, and inquiring as to when Ms. Myhers would respond to Parents' requests. In her e-mail reply of that same day, Ms. Myhers stated that she anticipated that a letter would be mailed on the following Monday.⁷ On November 21, 2008, Ms. Myhers sent a prior written notice denying Student's request to attend private school, and a separate prior written notice denying Student's request for Lindamood-Bell services. The prior written notice denying placement at the NPS facilities stated that the IEP team could reconvene to discuss additional supports, including additional RSP courses, support classes, or SDC support. The prior written notice denying Lindamood-Bell services and weekly tutoring similarly stated that the IEP team could reconvene to discuss further academic supports through general education, resource, or SDC. After having served these notices, in early December Ms. Myhers visited the campuses of three of the four NPS's that Parents had named as their preferred placements for Student. She did so because she wanted to continue to consider possible placements for Student, even though her placement recommendation had not changed.

51. Parents never consented to Student's IEP. Subsequent to the IEP meeting of

after they had served their Complaint and had served a document request on the District. Ms. Myhers testified that Ms. Klingelhofer had sent a full copy of the IEP home just prior to Thanksgiving break. Student did not include this issue in his Complaint. In any event, at the November 18, 2008 meeting, Ms. Myhers had advised Mother and Parents' counsel that the entire IEP would be sent in a day or two, and there was no evidence that the District would have refused to provide the IEP at any time upon request by Parents.

⁷ In this e-mail, which was dated November 21, 2008, Ms. Myhers states she expects to mail the letter on "Monday November 17th." Since November 17 had passed by the time of Ms. Myhers' e-mail, this is a typographical error.

November 18, 2009, District assessed Student in OT and APE, pursuant to the assessment plan Mother signed at the meeting of November 3, 2009. On January 22, 2009, after the assessments were completed, District convened an IEP meeting to discuss the assessments, and invited Parents. Parents at first refused to attend, due to the pendency of the Complaint, but, in a letter dated December 18, 2008, Ms. Myhers explained the District's legal obligation to hold the meeting, and encouraged Parents' participation in the meeting. Mother attended the meeting, as did Ms. Myhers, Ms. Schmidt, Ms. Smith, Ms. Klingelhofer, the occupational therapist, and the APE specialist. The team amended Student's IEP to provide OT and APE services, and also to offer Choir as an elective for Student. Mother had the opportunity to discuss Student's placement at this meeting, at which Ms. Smith, one of Student's general education teachers was present, but did not do so. Parents did not consent to the amended IEP.

52. Student continued to attend Sullivan, in a regular education program, through January 2009. He received no counseling or other special education or related services, except to the extent that his pre-algebra class had the collaborative services of the RSP teacher. His report card, covering the period ending on November 21, 2008, indicated that he earned grades ranging from A- to C in his academic subjects, and his effort marks were excellent and satisfactory. He had no discipline problems, and he did not report to anyone that he was having difficulties at school. During the hearing, Ms. Schmidt testified regarding one incident that came to her attention regarding Student being the subject of teasing. One student had made comments to Student. She gave no specifics as to the date or the precise nature of the incident, or what the comments were. The incident was reported to the teacher by another student, and the teacher addressed the incident. Student reported to the teacher that Student had advised Father of the incident.

53. Student's original due process complaint, filed on December 3, 2008, mentioned Student's suicidal ideations, and only after service of the complaint did District

have notice that Student had entertained suicidal thoughts. Ms. Myhers and Ms. Knight agreed that a current social-emotional assessment of Student was therefore necessary. On January 5, 2009, Ms. Myhers advised Ms. Knight to send an assessment plan to Parents quickly, and to include a note explaining the reason for the assessment. That day, Ms. Knight prepared an assessment plan which referred to Student's "reported depression, anxiety, and suicidal comments," as well as a cover letter. She stapled the documents together, and located Student on campus. She told Student she had documents for him to take home to Parents. He advised her where to put the documents in his backpack, and she did so. She did not tell him what the documents were or show them to him. She did not place the assessment plan or cover letter in an envelope, fold them, or otherwise attempt to conceal their contents. Parents observed that Student's behavior had deteriorated in January, and Ms. Pearne had observed that Student was more defiant and agitated during the week he came back from winter vacation. There was no specific evidence, however, that Student had ever read the documents Ms. Knight put in his backpack.

STUDENT'S PLACEMENT AT WINSTON AND REQUEST FOR LINDAMOOD-BELL SERVICES.

54. On December 12, 2008, the Lindamood-Bell Center in Del Mar, California, where Parents contemplated Student would receive services, conducted an assessment of Student. At the time of the hearing, Student was not receiving Lindamood-Bell services and had not enrolled at the Center. Student called Kristen Orphan, the Center's Director, to testify regarding the assessment results and her recommendation that Student would benefit from intensive Lindamood-Bell services to develop Student's language and literacy skills. Ms. Orphan has a B.S. in Child Development, with a minor in Psychology, from California State University, San Luis Obispo. She has no teaching credential. She has been employed by Lindamood-Bell for five years, and during that period has worked with

children with autism spectrum disorder. She has no training in reading methods other than the Lindamood-Bell program. Lindamood-Bell assesses students before offering services, and personnel at the Del Mar Lindamood-Bell Center (other than Ms. Orphan) had assessed Student for services. Based upon the assessments conducted by Lindamood-Bell, Ms. Orphan recommended that Student be enrolled in the Lindamood-Bell Visualizing and Verbalization for Language Comprehension and Thinking program. The purpose of the program was to strengthen the connection between mental imagery and language, both oral and written, to develop oral vocabulary, oral language comprehension, reading comprehension, written expression, the ability to follow directions, and critical/analytical thinking. She believed Student's reading comprehension would reach grade level or above with Lindamood-Bell support. She recommended an intensive program of four hours per day over a six to eight week period, and then a re-assessment to determine whether additional services were needed, and, if so, the level of services needed. There was no evidence that Ms. Orphan had reviewed Student's IEP, and she rendered no opinion regarding his proposed program at Sullivan.

55. Parents, through their attorney, sent a letter dated January 19, 2009, to District's counsel, and faxed a similar letter to the District superintendent, formally advising that Parents would be placing Student at Winston, and that his last day of school at Sullivan would be January 30, 2009.

56. Student began to attend Winston in February 2009. It offers small classes, and Student can receive counseling and LAS services there. Its Certification Renewal application filed with the California Department of Education on or about October 14, 2008, does not indicate that Winston provides services for autistic students. Approximately 20-25 of the students there are on the autism spectrum. As of October 2008, the school had an enrollment of approximately 95.

57. Student's autism expert, Cynthia LaBrie Norall, Ph.D. testified about Student's

placement. Dr. Norall is a credentialed school psychologist and a licensed educational psychologist. She received her M.A. in Counseling, with a school psychologist credential, in 1987, and she has a Ph.D. in Education. She has worked as a school psychologist and an autism specialist. She is the head of a nonpublic agency called Comprehensive Autism Services and Education, which provides services to children on the autism spectrum. She is not a credentialed teacher. She has never taught a general education core class on a middle school campus.

58. Dr. Norall described the general characteristics of children with Asperger's, including their difficulties with behavior, communication, and social skills. She testified that they are at risk for being bullied because of their lack of social awareness, social immaturity, and sometimes unusual behaviors and interests, as well as their inability to recognize bullying. She described students with Asperger's as being at risk for "sensory dysregulation," in which they can become overwhelmed and unable to attend and process.

59. Dr. Norall had observed an English class at Winston (which five of her clients attend), and she stated that the teaching method used in that class would be beneficial to students with Asperger's. The class she had observed at Winston had five children, two or three of which were children with Asperger's. The children were allowed movement during the class. One child was allowed to sit on a therapy ball. The class was reading a story, and the teacher emphasized the "big picture," which is important for children with Asperger's, because they have difficulty taking other's point of view and making inferences. The headmaster had told her Student would be enrolled in this type of class.

60. Dr. Norall also observed several classes at Sullivan in January 2009. She observed Student's Pre-Algebra class, taught by Mr. Precht. Student behaved well in the class. He participated, he completed a test, and he followed directions. He interacted with Mr. Precht, but not his classmates. Student sat in the front of a row facing a number of his classmates. Dr. Norall observed that he had an expressive face and he grimaced frequently.

She criticized the seating arrangement, because, combined with Student's grimacing, it called attention to Student. She testified that Mr. Precht had told her that the RSP teacher had recommended the seating arrangement. Dr. Norall believed that the recommendation and the fact that Mr. Precht followed it reflected their lack of knowledge of Asperger's children. She also believed that Student's conduct in seeming eager for class to end, and in racing out of class with his hood pulled over his head, reflected Student's discomfort.

61. Dr. Norall also observed Student's Literacy class. She criticized Ms. Pearne, the classroom teacher, because when Student finished the assignment before Ms. Pearne had finished giving the instructions, the teacher requested that he wait until she told him to start the assignment. The teacher made several comments to Student regarding his conduct in the class. Dr. Norall believed that these comments called attention to Student and made him uncomfortable. She observed that he had been hunched over in his seat initially, and he hunched over even more in response to the comments. She was also concerned that the class was not intellectually stimulating for him, as he had correctly completed the assignment before the teacher had finished the instructions. In this regard, Ms. Pearne testified that Student previously had difficulty with the content of this assignment, and that the assignment was a repeat of one she had given previously.

62. Dr. Norall observed Student race out of the class, with his hood pulled over his head, and she and Ms. Ross, the District autism specialist who was accompanying her on her observation, "lost" Student. They eventually found him in "lunch bunch," in the RSP room, after searching and asking others, including the principal, where he was. The "lunch bunch" was a place where Sullivan students, whether general education or special education, could play video games and socialize during lunch. Student spent his lunchtimes there, or at the library, where he could also socialize with others. Dr. Norall observed that Student was sitting at a computer, with other students gathered around him. He did not interact with the other children, except to turn to another child once, briefly,

and then he returned to the computer. Dr. Norall thought that giving Student the opportunity to spend his lunchtime in the library or in lunch bunch was appropriate. She was concerned, however, that there was no adult facilitation at lunchtime, especially should Student become a target for bullying. She noted that nobody, including Sullivan's principal, seemed to know where he was at lunchtime before she and Ms. Ross found him in "lunch bunch."

63. Dr. Norall also observed an RSP class for reading comprehension, which was attended by four students and was taught by Carol Williams, an RSP teacher. This class was potentially a class in which Student would be enrolled. Dr. Norall felt that the class would not necessarily be suitable for a student with Asperger's, as Ms. Williams was not teaching the "big picture." She felt the class was intellectually below Student's level, and felt it was more for children with learning disabilities. She also criticized the arrangement of the classroom, since another class met in there at the same time as the class she observed.

64. Dr. Norall concluded that a smaller school would be better for Student, as it would diminish the risk of Student suffering from sensory dysregulation. A comprehensive public school campus can be overwhelming for Asperger's children. Dr. Norall also was concerned as to whether the Sullivan staff was aware of the issues presented by Asperger's children. She testified that his needs require that he attend Winston.

65. Dr. Norall first met Student in 2005, when he came for a few sessions of a social skills group at her clinic. She never worked directly with Student, and she performed no formal observations of him. She had a five-minute conversation with Student, when she was introduced to him in conjunction with her observations. She did not have any conversation with him about her observations of him and his classes at Sullivan. She had not reviewed Student's entire IEP, just some of the goals and the team meeting notes. She did not criticize the goals, and she had no information as to how any of Student's teachers would implement the goals. She did not know whether Student was receiving special

education services prior to her observations. She did not know whether there were any other Asperger's children in the RSP class she observed.

66. Student also called Chris Bonta to testify regarding Student's placement and academic needs. Mr. Bonta had taught Student math, history, and religion when Student was in sixth grade at Old Mission. Mr. Bonta was not a special education teacher. He held an AA degree in math and general studies from Palomar College, and, at the time of hearing, was attending Cal State University, San Marcos, to obtain his B.A. degree. Mr. Bonta had never been to Sullivan, and there was no evidence that he had been to Winston. There was no evidence that he had reviewed Student's proposed IEP.

67. Mr. Bonta's class at Old Mission had 18 children at the start of the academic year, but the population diminished to 12 children by the end of the year. He stated it was difficult to test Student, because Student had difficulty reading and following instructions, and could not retain information from lectures. Student had difficulty writing in paragraphs. He needed extra practice and monitoring. Mr. Bonta described the teasing and bullying of Student that he had observed, some of which took place in Mr. Bonta's classroom. Mr. Bonta testified that Student would "shut down" when he was teased or bullied, and it would then be difficult to engage Student in his lessons. Mr. Bonta testified that Student did not belong in a mainstream setting, because other children "pushed his buttons." Mr. Bonta believed that Student required a smaller, more protected environment than Sullivan.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528].)

ISSUE (A): WHETHER THE DISTRICT DENIED STUDENT A FAPE BY STOPPING DISCUSSION OF GOALS AT THE NOVEMBER 18, 2008, IEP MEETING.

ISSUE (B): WHETHER DISTRICT DENIED STUDENT A FAPE BY FAILING TO CONSIDER PARENTS' REQUEST FOR A MATH REASONING GOAL IN THE IEP, AND FAILING TO DEVELOP SUCH A GOAL.

ISSUE (C): WHETHER DISTRICT DENIED STUDENT A FAPE BY FAILING TO MODIFY A SOCIAL SKILLS GOAL TO PROVIDE FOR STUDENT TO MAINTAIN PEER INTERACTION INDEPENDENTLY, WITHOUT THE ASSISTANCE OF AN ADULT.

2. Student contends that Parents were denied the right to participate meaningfully in the IEP meeting when the District staff decided to stop discussing goals at the November 18, 2008, IEP meeting. As a result, five of the goals drafted by Parents were never discussed. Student also contends District denied Parents' right to participate meaningfully in the IEP process and denied Student a FAPE in that the District failed to consider Parents' request for a math reasoning goal, and failed to develop such a goal. Similarly, Student contends that District denied Parents' right to participate meaningfully in the IEP process and denied Student a FAPE by failing to modify a social skills goal (Goal Number 7) to reflect that Student was capable of maintaining peer interaction independently. Parents contend that that this goal is therefore inappropriate for Student. They further contend that District, by denying the modifications to the goal that Mother suggested, deprived Parents of the right to participate in the formulation of the Student's IEP.

3. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent

or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).)⁸

4. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26); Ed. Code, § 56363, subd. (a).)

5. In *Board of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 176 [102 S. Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive 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 special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200; *J.G., et al. v. Douglas County School District* (9th Cir. 2008) 552 F.3d 786). 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 which are individually designed to provide educational benefit to the student. (*Rowley*,

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version, unless otherwise indicated.

supra, 458 U.S. 176, 201.)

6. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum. The goals are based upon the child's present levels of academic achievement and functional performance, and must include, if the child takes alternate assessments aligned to alternate achievement standards, benchmarks or short-term objectives. The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

7. For each area in which a special education student has an identified need, annual goals in the IEP establish what the student has a reasonable chance of attaining in a year. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R. part 300, Question 4 (1999 regulations).)

8. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

9. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir.

1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education*, *supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

10. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc.*, *supra*, 960 F.2d 1479 at 1483.) Citing *Rowley*, *supra*, 458 U.S. at p. 200 the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.)

11. One or both of the student's parents are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1).) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range*, *supra*, 960 F.2d 1479, 1485.) 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 conclusion, and requests revisions in the IEP.

(*N.L. v. Knox County Schools* (6th Cir. 2003), 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) “A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) However, an IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Distr 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.)

12. As is set forth in Findings of Fact numbers 37 through 48, Parents and District exchanged proposed goals prior to the November 17, 2008, IEP meeting. Goals in all areas of need were extensively discussed, modified, and adopted at the IEP meetings of November 17 and November 18, and at least one of the Parents actively participated in these discussions, as did Parents’ attorney. Ultimately, the IEP contained 21 goals. When the District members of the IEP team realized that goals had been discussed and adopted regarding each area of need, and that several of the remaining proposed goals contained matters that would be part of Student’s curriculum in any event, or were repetitive of matters in goals that had already been adopted, they attempted to move the meeting along and discuss accommodations. Before the discussion moved on, there was additional discussion of the goals, and why the District members of the team felt that it was time to discuss other elements of the IEP. Mother and her attorney actively participated in this discussion as well. The law does not require that the District adopt, or even discuss, every proposed goal of Parents in order to fulfill the legal requirement that parents meaningfully participate in the IEP. In short, based upon Findings of Fact numbers 37 through 48, and Legal Conclusions 1, and 3 through 11, Student did not demonstrate Parents were denied

the opportunity to participate in formulating his IEP. Rather, the evidence demonstrated precisely the opposite. Parents were invited to, and did, participate in the IEP to formulate the goals in Student's IEP. The evidence fails to support the Student's position that District denied Student a FAPE on this ground.

13. As is set forth in Findings of Fact number 41, there is no factual foundation for Student's contention that District failed to consider Parents' request for a math reasoning goal in the IEP, and failed to develop such a goal. Student's IEP contains several math goals, as math was an area of need for Student. Goal Number 16 in the IEP is, by its terms, a math reasoning goal, which was based upon a goal proposed by Parents. This goal was discussed during the November 17, 2008, IEP meeting, and Parents and their attorney participated in the discussion. The evidence does not support the factual premise of Student's contention, and therefore District did not deny Student a FAPE on this ground.

14. Goal Number 7 is a social skills goal, which provides that Student will maintain peer interactions (conversational turn-taking), within a structured small group setting with adult cues (re: nonpreferred topics of discussion, verbal prompts), for a three-minute time period on four of five occasions as measured by teacher and counselor records.

15. Based upon Factual Findings numbers 1 through 10, 13 through 44, and 57 through 67, Goal Number 7 addressed an area of need for Student. Indeed, Dr. Norall, Student's expert, was concerned that there was not sufficient adult facilitation at Sullivan to assist Student in social situations. Student required adult assistance to converse with his peers for any length of time. He was able to interact with peers independently only briefly, and, when he did, the conversation revolved around Student's own interests. At the time of the IEP, Student likely would have required adult assistance to achieve the nature and level of peer interaction contemplated by Goal Number 7. Therefore, based upon Legal Conclusions 1 through 10, and applying the "snapshot rule," the goal was appropriate.

Based upon the information that the IEP team had at the time of the IEP meetings, which included the personal, on-campus observations of school personnel, the goal reflected what Student could reasonably be expected to achieve within a year, and was reasonably calculated to provide Student with an educational benefit. District did not deny Student a substantive FAPE by including this goal in the IEP.

16. Further, based upon Legal Conclusions 1, and 3 through 11, District did not procedurally deny Student a FAPE by rejecting Parents' suggested version of the goal. Mother and her attorney actively participated in the discussion of this goal at the November 18, 2008, IEP meeting. The law does not require the IEP team to accept Parent's suggestions or ideas. The District is required to provide Parents the opportunity to participate in the formulation of the IEP, the District provided that opportunity, and Parents indeed participated. District did not commit any procedural violation so as to deny Student a FAPE.

ISSUE (D): WHETHER DISTRICT DENIED STUDENT A FAPE BY FAILING TO HAVE GENERAL EDUCATION TEACHERS PRESENT AT THE NOVEMBER 18, 2008, IEP MEETING.

17. Student contends that District's failure to have at least one general education teacher present at the November 18, 2008, IEP meeting denied him a FAPE, as that was the meeting at which the team determined placement.

18. A procedural violation only requires a remedy when the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Target Range, supra*, 960 F.2d. 1479, 1483.)

19. One of the IDEA's procedural requirements is the creation of an IEP team to formulate the IEP. (20 U.S.C. § 1414(d).) The IEP team must include at least one regular

education teacher of the child if the child is, or may be, participating in the regular education environment. (20 U.S.C. § 1414 (d)(B)(ii).) A member of the IEP team may be excused from attendance if the parent and the school district agree in writing that attendance of the team member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(C)(i), (iii).)

20. Based upon Findings of Fact numbers 1 through 67, and Legal Conclusions 1, 3 through 11, and 18 through 19, Student's contention is unmeritorious, for several reasons. First, the failure of the teachers to be present at the November 18, 2008, meeting did not deprive Student of an educational benefit, or a FAPE, or deny Parents the opportunity to participate in the IEP meeting. Several of Student's general education teachers had been present at both of the previous IEP meetings and, at the November 17, 2008, meeting, both Ms. Smith and Mr. PrechtI provided input on goals as well as placement. Secondly, Student rejected the placement offer for reasons other than that the general education teachers were not present at the November 18, 2009, IEP meeting. Student rejected the District's placement offer because Student did not believe that placement in the general education environment with RSP support was suitable for Student, and that Student needed a more restricted placement at an NPS, as well as Lindamood-Bell services. There was no evidence that Student's general education teachers had any particular information on these matters. Indeed, Parents rejected the District's proposed general education placement, which placement provides the rationale for the requirement that a general education teacher be present at the IEP meeting. Thirdly, Mother had the opportunity to question Ms. Smith, one of Student's general education teachers about placement issues at the January 22, 2009, IEP meeting, which was held to discuss the results of Student's OT and APE assessments. Mother did not do so.

21. Finally, the District's failure to have general education teachers present at the

November 18, 2008, IEP meeting did not deprive Student of an educational benefit, or a FAPE, or deny Parents the opportunity to participate in the IEP meeting, because Parents withheld from the IEP team critical information regarding Student. Parents did not reveal to the IEP team that Student had been hospitalized for psychiatric reasons only a few weeks prior to the meeting, and during the time that Student was undergoing the psychoeducational assessment upon which the IEP team's decisions were based. The failure of the Parents to provide this information, which was known only to Parents, when Ms. Knight and the District had directly requested pertinent background information on Student, directly impacted the assessment results and the ultimate appropriateness of Student's IEP. Under these circumstances, the absence of Student's general education teachers at the November 18, 2008, meeting, did not deprive Student of an educational benefit, or a FAPE, or deny his Parents the opportunity to participate in the IEP meeting.

ISSUE (E): WHETHER DISTRICT DENIED STUDENT A FAPE BY FAILING TO INCLUDE BENCHMARKS IN THE IEP IN CONJUNCTION WITH THE ANNUAL GOALS.

22. Student contends that his individual needs required that his goals contain benchmarks to monitor his progress in a timely fashion and ascertain whether Student was progressing as expected. Further, Parents were concerned that the District would not report Student's progress as stated by his IEP and mandated by law.

23. The IDEA and California provides that benchmarks or short-term objectives need not be included in an IEP unless the student take alternate assessments aligned to alternate achievement standards. (20 U.S.C. § 1414(d)(A)(I)(cc); Ed. Code, § 56345, subd. (a)(1)(C).) The IDEA also provides that nothing in its IEP provisions shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required. (20 U.S.C. 1414 (d)(1)(A)(ii)(I).) California law does not require an IEP to contain information except information that is required by 20 United States Code, section 1414 and the Education Code provisions regarding IEPs. (Ed. Code, § 56345, subd. (i).) The

significance of the IDEA's restriction in this regard was recently discussed in the case of *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.* (1st Cir. 2008), 518 F. 3d 18, 30, in which the court stated that school districts have legal rights with respect to special education, just as parents do. Parents who demand more than the IDEA requires frustrate the operation of the collaborative IEP process, and put the school district in an untenable position

24. Student's IEP does not provide that he take alternate assessments. Further, Student concedes that there is no requirement that an IEP contain benchmarks when, as here, Student is not taking alternative assessments. Parents concerns regarding whether Sullivan will timely report Student's progress do not override the District's right to refuse to include benchmarks in an IEP except when benchmarks are specifically required by law. Based upon Factual Findings numbers 1, 10 through 46, and Legal Conclusions 1, 3 through 11, and 23, District had no obligation under the IDEA or the Education Code to include benchmarks in Student's IEP. District did not deny Student a FAPE on this ground.⁹

ISSUE (F): WHETHER DISTRICT DENIED STUDENT A FAPE BY PREDETERMINING PLACEMENT.

25. Student contends that the District predetermined placement by failing to consider any placement besides Sullivan at the IEP meetings, and by not giving due consideration to Parents' requests for Lindamood-Bell services and an NPS placement.

26. School districts shall ensure that the parents of a child with a disability are members of the IEP team that decides the education placement of the child. (20 U.S.C. §

⁹ This result does not deprive Parents of opportunities to learn of Student's progress between reporting periods. Parents communicated with Sullivan staff often regarding Student, and, at least when these communication efforts followed school protocols, Sullivan staff was responsive to their requests. Further, Parents have the right to call an IEP meeting to discuss Student's progress. (Ed. Code, § 56343, subd. (c).)

1414 (e).) Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F. 2d 840.) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) 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 conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools, supra*, 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District, supra*, 37 F.3d 1115, 1131.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr. of Columbia, supra*, 238 F.Supp.2d 127, 139 [IDEA did not provide for an "education. . .designed according to the parent's desires."].)

27. Student has not met his burden of showing that placement was predetermined. There was no evidence that District personnel had made up their mind as to the content of the IEP prior to any of the IEP meetings. Student presented no evidence that there were any "pre-meetings" prior to the actual meetings, at which the outcome of any IEP meeting was determined. The evidence demonstrated that, prior to the November 17, 2008, IEP meeting District personnel drafted proposed goals, and began to consider the Parents' proposed goals. There was no agreement among District personnel prior to any of the IEP meetings as to the goals that would be adopted, or what Student's placement would be. For example, at the November 18, 2008, IEP meeting, Ms.

Klingelhofer suggested a different core Language Arts class than that discussed by Ms. Smith at the November 17, 2008, IEP meeting. Additionally, at the time of the IEP meetings, Ms. Myhers was in the process of investigating the NPS placements proposed by Student. She continued to investigate those placements even after the District made its placement offer.

28. Moreover, the evidence reflected that Parents' comments and input were considered at each IEP meeting. At the November 17, 2008, and November 18, 2008, IEP meetings in particular, either Father or Mother, or their attorney, were given the opportunity to discuss the assessment results, Student's academic background, his strengths and weaknesses, and his socio-emotional issues. They actively participated in these meetings until, towards the end of the November 18, 2008, IEP meeting when placement was discussed. It is true that the team, at that time, only discussed placement at Sullivan. However, at that point in the meeting, Mother and her attorney consciously chose to minimize their participation. There was no evidence that any input Mother or her attorney wished to provide with respect to placement options would have been disregarded.

29. It is also true that the team members, including Parents and their attorney, focused their discussion on how the goals would be implemented at Sullivan. However, this does not demonstrate predetermination such that Parents were denied the opportunity to meaningfully participate in the formulation of Student's IEP. The determination of Student's placement occurred after, and was based upon, the IEP team's discussions of Student's assessment results, Student's unique needs, and goals and accommodations. These factors supported the team's determination that Student's needs could be met at Sullivan. Parents and their attorney had the opportunity to, and did, meaningfully participate in these discussions.¹⁰

¹⁰ The OAH cases relied upon by Student are distinguishable. In *Parents, etc., v.*

30. Under these circumstances, and based upon Findings of Fact numbers 1 and 10 through 49, and Legal Conclusions 1, 3 through 11, and 26, the District did not predetermine placement so as to deny Student a FAPE. Parents meaningfully participated in the formulation of his IEP. Student was not deprived of an educational opportunity, or a FAPE.

ISSUE (G): WHETHER DISTRICT DENIED STUDENT A FAPE BY PRESENTING A VAGUE AND AMBIGUOUS PLACEMENT OFFER OF "GENERAL EDUCATION AND RESOURCE PROGRAMS" AND "POSSIBLE SPECIAL DAY CLASSES" IN THE IEP.

31. Student contends that the District's placement offer was vague and ambiguous, because District offered "general education and resource programs" and "possible special day classes" in the notices sent to Parents on November 21, 2008.

32. The IEP must contain a clear written offer of placement. (*Union Sch. Dist. v*

Modesto City Schools, OAH consol. Cases Nos. 2008030735 and 2008040702, the District failed to provide pertinent placement information to student's parents, and, at the IEP meeting, the District members of the team flatly refused to discuss or consider the parent's request for intensive services from a nonpublic agency for 35 to 40 hours per week. Unlike in the present case, the District did not investigate parents' proposed placement, or issue a formal prior written notice of denial of the parents' desired placement, or encourage Parents to participate in the IEP meeting. In *Student v. St. Helena School District*, OAH Case No. N 2007060718, placement was determined at a hastily-called meeting that the grandparent did not even realize was an IEP meeting, at which the grandparent felt "ambushed," and at which her attorney was not present. The result of the meeting was a reduction in student's services and an IEP that failed to meet the student's needs. These factors did not exist in this case. In any event, these decisions are not binding authority. (Cal. Code Regs., tit. 2, § 3085.)

Smith, (9th Cir. 1994), 15 F.3d 1519.) The offer of placement is not the same as the prior written notice that a District is required to give when it refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4, subd. (a).)

33. Student's contention is based upon the misapprehension that the prior written notices sent by Ms. Myhers on November 21, 2008, which contained the language regarding "general education and resource programs" and "possible special day classes" were IEP placement offers. In fact, the IEP notes contained the placement offer, and Mother had received a copy of the IEP notes at the conclusion of the November 18, 2008, IEP meeting.¹¹ Moreover, at the conclusion of the November 18, 2008, IEP meeting, when Ms. Myhers specifically asked Mother whether she had any questions about the placement offer, Mother replied in the negative. She also specifically rejected that placement offer at that time.

34. Under these circumstances, and based upon Findings of Fact numbers 1, and 34 through 51, and Legal Conclusions 1, 3 through 10, and 32, the District made a clear written offer of placement in the IEP, and the offer of placement was not contained in the prior written notices. There was no denial of FAPE.

ISSUE (H): WHETHER DISTRICT OFFERED AN APPROPRIATE PLACEMENT AND A

¹¹ At hearing, Student attempted to modify this allegation by contending that the placement offer was vague and ambiguous for an assortment of other reasons, including that it did not identify the teachers, or Student's schedule, or describe what "collaboration" meant, or state whether the LAS services were to be pull-out or push-in, or state when the LAS services would be rendered. These issues were not raised in the Complaint or the Amended Complaint, and therefore they not determined in this Decision. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

PLACEMENT IN THE LRE.

35. Student contends that his IEP did not provide a FAPE. Student contends that Sullivan cannot provide an environment that will properly accommodate his Asperger's or educate him to his potential. Student contends that he requires a smaller, more protected, environment than Sullivan.

36. According to *Rowley, supra*, an IEP must be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student.

37. To determine whether a school district's program offered a student a FAPE under the substantive component of the analysis (as opposed to the procedural component), the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District, supra*, 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP,¹² then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. However, to meet the level of educational benefit contemplated by *Rowley* and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877, 890.)

38. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education, supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

39. School districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.) On the "continuum of placements" which California school districts must make available, NPS placements are a more restrictive environment than a general education program with RSP support and related services. (Ed. Code § 56361.)

40. District's proposed placement offered Student a FAPE. Based upon the "snapshot" rule, and focusing on the District's offer, Student's program and placement at Sullivan was designed to address Student's unique needs, and was reasonably calculated to provide him with some educational benefit. This conclusion is supported in part by the significant fact that Student was successful in many ways in the general education environment at Sullivan even without supports. He was achieving passing grades, he was participating in classes, and he was interacting positively, however briefly and occasionally, with other students. He was not bullied. He was indeed subject to a single episode of teasing, but teasing, regrettably, probably cannot be totally eliminated on any middle school campus, public or nonpublic. The single teasing incident, which was reported to the teacher by another student, does not indicate that placement at Sullivan with the services,

goals, and accommodations set forth in the IEP is inappropriate.¹³

41. Student's ability to perform at Sullivan in a general education environment is particularly noteworthy in view of the facts that he was a new student at the school, he was in a fragile emotional state, having endured bullying at his previous school as well as a psychiatric hospitalization, and that he inarguably had a disability and was found eligible for special education.

42. Student called several witnesses to support his contentions that Sullivan was not an appropriate placement, and that Student required Lindamood-Bell services and placement at Winston. Mr. Bonta, one of Student's former teachers at Old Mission, testified that Student needed a smaller, more protected environment than Sullivan. However, Mr. Bonta's credentials were relatively weak. He did not have a B.A. degree, and there was no evidence that he had any understanding or particular training in special education or the needs of children with Asperger's. Additionally, Mr. Bonta's opinion that Student required a smaller, more protected environment than Sullivan was not persuasive. Some of the bullying Student experienced at Old Mission occurred in Mr. Bonta's classroom, if not in his presence, and he was powerless to stop it before it reached the point where Student would "shut down" and could not access his education. Old Mission was a far smaller school than Sullivan, yet that environment, including the environment in Mr. Bonta's small class, was not at all conducive to Student's emotional or academic well-being.

43. Dr. Norall had far better qualifications than did Mr. Bonta, but her testimony was also not persuasive. First, as she had very little familiarity with Student, her opinions were based upon her general knowledge of the general "needs" of children with

¹³ If Student's IEP had been implemented, with its counseling services and bullying goal, the District's response to the teasing arguably should have been more intense, but Student's IEP was not in effect while Student was enrolled at Sullivan.

Asperger's, rather than the particular needs of Student. Also due to her lack of familiarity with Student, her testimony as to her perception of Student's discomfort during her observations was speculative.

44. Further, Dr. Norall was unaware at the time of her observations as to whether Student was receiving special education services, she had not reviewed all of his goals, she had not reviewed his accommodations, and she did not know what special education and related services the District had offered. Since Student was in general education and not in special education, Dr. Norall's opinion that his educational program was lacking is not surprising. Indeed, in finding him eligible for special education and agreeing to an IEP, with specific goals, accommodations, and services, the District had also concluded that Student's general educational program was lacking. As a result, Dr. Norall's opinions were largely directed towards an educational program that Sullivan would not provide for Student if his IEP were implemented. For example, although Dr. Norall criticized Ms. Pearne's teaching methods, Student would not have been in any of Ms. Pearne's classes if his IEP had been implemented. Even though Ms. Williams would likely have been Student's RSP teacher if his IEP had been implemented, he would have had goals and accommodations that would have modified her teaching techniques. If Student's IEP had been implemented, his campus experiences outside of the classroom would have included more adult facilitation, as his goals included adult facilitation with peer communication, as well as a bullying goal and an accommodation specifically directed at bullying.

45. Dr. Norall's testimony regarding the merits of Student's placement at Winston also lacked foundation. She observed but one class at Winston, she did not know Student to any appreciable extent, and she has never observed Student at Winston. Yet, she opined, without reservation, that the classroom she observed at Winston was "where [Student] needs to be." Finally, Dr. Norall's testimony is also suspect because, although she had numerous criticisms of Sullivan, she had no criticisms of Winston. It is not entirely

credible that Winston has escaped the imperfection that one would expect of any human endeavor.

46. This is not to say that all of Dr. Norall's opinions were without merit. Her comments regarding where Student should be seated in pre-algebra class, her general concern that Student's teachers be sensitive to his special needs as a student with Asperger's, and her concern that his RSP class not be taught when there was another class in the room, are worthy of consideration. However, the law does not require the District to provide Student with an optimal program. Dr. Norall's comments do not support that Student's IEP, with its 21 goals, accommodations, and related services, did not meet his areas of need, and was not reasonably calculated to provide Student with some educational benefit if he were placed at Sullivan.

47. Ms. Orphan testified about Lindamood-Bell's program and assessments, but she demonstrated no knowledge of Student's IEP, or of the legal requirements governing special education, and therefore did not, and could not, offer any opinion as to whether Student's program at Sullivan offered a FAPE. At best, her testimony demonstrated that Student would benefit from Lindamood-Bell services. Her testimony, however, did not focus on the primary issue, which is whether Student's IEP addressed Student's unique needs, and whether Student was likely to obtain an educational benefit from the placement and services District offered for Student at Sullivan.

48. Finally, in addition to offering a FAPE, the IEP offered Student a placement in the LRE. The IEP offered Student a placement that was largely in the general education setting on a public middle school campus of several hundred children, with resource support and related services such as counseling, LAS, OT, and APE. Instead, Parents chose to enroll Student in a small NPS with an enrollment of approximately 95 children, with LAS, OT and counseling services, and were seeking to enroll him in a Lindamood-Bell program. District's proposed placement, which is located in Student's community, and which would

expose him to numerous typical peers, is a less restrictive environment than the placement selected by Parents.

49. Under these circumstances, and based upon Findings of Fact numbers 1 through 67, and Legal Conclusions 1, 3 through 9, and 37 through 40, the District offered Student a FAPE in the LRE.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: March 27, 2009

_____/s/____

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings