

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

CLOVIS UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2009020721

v.

PARENTS ON BEHALF OF STUDENT.

CLOVIS UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2009030990

v.

PARENTS ON BEHALF OF STUDENT.

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2009050619

v.

CLOVIS UNIFIED SCHOOL DISTRICT.

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Clovis, California on July 6 through 9, 14 through 16, 27 through 29, and August 6 and 7, 2009. At the request of Student's Parents (Parents) the hearing was opened to the public.

Karen E. Samman, Esq., of Lozano Smith, appeared on behalf of the Clovis Unified School District (District). Janet Van Gelder, a special education consultant and the former

Special Education Director for the District, attended each day of hearing. Student's Mother appeared on his behalf. Student's Father attended most of the hearing as well. Student did not appear.

On February 24, 2009, the District filed a Request for Due Process Hearing (complaint) in OAH Case No. 2009020721, naming Student as Respondent. In that case, the District sought an order from OAH validating the assessments it had administered to Student due to Student's request for independent educational evaluations (IEES) in all areas in which he had been assessed by the District. On March 19, 2009, the District filed a due process complaint in OAH Case No. 2009030990, again naming Student as respondent. In this second complaint, the District sought an order from OAH that its January and February 2009 offers of placement and services to Student constituted a free and appropriate public education (FAPE). OAH consolidated the two District cases on March 27, 2009, and continued the matter to June 1, 2009, for a due process hearing. On May 13, 2009, Student, through his Parents, filed a due process complaint in OAH Case No. 2009050619, raising substantive and procedural challenges to the District's offers of FAPE during the entire 2008 – 2009 school year. On May 22, 2009, OAH consolidated the three cases and granted for good cause Student's motion to continue the due process hearing. The timelines for issuance of the decision in the consolidated cases is based on the date of the filing of the complaint in OAH Case No. 2009050619 and the continuance granted on May 22.

At the hearing, oral and documentary evidence was received. The following witnesses testified: Mother, Father, Student's Uncle, Lisa Hansen, Amanda Fisher, Tamara Soemali, Wendie Huerta, Theresa Pafford, Jennifer Puentes, Melinda (Lindy) Adolph, Susan Neuffer, Sasha Johnson, Cheryle Anderson, Jon Nikaido, and Dr. Howard Glidden.

At the request of the parties, the ALJ permitted them to file written closing briefs and reply briefs in lieu of oral closing argument. The District timely filed its written

closing brief on August 17, 2009. Student filed his written closing brief on August 18, 2009. The District and Student filed their reply briefs on August 24, 2009, at which time the ALJ closed the record and the matter was submitted.

ISSUES¹

DISTRICT'S ISSUES (CASE NOS. 2009020721 AND 2009030990):

1. Are the following assessments² appropriate, so that the District is not liable for the cost of the independent educational evaluations (IEES) obtained by Parents?³

¹ The ALJ has reframed the issues in light of the discussions with the parties at the first day of hearing and in order to address them in a more logical order. The parties stipulated that this ALJ's decision in *Clovis Unified School District v. Student* (OAH, June 24, 2009) OAH Case No. 2008110569 was a final decision on the merits of the issues presented in that case and that neither party intended to file an appeal of the decision. The ALJ reviewed each issue raised in the parties' respective complaints in light of her decision in *Case I* and determined that several of Student's issues were barred by issue preclusion as had been discussed by the parties and ALJ Charles Marson during the prehearing conference in this matter, and is indicated in ALJ Marson's prehearing conference order. The issues framed for the instant decision are those which were not raised and decided in *Case I*, but otherwise track all issues delineated in the prehearing conference order in this case.

² The terms "assessment" and "evaluation" are synonyms. Federal statutes and regulations generally use the term evaluation. California statutes and regulations generally use the term assessment. This decision will use the term "assessment" (except when referring to an IEE) since that is the common usage in California.

³ On the first day of hearing, Student withdrew his objections to the following assessments, and therefore conceded that he was not entitled to IEES in those areas: the speech and language evaluation administered by Melinda Adolph; the assistive

- a. Psychological Evaluation by Tamara Soemali
- b. Educational Evaluation by Wendi Huerta

2. With the exception of its offer of specialized academic instruction for 60 minutes per month of consultation in the areas of reading comprehension and written expression, which the District concedes was inadequate in light of the undersigned ALJ's decision of June 24, 2009, in a previous due process hearing between the same parties (OAH Case No. 2008110569, herein referred to as *Case J*), did the District's offer of placement and services made during the January 14, 2009 individualized education program (IEP) team meeting, as continued on January 16 and January 26, 2009, provide Student with a FAPE (subject to the stated exception), and may it therefore implement the offer (subject to the stated exception) without Parents' consent?

3. Is a total of 50 minutes a day of specialized academic instruction in the areas of reading comprehension and written expression, to be given during a non-academic period of instruction during Student's school day, an appropriate remedy for the District's conceded denial of a FAPE in the area of specialized academic instruction for the 2008-2009 school year?

4. Is 175 hours of one-to-one specialized academic instruction in the areas of reading comprehension and written expression, provided by a District special education teacher for one hour per day, after school, an appropriate compensatory remedy for the District's conceded denial of a FAPE in the area of specialized academic instruction for the 2008-2009 school year?

technology assessment administered by Amanda Fisher; the occupational therapy assessment administered by Anna Burley; and the health background study completed by Gayle Guenther.

STUDENT'S ISSUES (CASE NO. 2009050619):⁴

⁴ Student, in his closing brief, addresses what was originally his issue one: whether the District failed to provide him with an appropriate interim placement on August 25, 2008. However, that issue was already litigated and ruled upon in the previous case between the parties and is therefore barred by issue preclusion, as the ALJ stated on the first day of hearing. Further, on the first day of hearing, Student withdrew Student issues designated 2, 18 and 19 in the prehearing conference order: whether the District implemented its interim placement offer of August 25, 2008, and its IEP offers of September 24 and November 12, 2008, in the absence of parental consent; whether the District failed to timely execute its September 24, 2008 assessment plan; and whether the District failed to assess Student in all areas of suspected disability during the 2008 – 2009 school year. In his closing brief, Student attempts to partially re-assert issue 19 as to whether the District failed to adequately assess Student in the areas of social and emotional status, academic performance, and motor abilities during the 2008 – 2009 school year. To the extent that Student withdrew issue 19 at the onset of the hearing, he may not now re-assert it since the District was not on notice that this issue would be litigated. To the extent that Student means to contest the psychological assessment administered by Tamara Soemali and the academic assessment administered by Wendi Huerta, those issues are subsumed in District's issue 1. To the extent that Student argues that his motor abilities were not assessed, on the first day of hearing, Student withdrew his contention that the District failed to appropriately administer an OT assessment to him, and cannot now re-allege the issue. Furthermore, Student provided no evidence at hearing that he had motor-related deficits that were not addressed by the District. Nor does Student discuss this issue in his closing brief.

5. Did the District fail to allow Parents to meaningfully participate as members of the IEP team after November 12, 2008, by refusing to provide Parents the information they needed to make informed decisions, thus depriving them of the ability and right to give their informed consent?

6. Did the District predetermine the outcome of Student's IEPS at the IEP meetings held in January and February 2009, before IEP team meetings were held and in the absence of Parents?

7. Did the District adequately address Student's present levels of performance during the development of his IEPS on January 14, 16, and 26, and February 12, 2009?

8. Did the District develop appropriate and adequate goals and objectives for Student in its IEP offers of January 14, 16, and 26, and February 12, 2009?

9. Did the District violate the Individuals with Disabilities Education Act, as reauthorized (IDEA) by refusing to discuss and disclose what if any scientifically based methods of instruction would be utilized in its January 14, 16, and 26, and February 12, 2009 IEP offers?

10. Did the District fail to provide prior written notice when it declined to state what scientifically based, peer-reviewed, research-based intervention program and methodology would be utilized in the District's IEP offers of January 14, 16, 26, and February 12, 2009?

11. Was the progress monitoring of Student's IEPS of January 14, 16, and 26, and February 12, 2009, developed to meet Student's unique needs?

12. Did the District alter Student's assessments and records in order to hide the fact that Student was not making the educational progress reported in his IEPS and educational records during the 2008-2009 school year?

13. Did the District fail to offer or provide Student an appropriate placement in the least restrictive environment at the January 14, 16, and 26, and February 12, 2009 IEP meetings?

14. Did the accommodations, modifications, supports and supplementary aids and services offered by the District January 14, 16, and 26, and February 12, 2009 IEP meetings meet Student's unique needs?

15. Did the District fail to provide adequate supports and services emphasizing special education and related services designed to meet Student's unique needs and prepare him for employment and independent living in its IEP offers of January 14, 16, 26, and February 12, 2009?

16. Did the District fail to address Student's English language development levels and his culturally linguistic language needs in its IEP offers of January 14, 16, and 26, 2009?

17. Did the District unilaterally determine that Extended School Year (ESY) services in 2009 were not necessary for Student?

18. Did the District fail to offer necessary assistive technology (AT) equipment to Student in its IEP offers of January 14, 16, 26, and February 12, 2009?

19. Did Student suffer regression during the 2008-2009 school year due to the inadequacy of the IEP offers made to him during that school year?

20. Did the District offer Student a FAPE in its IEP offers of January 14, 16, 26, and February 12, 2009, which covered the period of January 2009 to January 2010?

PROCEDURAL ISSUES

STUDENT'S MOTION FOR SANCTIONS

On July 19, 2009, the day before the hearing was scheduled to resume after a brief continuance, the ALJ was telephonically contacted by counsel for the District who

sought a one-week continuance of the hearing based upon a family medical emergency. The ALJ set up a telephonic conference with District's counsel and Mother. Mother opposed the continuance for three reasons: 1) Parents had already subpoenaed their expert, Dr. Howard Glidden, for Monday, July 20, and paid him almost \$1,000 in expert witness fees. Mother believed that Dr. Glidden would charge for an additional day of expert witness fees if required to re-arrange his schedule to testify another day; 2) Mother, who is a teacher in another school district, had a work-related training scheduled for the week of July 27, 2009; and 3) Parents had a due process hearing involving another of their children that was scheduled to begin the week of August 10, 2009, and they needed time to prepare for it.

The ALJ offered to continue the instant due process hearing until after Mother's training and to consult with the ALJ who would be assigned to the case of Parents' other child in order to accommodate the scheduling conflicts. The ALJ also offered to explore other means of addressing Dr. Glidden's testimony and expert fees such as taking his testimony by telephone, holding the hearing at his office to take his testimony, or entertaining a motion by Student to introduce Dr. Glidden's assessment report without his testifying.⁵ Mother indicated that she did not want to continue the hearing past July 27, 2009, and preferred reconvening on that day if the District's motion to continue was granted even though it meant she would not be able to attend her training. She also stated that Dr. Glidden was going on vacation and she would need to contact him regarding the rescheduling of his testimony. Finding that the District had presented good cause for a continuance, the ALJ granted its request and continued the hearing for

⁵ The ALJ also investigated whether the cost of Dr. Glidden's expert fees could be shifted to OAH but determined that there was no procedure or precedent for doing so under these circumstances.

one week. The hearing resumed on July 27, 28, and 29. Based upon the unavailability of Dr. Glidden, the ALJ then continued the hearing until August 6, 2009.

On August 3, 2009, Student filed a motion for sanctions against the District. Student's motion was based upon the ALJ's grant of the District's request for a continuance and the resulting financial hardship to Student's Parents for the anticipated costs of a second payment of expert fees to Dr. Glidden and for the loss to Mother of compensation she would have received had she attended her work-related training. In his motion, Student indicated for the first time that the training Mother was to attend was due to have lasted for two weeks rather than the one week she implied during the telephonic discussions on July 19. Student also indicated for the first time in his motion that Mother would lose compensation from her school district based on her inability to attend the training. The District filed an opposition to the motion for sanctions on August 5, 2009.

When the hearing reconvened on August 6, 2009, the ALJ orally denied Student's request for sanctions finding that Student had failed to raise a compelling argument in support of his motion to shift costs to the District.

Government Code section 11455.30, subdivision (a), provides that a presiding officer (such as an ALJ) may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure. California Code of Regulations, title 1, section 1040, reiterates the same test for determining whether an ALJ may order cost-shifting sanctions and states that 'actions or tactics' include, but are not limited to, the making or opposing of motions or the failure to comply with a lawful order of the ALJ. This regulation continues by stating

that 'frivolous' means an action that is totally and completely without merit or is made for the sole purpose of harassing an opposing party.

The California Court of Appeal discussed what is required to impose sanctions under California Code of Civil Procedure section 128.5 in the case of *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635. In discussing what constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, the court stated the action taken by the party or its attorney must be solely for the purpose of harassing an opposing party. Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose, such as subjective bad faith on the part of the attorney or party to be sanctioned. (*Levy v. Blum, supra*, 92 Cal.App.4th at p. 635.) This subjective bad faith requirement does not impose a determination of evil motive, and subjective bad faith may be inferred. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

In the instant case, Student admitted in his motion for sanctions that the District's motion for a continuance was based upon a valid family medical emergency of District's counsel. There is no evidence that the District's motion was frivolous or was made for the purpose of harassing Student or his Parents. Student therefore failed to prove any legal basis for shifting the cost of his expert fees to the District or any basis for ordering the District to pay Mother for her lost compensation due to having been unable to attend the training. Additionally, the ALJ notes that Mother had an opportunity to suggest another day to continue the hearing to a date that would not conflict with her training but she chose not to do so. With regard to Dr. Glidden's testimony, although he testified in person the afternoon of August 6, there is no evidence that Parents asked him if he would testify by telephone. Nor did Parents present any evidence, either through documentation or through testimony at hearing, that Dr. Glidden charged or

was going to charge Parents a second amount of expert witness fees based on his testimony being re-scheduled from July 20 to August 6. There was therefore no factual or legal basis to support a finding that sanctions against the District were warranted based upon the ALJ's grant of the District's emergency motion for continuance.

DISTRICT'S MOTIONS TO STRIKE PORTIONS OF STUDENT'S CLOSING BRIEFS

At the close of the hearing on August 7, 2009, the ALJ gave the parties leave to file closing briefs of no more than 35 pages by no later than 5:00 p.m. on August 17, 2009, and leave to file reply briefs of no more than 15 pages by noon on August 24, 2009.

On August 17, 2009, Mother called OAH to inform that she was experiencing computer difficulties and that she would not be able to file Student's closing brief until the following morning. Mother also contacted counsel for the District. Student filed a closing brief of 43 pages, eight pages longer than the limit set by the ALJ, on August 18, 2009, at approximately 8:50 a.m. Student attached to his brief copies of his spring 2009 California Standards Testing scores, which had not been moved into evidence or discussed at the hearing. Student also referenced these test scores in the body of his closing brief and used them to support many of his arguments concerning his contentions that the District had denied him a FAPE.

The parties thereafter filed their reply briefs.⁶ In its reply brief, the District moved to strike Student's closing brief as untimely, moved to strike those pages of Student's

⁶ The District filed and served its reply brief on August 24, 2009, the date the briefs were due. The District received Student's reply brief on August 24, 2009. OAH did not. This ALJ became aware that Student had filed a reply brief only after receiving the District's motion to strike portions of Student's reply brief on August 26, 2009. On

closing brief in excess of 35 pages, and moved to exclude the newly submitted evidence from consideration by the ALJ. On August 25, Mother filed a letter with OAH in which she explained that the excess pages in Student's closing brief were the result of her computer problems and the result of Mother's difficulties with written language, an issue which she raised for the first time in her letter. Mother also explained that the test scores were not submitted until Student filed his closing brief because Parents received them after the hearing had ended.

Student's reply brief is 23 pages long, eight pages longer than the limit set by the ALJ. In his reply brief, Student raised many issues and made many arguments that had not been presented at hearing or raised in Student's closing brief. Student also requests remedies he had not previously raised at hearing or in his closing brief. On August 26, 2009, the District filed an objection and motion to strike the excess pages of Student's reply brief and the new issues, arguments, and remedies Student had raised for the first time in that brief. Student filed a letter reply to District's objections stating that he had not raised new issues.

With regard to Student's untimely filing of his closing brief, the District has not demonstrated that it has suffered any prejudice by the 16-hour delay in receipt of the brief. Additionally, the ALJ finds that Student has shown good cause for the late filing. The District's motion to strike Student's entire closing brief based on the untimely filing is therefore denied.

Student has not, however, shown good for the excessive length of his briefs. Although Parents are representing Student in pro per, this does not excuse their failure to follow the specific directives of the ALJ as to the length of the briefs. Student failed to

August 27, 2009, after being unable to locate Student's brief, an OAH staff member contacted Mother who thereafter re-faxed the brief.

abide by the page limit in both of his briefs. The District's motion to strike the excess pages of both of Student's briefs is granted.

Nor has Student shown good cause for the admission of new evidence after the close of the hearing. Student indicated that Parents did not receive the test score documents until after the close of hearing. However, Student offered no legal basis for the ALJ to accept evidence that was never referenced or introduced at hearing. The case law is contrary to Student's position: a trier of fact cannot consider evidence that was not admitted at hearing. (*Brokopp v. Ford Motor Co.*, (1977) 71 Cal.App.3d 841, 862; *Los Angeles Unified School District* (OAH April 19, 2006) OAH Case No. 2005090908; *Barstow Unified School District* (OAH Feb. 9, 2006) OAH Case No. 2005070531; 34 C.F.R. § 300.512(a)(3).) Accordingly, the District's objection is sustained. The ALJ has not considered the test score documents or any reference to them in Student's brief as the basis for this Decision.

The District's contentions with regard to the new issues and arguments raised and new remedies requested by Student in his reply brief are also well-taken. Issues not raised in a party's due process complaint may not be raised at hearing unless the other party agrees. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Compton Unified School District, et al.* (OAH Dec. 12, 2005) OAH Case No. 2005060620; *Fremont Unified School District, et al.* (OAH Feb. 20, 2009) OAH Case No. 2008090878.) Further, as the District stated in its objection and motion to strike, new issues and new arguments cannot be raised for the first time in a party's reply brief. (*United States v. Rearden* (9th Cir. 2003) 349 F.3d 608, 614 n.2; *Cedano-Viera v. Ashcroft* (9th Cir. 2003) 324 F.3d 1062, 1066 n.5.) The ALJ therefore did not consider any new issues or arguments raised for the first time by Student in his reply brief.

FACTUAL FINDINGS

JURISDICTION AND FACTUAL BACKGROUND

1. Student is a twelve-year-old boy who was a sixth grade student at the District during the 2008-2009 school year. Up until July 2008, when he and his family moved within the boundaries of the District, where they still reside, Student attended school in the Fresno Unified School District (FUSD). FUSD found Student eligible for special education and related services as a student with autism in 2000. The FUSD IEP teams developed and implemented a series of IEPs for Student from 2000 until June 2008, just before Student and his parents moved within the District.

2. Student has a history of delays in receptive and expressive language, social difficulties, reading comprehension and writing. All parties agree that although Student has deficits in reading comprehension and written expression, he has good to excellent spelling and reading decoding skills and is at or above-grade level skills in mathematics. Student has progressed from grade to grade at a normal pace.

3. Both of Student's parents are educators. Father has a master's degree in business and teaches college level classes. Mother is a third grade teacher in FUSD. She has an elementary school credential as well as a bilingual credential. Mother also recently completed a program to receive an interdisciplinary certificate in autism. Although she is not an assistive technology specialist, Mother has a very strong background in technology and computers. Since Student was diagnosed with autism at age three, both Mother and Father have educated themselves in all aspects of the disorder and have become active in the autism community where they live. Mother has

been a presenter or co-presenter on autism issues at various programs and seminars over the past several years.⁷

4. Student received intensive reading intervention services from FUSD for many years, including the Fast ForWord program, a reading program called Orton-Gillingham, and several programs developed by the LindaMood Bell Reading Centers, including its visualization and verbalization program (commonly referred to as "V & V"). FUSD provided these services through the Cullinan Center, which is a private service provider that is not certified as a non-public agency (NPA) by the State of California.

5. FUSD referred Student on August 1, 2006 to Dr. Blythe Corbett of the University of California, Davis Medical Center's Medical Investigation of Neurological Disorders Institute (commonly referred to as the M.I.N.D. Institute) for a neuropsychological assessment. Since Student had satisfactory receptive and expressive English language skills, Dr. Corbett administered the assessment in English. Dr. Corbett made several recommendations regarding Student's education which were incorporated into Student's FUSD IEPs or which his FUSD IEP team used as a basis for its decision to provide certain services and accommodations to Student.

6. Student's FUSD IEP team met on June 4, 2008, for the purpose of transitioning Student from fifth to sixth grade. The IEP indicated that writing skills were still a weak area for Student. It specifically indicated that Student's diagnosis of autism created difficulties for him in reading comprehension, receptive and expressive language, written expression, and social skills. The IEP noted that Student's English

⁷ Pursuant to the parties' stipulation at hearing, the ALJ takes administrative notice of the education and employment history of each witness who testified both at the prior hearing in OAH case number 2008110569 and in the instant proceedings. Mother testified at both hearings.

writing sample scores were still below passing and that his reading comprehension skills still needed improvement and continued to be an area of concern. The IEP provided Student with 30 minutes a month of consultation services each in the areas of specialized academic instruction to meet Student's reading comprehension and written language deficits and in the area of speech and language (SL). Additionally, the IEP provided Student with intensive reading instruction at the Cullinan Center for two hours a day, five days a week. The IEP also included numerous classroom and assignment accommodations to support Student in accessing the general education curriculum, including assistive technology (AT) through the use of visual place holders, use of the notebook tablet, an interactive whiteboard device called a Smartboard, an LCD projector, and a digital camera.

7. The June 4 IEP designated Student as an English Language Learner (ELL), based upon his Parents' designation of him as such and based upon his California English Language Development Test (CELDT) scores, but does not state how, if at all, Student's language needs related to his IEP. The June 4 IEP did not contain any English language development goals for Student.

8. In July 2008, Student's family moved into the District's boundaries. On August 19, 2008, Father hand-delivered a letter to the District informing them that Student would be entering sixth grade there for the fall 2008 semester and that he was a general education student with an IEP. In their letter, Parents requested that the District implement Student's June 4, 2008 IEP from FUSD.

9. Father also filled out a District home language survey on August 19. In it, he indicated that Student learned English when he first learned to speak, that Student most frequently used English at home, that Father most frequently spoke English to Student, and that English was the language most often spoken by the adults in Student's home.

10. Parents met with District program specialist Lisa Hansen and District resource specialist program (RSP)⁸ teacher Wendie Huerta on August 25, 2008, the first day of the 2008 – 2009 school year, in order for the District to present a 30-day interim placement offer for Student. The interim offer incorporated all aspects of Student's June 4 IEP from FUSD as to the following: placement of Student in a general education classroom with 30 minutes of RSP consultation per month, 30 minutes of speech and language consultation per month, the provision of a full time one-on-one aide, and implementation of FUSD's four goals and objectives. However, the District did not offer Student any specific assistive technology and did not offer to provide Student with the 10 hour a week after school reading intervention program at the Cullinan Center Student had received through his FUSD IEP. Nor did the District offer a comparable reading program through its own staff. It was the District's position that it would be able to implement Student's goals solely through the sixth grade general education curriculum. Parents did not agree to the interim offer. Since the District was not legally obligated to implement Student's FUSD IEP since he moved between school years rather than during a school year, it implemented the interim offer it made on August 25, 2008.

11. Student's District IEP team met on September 24, 2008, for the 30-day review of Student's placement, and on November 12, 2008, for an addendum IEP meeting. The District's IEP offer mirrored in substantial part the August 25, 2008 interim offer it had made and which it had already implemented. Parents did not agree with the IEP and did not sign their consent to it.

⁸ The District uses the term "specialized academic instruction" instead of "resource specialist program." The terms signify the same type of programs and are used interchangeably in this Decision as they were by District personnel, including Ms. Huerta.

12. On November 17, 2008, the District filed its due process complaint in OAH Case No. 2008110569, seeking an order that its interim offer of August 25, 2008, and IEP offer of September 24, 2008, offered Student a FAPE. In a decision issued on June 24, 2009, after a 15-day hearing, the undersigned ALJ found that the District's interim offer and IEP offer constituted a FAPE for Student in all areas except for the specialized academic instruction portion of the offers. The ALJ found that 30 minutes a month of consultation between the RSP teacher and Student's general education teacher was not sufficient to address his deficits in written language and reading comprehension. Since the case had been filed by the District rather than by Student, the ALJ made no findings as to what type of program should have been offered to Student to ensure his receipt of a FAPE. Nor was the issue of a remedy for the District's failure to offer Student a program that met his unique needs before the ALJ in *Case I*.

13. Student's District IEP team met in January and February 2009, during which time the District made a final offer of placement and services to encompass Student's schooling from January 2009, to January 2010. Parents did not agree with the District's IEP offer and did not agree to the implementation of any portion of it. Therefore, the placement and services Student received for the remainder of the 2008 – 2009 school year were the same as those he received for the first half of the school year: those delineated in the District's interim offer of August 25, 2008. As discussed below, in light of the ALJ's Decision in *Case I*, the District has conceded that its offer to Student in the January 2009 IEP of 60 minutes of RSP consultation per month did not offer him a FAPE.

WERE THE DISTRICT'S ACADEMIC AND PSYCHOLOGICAL ASSESSMENTS PROPERLY CONDUCTED, SUCH THAT THE DISTRICT HAS NO DUTY TO FUND STUDENT'S IEES IN THOSE AREAS? (ISSUE 1)

14. After reviewing Student's educational records it received from FUSD, the District determined that previous assessments administered by FUSD were too old to

provide appropriate present levels of performance for Student. The District therefore formulated an assessment plan which included assessments in the area of academic achievement (to be administered by a special education teacher), health (to be administered by a school nurse), intellectual development (to be administered by a school psychologist), language and speech communication development (to be administered by a speech and language pathologist (SLP)), motor development (to be administered by an occupational therapist (OT)), social/emotional/adaptive behavior (to be administered by a school psychologist), and assistive technology (AT) (to be administered by an AT specialist). The District mailed the plan to Parents on September 9, 2008.

15. The District IEP team members and Parents discussed the assessment plan at Student's September 24, 2008 IEP meeting. In response to Parents' concerns, the District added additional alternative means of assessments to the plan so that the assessors would specifically incorporate observations of Student, records review, and interviews into their assessment process. Parents did not consent to the plan at the IEP meeting. Mother eventually signed unconditional consent to the plan on November 6, 2008.

16. The District's multidisciplinary team for Student's assessment was headed by school psychologist Tamara Soemali and included Student's special education teacher Wendie Huerta, speech and language therapist Lindy Adolph, assistive technology specialist Amanda Fisher, OT Anna Burley, and nurse Gayle Guenther, all of whom, save Ms. Guenther, testified at hearing. Although, as school psychologist, Ms. Soemali was tasked with making sure that each member of the assessment team completed their respective assessments, and was tasked with putting together the assessments for presentation to Student's IEP team, it was not her responsibility to

duplicate, expand upon, or otherwise address the areas of assessment covered by the other assessors.

Ms. Soemali's Psychological Assessment

17. Ms. Soemali conducted her psychological assessment of Student on November 20, 2008, and December 15 and 17, 2008, with input from Jennifer Puentes, Student's general education teacher, Wendie Huerta, Student's special education teacher, and Mother. Ms. Soemali spent several hours assessing Student. When assessing students who are or who may be autistic, she follows a model from the M.I.N.D. Institute which Ms. Soemali stated was the "gold standard" for such assessments.

18. Ms. Soemali received her Bachelor of Arts degree in Child Development and Family Studies from California State University, Fresno in 1987. She received her Master of Arts degree in Counseling Psychology from National University in 1995. She is a Board Certified Behavior Analyst (BCBA), and holds credentials as a school psychologist as well as in school counseling. She has also completed a certificate program in school conflict resolution and mediation. Ms. Soemali was first hired by the District as a student guidance coordinator in 1996. She received her school psychologist credential in 1997. The District thereafter transferred her to the position of school psychologist in 1998. In 2005, she was promoted to the position of program psychologist. As a school psychologist, and now as a program psychologist, Ms. Soemali's duties are to identify children who need special education or counseling services, provide them with appropriate interventions, assess them for initial or continuing eligibility for special education, and consult with teachers and parents to meet the needs of the students she serves. Ms. Soemali has worked with autistic children since the beginning of her career as a school psychologist. For the last four years as a program psychologist for the District, Ms. Soemali has been responsible for

the autistic programs at three elementary schools and at the junior and senior high schools within the same geographical area as the elementary schools. The majority of her education and training has been in autism assessment, treatment, and approaches. In her career, she has administered approximately 1,000 assessments. In the last four years, most of the assessments she has administered have been to children who were either suspected of being on the autism spectrum or who had already been determined to be. Ms. Soemali was an extremely thoughtful, deliberate, and attentive witness, and her testimony was very persuasive.

19. In conducting her assessment of Student, Ms. Soemali administered standardized assessments to him, conducted observations, reviewed his records dating back to 1999, reviewed his health history, spoke with Student's teacher and aide as well as with Ms. Adolph, the SLP, and spoke with the on-site school psychologist at Student's school. Each of the professionals with whom Ms. Soemali spoke told her that Student had transitioned well to Ft. Washington Elementary School, that he had integrated himself into the school setting, was making friends, and was becoming involved in after school activities.

20. Ms. Soemali conducted interviews with Student's teacher and instructional aide, and observed him in class and during the testing process, in order to garner additional information regarding Student's instructional environment, learning habits, style preferences, and level of acquisition of skills necessary for adequate functioning in a classroom learning environment. During the course of her classroom observation, Ms. Soemali was able to observe Student during whole group interaction in the classroom, independent work during a test, and social interaction during recess. Observing Student on the playground at recess was particularly important for Ms. Soemali since social skills, or the lack thereof, is an important component of autism. Observing Student in a social situation was an important factor in determining his social interaction abilities.

21. Ms. Soemali had not met Student before she went to observe him on November 20, 2008. She had no idea who he was when she entered the classroom. She had thought she would be able to identify Student immediately because of his autism, but, even after viewing the classroom for a few minutes she could not determine which child he was. However, Ms. Soemali knew Student's one-on-one aide and called him over so that the aide, Mr. Walton, could identify Student to her. Student was seated in front of the class, working in a group of six students. He was speaking to a girl in the group, working cooperatively with her. He was engaged in the activity, was reciprocating discussion, and even initiated conversation. A substitute was in charge of the classroom that day. Student asked the substitute a question for clarification purposes, which Ms. Soemali thought was significant since it indicated that Student was comfortable asking questions even when it was to a teacher who was not that familiar to him. Student was able to follow the class routine, was able to follow multi-step directions, was aware of the expectations for the class, was able to take a math benchmark test independently, and appeared comfortable and successful in the classroom setting.

22. Ms. Soemali followed the class when it went outside for recess. Student had no difficulty transitioning from the classroom to the playground, even without much warning. He cleaned up his classroom materials, lined up at the classroom door, and asked if he could take a football outside with him. Ms. Soemali testified that she works with many children on the autism spectrum that often have difficulty with transitions, so she was vigilant for that when observing Student. She was interested in observing him on the playground because he was so successful there. He went outside with the football and a group of boys joined him, after which they played for a while. He then exited the football group, making eye contact with the boys there, and joined another group of boys on the basketball court. He played with them a bit, then exited that group and rejoined the group playing football without any difficulty. Student then joined an

aide on the playground and showed her how he kicked a football. While Ms. Soemali noted that Student had limited eye contact with the aide when she asked him questions, she attributed that to the fact that sixth grade boys often are not too communicative with strange adults. When the recess bell rang, Student froze appropriately, lined up, and transitioned back to the classroom without any difficulty.

23. Ms. Soemali stressed the importance of observation as part of the assessment process. She persuasively testified that it is not best practice to do an assessment without observing the student in and out of the classroom, particularly with an autistic child, in order to determine what if any social issues the child has and if the child has anxiety in any of the observed environments. Ms. Soemali has only foregone an observation during a few assessments she has done when time factors did not permit the observation.

24. Ms. Soemali also interviewed Student's aide to obtain his perspective on Student and to query him as to whether Student was becoming prompt dependent on him. The aide, Mr. Walton, indicated that Student had initially been more dependent on him but that Student was becoming less dependent on him in the classroom and was by that time fully independent on the playground. The aide indicated that Student was more dependent on him during his English Language Arts period than during other classroom periods.

25. Ms. Puentes had similar comments: Student was becoming more independent, was comfortable in the class, and was becoming more likely to go to her for questions rather than to the aide. She noted that Student behaved the best in larger group settings with clear expectations than he did in smaller groups or when working one-on-one. She noted that Student could stay on task and complete most assignments. If he went off-task, he was easily re-directed. He listened and responded better to Ms. Puentes than to his aide. She noted that Student could follow multi-step

instructions if they were not too complex. If they were, she would break the directions down to individual steps for him.

26. Ms. Soemali also observed Student during the formal assessment process. Student was cooperative, listened to directions, and appeared motivated to answer to the best of his ability. He did exhibit significant motoric activity and needed to be re-directed frequently. While Student frequently attempted to exchange assessment tasks for more preferred activities, he was easily re-directed. One of the significant factors Ms. Soemali noted regarding Student was that he breaks down as the group size becomes smaller. In other words, the smaller the group, the more issues he has with behavior. While in the classroom it is difficult to tell him from the other students, in smaller groups or one-on-one, Student exhibits increased discomfort as if he does not like to have the interpersonal communication focused on him. Ms. Soemali noted that Student focuses on how long things will take and does not want to miss anything in his routine. He is very rule-oriented so telling him the rules helped him to be more comfortable during the assessment process.

27. To test Student's cognitive development, Ms. Soemali utilized the Kaufman Assessment Battery for Children, Second Edition (KABC-II), which is a standardized test for children ages 3 – 18 that measures intellectual ability. Ms. Soemali administered it to assess Student's mental processing strengths and weaknesses, and to address his range of cognitive functioning. Although Student demonstrates the language ability necessary to complete a verbal cognitive assessment, Ms. Soemali decided to administer the non-verbal section of the KABC-II because it is norm-referenced on students diagnosed with autism and therefore appeared to her to be the best research-based measure for an assessment on an autistic child such as Student. The KABC-II measures a range of abilities including general sequential reasoning, visualization, spatial relations, and memory. The non-verbal KABC-II was designed to minimize the potential interference of

verbal instructions and responses, as well as the performance handicap for students from diverse cultural and/or language backgrounds. It was therefore appropriate for Student both based on his being on the autism spectrum as well as based upon his multi-lingual and multi-cultural background.

28. The KABC-II has a mean score of 100 and a standard deviation of 15, signifying that an "average" score on the test would fall anywhere between 85 and 115. Student scored an 89 on the test, which means he fell in the average range. Ms. Soemali noted that Student rushed through some of the subtests even when re-directed, which may have decreased his performance on those tests.

29. Ms. Soemali also administered the Vineland II Adaptive Behavior Survey Interview Form (Vineland) to Student by having Ms. Puentes complete the teacher behavior scales. The Vineland comprises an individualized assessment of adaptive behavior which measures performance of the day-to-day activities necessary for someone to take care of himself and get along with others. The Vineland measures behavior in three domains for children over age 11: communication, daily living skills, and socialization. From the combined scores the assessor is able to obtain an overall adaptive behavior composite. The standard scores have a mean of 100 and a standard deviation of 15. Ms. Soemali did not give Parents the Vineland ratings to complete because the parent ratings only address behaviors in the home and do not address the educational setting. Additionally, as stated below, Ms. Soemali gave three other rating scales to parents to complete, so she had a significant amount of input from them from other sources. The results of Ms. Puentes' completion of the Vineland rating score indicated that Student's communication and socialization were moderately low and that his daily living skills were adequate. His composite score was in the adequate range. Overall, his scores on the Vineland indicated that Student's adaptive behavior was consistent with eligibility under the criteria of autistic-like behaviors.

30. Student challenges the District's psychological assessment primarily because Ms. Soemali did not have Parents fill out the parent rating form. Dr. Howard Glidden, Student's expert witness, testified that while he would have given the Vineland ratings scales to Parents, it was a professional decision of each assessor which tools to use. While he referenced Ms. Soemali's assessment in his own assessment report, Dr. Glidden never criticized her assessment procedures in his report nor did he criticize them at hearing. There is no evidence that the failure to give Parents the Vineland rating scales invalidated Ms. Soemali's psychological assessment.

31. The Behavior Assessment Scale for Children 2 (BASC-2) is a norm-referenced, standardized behavioral assessment system designed to diagnose and classify a variety of emotional and behavioral disorders in children and to aid in the design of treatment plans for them. It is administered by giving rating scales to respondents that may include a child's teacher and parents and the child himself. The assessment covers five domains for the teacher ratings: externalizing problems, internalizing problems, behavioral symptoms index and school problems. The parent ratings cover all but the school problems domain. The students' self-report also covers five domains: school problems, internalizing problems, inattention/hyperactivity, emotional symptoms index, and personal adjustment. Scores in the "clinically significant" range suggest a high level of maladjustment and the possible need for intervention in that area. Scores in the "at-risk" range suggest a significant problem that may not be severe enough to require formal treatment. At-risk scores may suggest a potential problem that warrants monitoring.

32. Ms. Soemali had Ms. Puentes, Parents, and Student complete the BASC-2 rating scales. Ms. Puentes' scores indicated that Student scored in the average range for all five domains. Student's self-scoring indicated that he was in the average range for all five domains assessed. Parents' scores on the BASC-2 indicated that they observed

Student to be in the average range in externalizing and internalizing problems, but at-risk in the behavioral symptoms index and clinically significant in adaptive skills. Ms. Soemali noted that while Parents' scores indicated social emotional concerns at home, both Student's self scoring and his teacher's scoring indicated that social emotional issues were not a concern in the school setting.

33. Ms. Soemali also had Parents and Ms. Puentes complete the rating scales of the Social Skills Rating System (SSRS). The SSRS is a norm-referenced rating system for assessing the social, academic and behavioral competencies of children from preschool through secondary school. Teacher ratings measure social skills, problem behaviors and academic competence. Parent ratings measure social skills and problem behaviors. Ms. Puentes' ratings indicated that Student was in the average range for all areas. At school, Student demonstrated average caring, assertion, and self-control, as well as average internalizing, externalizing and hyperactivity, and that he was in the average range for academic competence. Parents' ratings indicated that at home Student also demonstrated average overall externalizing and internalizing problem behaviors, although hyperactive skills alone were higher than most children his age. Additionally, Parents' ratings indicated that at home Student demonstrated fewer caring, responsibility, and self-control skills as compared to the average child his age.

34. The Autism Diagnostic Observation Schedule (ADOS) is a semi-structured, standardized assessment of communication, social interaction, and play or imaginative use of materials for individuals who are who may be on the autism spectrum. Ms. Soemali administered Module 3 of the ADOS to Student as part of her assessment. Student's scores indicated that he continued to meet the autism classification based on communication and reciprocal social interaction issues. However, Ms. Soemali's scores indicated that Student demonstrated an ability to be imaginative and creative and that he did not demonstrate any stereotyped behaviors or restricted interests.

35. Finally, Ms. Soemali also administered the Social Communication Questionnaire (SCQ) as part of her assessment of Student. The SCQ consists of rating scales completed by parents and teachers that maps the symptomology associated with autism spectrum disorder. A score of approximately 15 or above indicates a child is possibly on the spectrum. Ms. Puentes' ratings indicated a score of 21. Parents' score, however, was 11, indicating that at home the behavior they noted in Student did not meet the cut-off criteria, at least pursuant to this particular assessment.

36. After reviewing the results of her own assessments as well as the results of the other areas in which Student was assessed, Ms. Soemali concluded that Student was functioning within the average range of non-verbal cognitive abilities. Her observations of Student, as well as those of his teacher and aide, indicated that Student had transitioned well to his new school, and that he was doing well academically and socially. Ms. Soemali noted that results of all assessments of Student indicated that areas of academic concern included reading comprehension and written language. The assessments also indicated that Student's speech and language skills, specifically social-communication, continued to be delayed. Student continued to meet the educational criteria for classification as "autistic-like" since he continued to demonstrate an inability to use oral language for appropriate communication, continued to have difficulty relating to people appropriately, continued to demonstrate impairment in social interaction, continued to have an obsession to maintain sameness in his routine, and continued to demonstrate resistance to controls, although Student could be re-directed. However, Ms. Soemali also noted that Student's autistic-like behaviors did not typically interfere with his ability to comply with school rules. Ms. Soemali made various recommendations for Student based upon the assessments, which, as discussed below, were adopted by Student's IEP team as part of the District's IEP offer.

37. Ms. Soemali credibly testified, and the evidence indicates, that she was qualified to administer all the tests involved in her assessment, and that the standardized tests she administered to Student were validated for the purposes for which she used them. Ms. Soemali either administered a non-verbal assessment to Student, as she did in the case of the KABC-II, or administered tests based on ratings scales completed by Student's teacher and, in most cases, by Student's Parents. In each case, there is no evidence that the tests and assessment tools Ms. Soemali used were racially, culturally or sexually discriminatory. The tests were administered in accordance with the publisher's instructions. Ms. Soemali believed that she had developed a good rapport with Student and that her test results were valid. She used a variety of tools, tests and observations, and did not rely upon a single procedure in determining Student's needs. Finally, Ms. Soemali prepared a comprehensive report regarding her assessments that included her interpretations of the assessment data, identification of Student's unique needs and recommendations. She gave a copy of her report to Parents who reviewed it as part of Student's IEP team at his IEP team meetings. Parents had an opportunity to discuss the assessment results with the IEP team and they asked numerous questions about the test results and the implications for Student's education.

Ms. Huerta's Educational Assessment

38. Wendie Huerta has been an RSP teacher for one year at Ft. Washington Elementary school and has completed a total of six years working with the District. She has a Bachelor of Arts degree and a Master of Arts degree in Education. Ms. Huerta has both a multisubject teaching credential and a special education teaching credential. Her job duties include providing special education instruction in group and one-on-one settings to special needs children, collaborating with general education teachers, working with her students' parents, attending IEP meetings, developing strategies for special needs children, and conducting assessments through observations, interviews,

and standardized and informal testing. Her observation practices include observing children in the classroom, at recess, and at lunch. Ms. Huerta was acquainted socially with Mother and Mother's family before she became Student's teacher. Ms. Huerta was a forthright and patient witness who gave detailed and credible explanations of her testing processes and the educational services she provided to Student during his sixth grade school year.

39. Ms. Huerta's educational assessment of Student consisted of a review of his educational records, observations of Student in his classroom and during the testing process, an interview with Student's general education teacher, and standardized and informal testing of him. Based on her observation of Student in his classroom, Ms. Huerta noted that Student was involved in and continued to participate in the general education classroom. He was attentive to the teacher's instructions, followed directions when asked, and participated in classroom discussions. She noted that Student was cooperative in groups and had made friends in his classroom, but he also was able to work independently. Ms. Huerta observed Student lining up for class at the head of the line at the start of the school day. He immediately and independently began his daily math and language assignments. He interacted appropriately when a classmate asked him to stop swinging his feet back and forth. Student was one of the first pupils to finish his math and language assignments, after which he independently took out a book to read.

40. Ms. Huerta's observations of Student's behavior during her testing process indicated that Student had more difficulty in the one-on-one testing environment than he did in the classroom. Student's level of conversational proficiency was limited, he was uncooperative at times, and appeared fidgety, restless and anxious and was distracted often. Student responded too quickly to questions. Ms. Huerta let him know that the testing was not timed and he could take as long as he needed. Student attempted every task during the assessment but gave up easily. Although from Student's body language

at times it appeared he was not engaged in the testing process, Student responded appropriately and correctly to the test questions. Student at times interrupted the flow of the testing process to make statements such as when his lunch period would begin, but Ms. Huerta assured Student that his teachers were aware he was being tested. Ms. Huerta observed that Student preferred to solve mathematical problems in his head rather than using paper and pencil.

41. Ms. Huerta also interviewed Student's teacher as part of her assessment. Ms. Puentes informed her that Student had difficulties with any tasks that required him to make inferences. The fact that he was literal and concrete in class made mathematics easier than reading, science and social studies, where reading comprehension based upon making inferences was necessary in order to completely understand and absorb the information. Student continued to have difficulties seeing the "big picture," selecting main ideas, and demonstrating the imagery of the lessons being taught. Student continued to have difficulty verbalizing his thoughts and in identifying the sequential order for tasks. Ms. Puentes provided Student with a number of accommodations, such as the use of graphic organizers and highlighting key words in an assignment to help Student initiate his writing process.

42. In order to assess Student's academic achievement, Ms. Huerta administered the Woodcock-Johnson III (WJ-III) Tests of Achievement to Student, which is a standardized testing tool. The testing results were based on norms for children at the 6.4 grade level (fourth month of sixth grade), Student's grade level at the time he was assessed. The assessment consisted of various subtests that assessed Student's oral language, written language, listening comprehension, and math skills, as well as his academic skills, fluency, applications and knowledge. Student's composite test scores in broad reading and broad written language were all within the average range and his math broad score was in the above-average range. He demonstrated strengths in letter-

word identification, story recall, calculation, math fluency, spelling, writing samples, spelling of sounds, punctuation, and capitalization. However, Student's subtest results on the WJ-III indicated that he had weaknesses in understanding directions, passage comprehension and oral comprehension. Additionally, Student scored at a K.7 (seventh month of kindergarten) level in academic knowledge indicating that he had a significant difficulty recalling concepts previously taught in the subject areas of science, social studies and humanities.

43. Although Student scored in the average range in broad reading and written language on the WJ-III, which would normally indicate that Student had no unique needs in those areas, Ms. Huerta was aware of Student's difficulties in reading comprehension and written language based upon a review of his educational records and schoolwork, discussions with his teacher, and from her past experience with Student since she was providing 30 minutes of consultation to his teacher based upon the District's interim placement IEP. She felt that Student still had unique needs that were not evident from the results of the standardized WJ-III and that might become apparent through another type of assessment. Ms. Huerta therefore decided to administer the Developmental Reading Assessment (DRA) to Student which is a non-standardized test that measures a written response to a comprehension tool.

44. For the DRA, Student was given a passage to read. Ms. Huerta chose to test using Level 40 of the DRA, which is a fourth grade level, since she had tested Student at DRA Level 16 (first grade) at the beginning of the school year and he had clearly mastered that level. In addition, the books that he was choosing to read on his own were about fourth grade level material, and prior testing of Student had indicated that he was between third and fourth grade level when he began school at the District.

45. The results of the DRA indicated that Student was reading at 147 words per minute, which was advanced level, that his accuracy was 100 percent, and that he

had good reading decoding skills and self-corrected when he made an error. Ms. Huerta noted that his oral expression emphasized key phrases and words. However, Student's weakness in comprehension was apparent as he only was able to write partial responses to questions about the passage he wrote and was only able to provide a partial summary of what was occurring in the passage. Student was not able to demonstrate understanding about the most important aspects of what he had read. Therefore, Student only scored at the "instructional level" in reading engagement and comprehension on the DRA.

46. Based upon her observations of Student, her interview with Student's teacher, her review of his records and class work, and the results of both the standardized and informal assessments she administered to him, Ms. Huerta noted that written language and reading comprehension continued to be areas of concern for Student. She noted that he continued to need support in the areas of reading comprehension related to the main idea, inference and narrative story elements, as well as in written language with a goal to improve his writing organization.

47. Ms. Huerta credibly testified, and the evidence indicates, that she was qualified to administer all the tests involved in her assessment, and that the standardized tests she administered to Student were validated for the purposes for which she used them. There is no evidence that the WJ-III or the DRA were racially, culturally or sexually discriminatory. The evidence demonstrates that the tests were administered in accordance with the publisher's instructions. Ms. Huerta used a variety of tools, tests and observations, and did not rely upon a single procedure in determining Student's needs. In particular, she added an additional test, the DRA, to her assessment process after determining that the results of the standardized WJ-III might not have given a complete picture of Student's unique needs. Finally, Ms. Huerta prepared a comprehensive report regarding her assessments that included her interpretations of

the assessment data, identification of Student's unique needs and recommendations. She gave a copy of her report to Parents who reviewed it as part of Student's IEP team at his IEP team meetings. As with all assessments administered to Student, including Parents' IEES, Parents had an opportunity to discuss the assessment results with the IEP team and were able to ask numerous questions about the test results and the implications for Student's education.

48. Student argues that Ms. Huerta's assessment was inappropriate because she did not administer another standardized test such as the Gray Oral Reading Test (GORT) when the WJ-III indicated no areas of unique need in written language and reading. However, there is no evidence that Ms. Huerta was required to do so simply because of the results she received from Student on the WJ-III. Both Dr. Glidden and Student witness Cheryle Anderson, who is a former special education teacher and is presently an autism consultant for the Fresno County Office of Education, testified that Ms. Huerta's assessment was appropriate. In response to a question from the ALJ, Ms. Anderson specifically stated that Ms. Huerta's assessment met all legal requirements and was valid. Neither she nor Dr. Glidden offered any criticism of the assessment itself. To the contrary, Dr. Glidden relied upon it during the preparation of his own assessment report. With regard specifically to the GORT, Dr. Glidden stated that he used to administer it many years ago. However, since the GORT requires the student read out loud so that the assessor can catch errors in reading and people generally do not read out loud in real life, Dr. Glidden feels the GORT is not a useful test. He stated that the Weschler Intelligence Scale for Children – IV (WISC-IV), which he administered to Student, and the Woodcock-Johnson, which Ms. Huerta administered to Student, are much better tests.

49. Student also takes issue with the fact that Ms. Huerta administered Level 40 of the DRA. However, Student never clarified what other level Ms. Huerta should have

administered and which test results, if any, would have been different had she administered a different level of the test. The DRA test result indicated that Student's instructional level was fourth grade, a finding (as discussed below) basically consistent with the results of Student's IEES. There is no evidence that the DRA was administered improperly to Student.

50. Neither the failure to administer the GORT or other standardized test in addition to the WJ-III, nor the manner in which Ms. Huerta administered the DRA, are a basis for finding that Ms. Huerta's assessment was inappropriate.

Student's IEES

51. Student's Parents decided to obtain an independent neuropsychological evaluation of Student before Ms. Soemali had completed her assessment of Student and before her assessment results were presented to Parents, even though the District did not intend to conduct a neuropsychological assessment of Student. Parents contacted Dr. Howard Glidden, a neuropsychologist who is associated with the M.I.N.D. Institute, in December 2008. Dr. Glidden is extremely busy and he was unable to assess Student until April 16, 2009. Dr. Glidden testified as an expert witness for Student at the hearing.

52. Dr. Glidden assessed Student using 22 testing instruments. He reviewed the District's multidisciplinary assessment of Student, Student's IEES by the Cullinan Education Center and the Lindamood-Bell Center (LMB), the 2006 assessment completed by Dr. Blythe Corbett, and Student's IEPS. Dr. Glidden also interviewed Mother.

53. Dr. Glidden's intellectual functioning score for Student on the WISC-IV was 86, which is comparable to the score of 89 obtained on the KABC-II administered by Ms. Soemali. Like the District, Dr. Glidden found that Student demonstrated a variety of behavioral symptom clusters consistent with autism spectrum disorder. Dr. Glidden noted that individuals on the spectrum generally exhibit three areas of impairment: 1)

Abnormal development of language abilities including non-verbal language processing; 2) Limited imitative abilities and imaginative play, and show obsessions, and stereotypical behaviors; and 3) Impaired reciprocal social interaction. Dr. Glidden, like the District, found that Student appeared to meet these criteria, although Student falls within the range of "high-functioning" based upon his full scale intelligence quotient which is in the low average range.

54. Dr. Glidden found that Student's challenges with reading comprehension were predictable given the language processing disorder associated with Student's autism. His recommendations therefore were that Student should continue to receive a significant amount of reading intervention. He noted that the Cullinan Center had provided beneficial instruction in the past and therefore recommended that Student return to Cullinan or that he should receive a similar program from Student's school district. Dr. Glidden also recommended that the District speech pathologist increase services to him. However, Student's Parents did not provide Dr. Glidden with a copy of the District's January 2009 IEP; Dr. Glidden was therefore unaware that the District had offered to provide Student with 90 minutes a month of direct SL services in addition to the consultation model it was already providing. Dr. Glidden also believed that Student would benefit from social skills training that would focus on his social communication deficits. Dr. Glidden testified that he had no specific recommendations for the amount of reading intervention services or SL services that the District should provide to Student. Rather, he believed decisions regarding the amount of services were better left to educational professionals. Dr. Glidden's assessment was completed months after the District convened the IEP team meetings for Student in January and early February 2009, and therefore was not available for review by Student's IEP team at that time.

55. Parents also had Student tested in the areas of reading comprehension and written expression by LMB and the Cullinan Center. Parents took Student to be

tested by LMB on January 5, 2009, prior to receiving the results of Ms. Huerta's assessment at Student's IEP meeting on January 14, 2009. Parents therefore obtained the LMB assessment before determining whether they had any disagreements with or reason to contest the results of Ms. Huerta's assessment. The LMB testing consisted of various standardized tests: the Peabody Picture Vocabulary Test, the Detroit Tests of Learning, the Woodcock Reading Master Test, the Slosson Oral Reading Test, the Wide Range Achievement Test-V and, primarily, the GORT. No one from LMB testified at hearing. There is no evidence that LMB observed Student in his classroom, spoke with Student's teachers, or reviewed his records as part of its assessment process. There is also no evidence regarding the qualifications of the person at LMB who assessed Student there. The results of LMB's testing are similar to that of the District: its test show that Student continued to have deficits in reading comprehension and written language.

56. LMB recommended that Student receive 200 hours of reading intervention through its Visualizing and Verbalizing (V & V) program: four hours a day for a period of approximately 10 weeks. At Student's IEP meetings in January 2009, his IEP team reviewed the results of the LMB assessments and reviewed its recommendations regarding reading intervention for Student. Father told the IEP team that he disagreed with LMB's recommendation for four hours a day and stated that he felt that was too much when added to Student's full school day, although Parents continued to believe that Student required at least 200 more hours of V & V.

57. On April 17, 2009, Parents took Student to be assessed by the Cullinan Center. Sasha Johnson, who is a credentialed teacher (although she has never taught in a classroom other than during her teacher training), is trained in all LMB programs, and is the on-site Director at Cullinan, administered the assessment to Student. She assessed him using the Test of Written Language – 4 (TOWL-4), which is a normed, standardized test, and using an informal reading assessment. Ms. Johnson did not observe Student in

the classroom, did not review his records, and did not interview his teachers, nor did she write a report detailing the results of her assessments.⁹

58. The results of the TOWL-4 indicated that Student was below average in vocabulary and contextual conventions, that he scored poorly in logical sentences, very poorly in story composition, and average in spelling, punctuation, and sentence combining. Other than the below average score in vocabulary, Ms. Johnson's results for Student on the TOWL-4 were fairly consistent with the testing and assessments conducted by the District. Ms. Johnson stated that Student's instructional level could be up to fifth grade, but she had concerns that he was showing frustration at times even at a third and fourth grade level.

59. The principal discrepancy between Ms. Johnson's assessment and formal and informal assessments done by the District over the course of the 2008 – 2009 school year was in writing paragraphs based upon Student's viewing a depictive scene and then being asked to write paragraphs describing what he was seeing in the picture. On Ms. Johnson's assessment, Student was only able to write one descriptive paragraph that was incomplete and contained poor grammatical construction. Writing samples Student produced as part of in-class assignments for Ms. Puentes were more complete, often containing multiple paragraphs, and their grammatical content was better.

60. At hearing, Ms. Johnson reviewed the LMB assessment and the program recommendations contained in the LMB report. Although she is trained in the LMB programs, she does not agree with the recommendation that Student receive four hours

⁹ At hearing, Ms. Johnson produced another version of her scoring of the TOWL-4 because she realized that she had made an error in computation of Student's scores. The revised TOWL-4 scores do not significantly alter the overall results Ms. Johnson obtained on the assessment.

a day of V & V. She stated that the Cullinan Center generally recommends a program of one hour a day after school as reading intervention for children and that she believed Student would benefit from a one-hour a day, five-days a week reading program in addition to one hour a day, five days a week of writing intervention. Ms. Johnson believes that Student would benefit most from a one-on-one multi-sensory, direct instruction program in order to close the gaps in his reading and writing deficits.

61. Parents also obtained an IEE for Student from Susan Neufer, a speech language pathologist. Ms. Neufer assessed Student on November 30, 2008. She is a licensed speech and language pathologist who received her Masters degree in 1979. She worked as an SLP for a school district for 25 years and for the Madera Department of Education, also as an SLP, for another two years. Like Mother, Ms. Neufer recently completed her certificate program in autism spectrum disorders. Her primary professional focus has been on autistic students and she presently helps facilitate programs to help autistic children do well in school.

62. Because Student was from a bilingual background, Ms. Neufer administered the bilingual edition of the Receptive One Word Picture Vocabulary Test to him. Student's scores on the test put him in the 2nd percentile, indicating that Student's vocabulary skills in Spanish were in the below average range. Ms. Neufer thus found that Student's English language development was stronger than his Spanish language skills.

63. Ms. Neufer administered the CELF-4 to Student in English. The scores she obtained from Student had many similarities to those obtained by Ms. Adolph on the same test. For example, Student scored in the 9th percentile for total word classes on both tests. Student's total test score for receptive language was in the 39th percentile on both tests as well. However, while his total expressive language score was only in the 4th percentile on the test administered by Ms. Neufer, the results of Ms. Adolph's

administration of the CELF-4 showed Student's total expressive language score to be in the 23rd percentile.

64. Ms. Neufer also assessed Student's language processing abilities using the Test of Auditory Processing Skills -3 (TAPS-3). On the TAPS-3, Student scored below average in subtests number memory reversed, sentence memory, and auditory reasoning.

65. Additionally, Ms. Neufer assessed Student using the Test of Pragmatic Language – 2 (TOPL-2), which measures the purpose or function of communication. The test is used to identify students who have needs in the areas of social language. During the test, Student often left his seat and had to be reminded to return to the testing table. He also sometimes asked to have items repeated in an effort to understand the person's communicative intent. Student also had difficulty during the test asking a question to obtain or clarify information and demonstrated difficulty with appropriate conversational strategies. Ms. Neufer found that Student had difficulty using language to repair social errors, to inform, to explain, to describe, or to regulate situations. She also noted that he had difficulty understanding visual, gestural or nonverbal social cues. He was not able to understand abstractions, proverbs, metaphors, figurative language, or idioms.

66. Ms. Neufer's overall impressions of Student were that he presented with a disorder in receptive and expressive language. She found that deficits in the areas of pragmatic language, auditory reasoning, and expressive vocabulary will cause Student difficulty learning and functioning in a general education classroom without support of specialized education programs. She found that Student would benefit from direct teaching of language skills in a one-on-one program such as speech therapy with small group sessions added to attain carryover of skills. Ms. Neufer recommended that Student's goals should focus on pragmatic language, which she then broke up into 10

separate categories. She recommended that Student receive a minimum of two, 30-minute SL sessions a week in addition to consultation between his instructors.

67. Ms. Neuffer's assessment did not include observations of Student at school, or interviews with any of his teachers. She stated that she normally conducts observations of students as part of her assessment process because that is an important part of the assessing a student and developing goals for him. However, she did not have enough time in Student's case to observe him.

DID THE DISTRICT'S OFFER OF PLACEMENT AND SERVICES AT THE IEP MEETINGS OF JANUARY 14, 16, AND 26, 2009, AS MODIFIED BY THE DISTRICT'S CONCESSIONS AT HEARING, CONSTITUTE A FAPE? (ISSUES 2 AND 4 – 20)

Student's Unique Needs

68. There is no dispute among the parties that Student is on the autism spectrum and that he has unique needs concurrent with that finding, primarily in the areas of reading comprehension, written language, social communication, and speech and language. The disagreement between the parties lies in the extent of Student's deficits and how best to address them.

69. As discussed in detail in this ALJ's decision is *Case I*, the District made an interim offer of placement to Student when his Parents registered him in the District approximately August 25, 2008. The interim offer included placement in a sixth grade general education classroom, the provision of a one-on-one instructional aide during Student's entire school day, 30 minutes a month of consultation between Student's general education teacher and the RSP teacher, and 30 minutes a month of consultation between Student's general education teacher and the SLP. Several accommodations were also implemented for Student. With the exception of failing to provide two-hours a day of after-school reading intervention at the Cullinan Center, and failing to provide all the AT Student had previously had access to, the District implemented the IEP Student

brought from FUSD. In her Decision in *Case I*, the ALJ found that 30 minutes a month of RSP consultation was not enough intervention to meet Student's unique needs in written language and reading comprehension. Since Parents have not agreed to any portion of the IEP offers made by the District during the 2008 – 2009 school year, the only IEP that the District has implemented during that time has been its interim offer of placement.

70. This ALJ issued her Decision in *Case I* on June 24, 2009. The prehearing conference (PHC) in the instant case was held on July 1, 2009. In light of the ALJ's Decision in *Case I*, the District made certain concessions at the PHC, to wit, that the District's offer of 60 minutes per month of RSP consultation to Student to address his written language and reading comprehension needs was not sufficient. Instead, in light of the Decision, the District proposed that Student would receive FAPE through the receipt of RSP small-group instruction during one 50-minute class period a day, five days a week. At hearing, the District clarified that the RSP instruction would be provided to Student during an elective period, so that Student would continue to receive his normal one-period a day of English Language Arts.¹⁰ Furthermore, in light of the ALJ's Decision, and the fact that an entire school year had elapsed, the District also offered Student compensatory education in the form of 175 hours of one-on-one individualized instruction by a credentialed special education teacher after school. Based upon these concessions, the ALJ informed Parents that part of their burden of proof at hearing was to counter the District's contentions that its proposal of 50 minutes a day of RSP

¹⁰ Student promoted from sixth grade in elementary school to seventh grade at intermediate (or middle) school at the end of the 2008 – 2009 school year. All references to his future schooling are therefore in the context of the periods of instruction at the District intermediate school.

prospectively offers Student a FAPE and that its offer of 175 hours of individualized instruction compensated Student for the lack of FAPE found by the ALJ in *Case I*.

Procedural Aspects of FAPE

71. A school district must comply both procedurally and substantively with the IDEA. While not every procedural flaw constitutes a denial of FAPE, procedural flaws that inhibit a student's right to receive a FAPE, significantly prevent a parent's opportunity to participate in the IEP process, or cause a deprivation of educational benefit to a student, will constitute a substantive denial of FAPE. The IDEA provides that an IEP must contain a statement of the current levels of educational performance, measurable annual goals, and a means to measure progress towards the goals. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP in order to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals. The failure of the IEP to include the required elements is a procedural violation of the IDEA. An IEP that is not properly formulated may also constitute a denial of a FAPE if the IEP thereby fails to address the student's unique needs, or is not reasonably calculated to provide the student with some educational benefit.

72. Between November 2008, and January 2009, the District assessed Student in all areas of suspected disability. Pursuant to the assessment plan signed unconditionally by Mother on November 6, 2008, the District administered seven assessments to Student in the following areas: intellectual development, social/emotional/adaptive/behavior, academic achievement, SL, OT, AT, and health. Once the assessments were completed, the District convened an IEP meeting on January 14, 2009, to develop an educational program for Student based upon the results of the assessments. The meeting was continued on January 16, 2009, and on January 26, 2009, at which time the District made its complete IEP offer to Student. The team reconvened

on February 12, 2009, at Parents' request so that Parents could verbally respond to the District's IEP offer. The District gave adequate notice of the meeting to Parents and provided Parents with their procedural safeguards. Mother attended all the IEP meetings; Father attended all but one. There is no contention that any required IEP members failed to attend the meetings.

Did the District Violate Parents' Procedural Rights by Failing to Allow them to Meaningfully Participate in the IEP Process and/or by Predetermining its IEP Offer? (Issues 2, 5, 6, and 20)

73. When a child has been found eligible for special education services, the mechanism for determining appropriate services is the IEP team meeting. Parents are an integral part of the IEP team, and their opinions and concerns must be addressed and considered by the IEP team. If a district predetermines the offer of placement it prevents the student's parents from participating in the IEP process. Student contends that the District predetermined its offer to Student at meetings held without Parents prior to the first IEP meeting on January 14, 2009. Student also contends that the District did not permit Parents to meaningfully participate in the IEP meetings because although District staff listened to everything Parents had to say, the District did not question Parents about their concerns and did respond to Parents' concerns by adopting proposals they made. The weight of the evidence does not support Student's position in either regard.

74. The IEP team meetings took place over approximately 13 hours. Although program specialist Lisa Hansen met with District IEP team members Wendie Huerta, Lindy Adolph, Anna Burley, and Amanda Fisher prior to the first IEP meeting on January 14, she and the other District team members persuasively testified that Ms. Hansen met separately with each only to confer with them about each member's input into Student's IEP, not to predetermine the final contents of Student's IEP. The IEP document which the District brought to the meeting was merely a draft which underwent significant changes

based upon input from Parents and based upon the IEES Parents shared with the District.

75. The draft IEP, which is District's exhibit 43, was typewritten on a District computer program to generate IEP documents. The draft includes the many changes the IEP team made based upon input from all team members, including Parents. The changes are all apparent since they were hand-written on the draft during the IEP meetings. Based upon Parents' input, the team added additional information concerning Student's educational background and added additional Parent concerns on Page 2, entitled "Present Levels of Academic Achievement and Functional Performance." Additional vocational information was added to page 9 based upon Parent input as well. On the Special Factors page (page 11 of the draft), the IEP team added information regarding the fact that the team had confirmed Student's status as an English Language Learner (ELL) and that English Language services would be provided by Student's general education teacher to address his status as an ELL. This information was clarified at the January 14 meeting and included based upon Parents' clarification that they still wished Student to be considered an ELL. Additionally, information on the Special Factors page was modified regarding the goals the team would develop for Student. The team based the modifications on input from Parents and on information and recommendations from the SL IEE administered by Susan Neufer, Student's independent assessor.

76. The IEP team also made several changes to the draft goals for Student based upon discussions with Parents and information gleaned from Student's IEES. For example, the baseline for Student's inferencing goal was reworded to better reflect his present levels in that area. Additionally, the team changed the goal to measure Student's progress based on his independent selection of reading material rather than

based upon sixth-grade reading materials since discussion with Parents and other team members indicated that Student was still not reading at a sixth grade level.

77. The team made several changes to the draft of Student's reading goal by adding the California reading standard to which the goal corresponded and by adding information on how the goal would be measured. Additionally, the team, after discussion with Parents and District team members, added that the individuals responsible for implementing Student's reading goal would include his general education and special education teachers as well as AT specialist Amanda Fisher, who would consult with Student's teachers as to any AT Student needed in order to meet the goal's objectives.

78. Based upon Parents' input and their discussions with the District team members, the team completely revised the baseline for Student's goal in reading comprehension and analysis. The team also revised the draft goal to include the use of a graphic organizer to aid Student in meeting the goal, and added the AT specialist as one of the responsible people for assuring that the goal was implemented, based upon discussions between she and Parents and the need for Student to have access to AT if necessary to meet the goal's objectives.

79. Based upon Parents' input and the information found in Student's SL IEE, and in recognition of Student's need to generalize language skills and social skills he would be learning during direct SL services, the team added Student's general education teacher as one of the persons responsible for implementing his social/pragmatic language skills goal. With regard to Student's writing organization and writing focus goal, the team modified the measurable annual goal and also added the AT specialist as a person responsible for implementing the goal, based upon discussions between Parents and the District team members.

80. Finally, the team added a pragmatic language skills goal specifically based upon the information and recommendations in Susan Neufer's SL IEE. Because the goal was new and was added at the IEP meeting on January 14, there were no baselines. Rather, SLP Lindy Adolph was tasked with determining Student's baselines in the area of pragmatic language. After Ms. Adolph determined Student's baseline, the information was added to Student's goal in pragmatics and was included in the final IEP offer the District made to Student.

81. Furthermore, several changes were made to the services the District offered to Student, based upon Parent input and based upon information from Student's IEEs. With regard to the program accommodations and supports offered to Student, the draft IEP added multi-modality instruction, access to word-processing software (rather than to keyboarding device), the use of verbal and visual cuing to prompt Student rather than only visual cuing, and added a system to predict scheduling out of routine as an accommodation for him.

82. Additionally, at the IEP meetings, the team discussed Student's need for specialized academic services (or RSP) to address Student's written language and reading comprehension needs. Student's interim IEP provided 30 minutes of consultation a month between Student's RSP teacher and his general education teacher. At the IEP meetings, Ms. Huerta discussed the possibility of pulling Student out of the classroom for RSP instruction during his school day. However, she, Ms. Hansen and Ms. Puentes each persuasively testified that Parents were adamant that they did not want Student to lose any general education instruction time and therefore did not want him to be pulled out of class. The IEP meeting notes support this testimony. Based upon Parents' position regarding pull-out instruction and in recognition of Student's assessed need for reading and writing intervention, the IEP team at the IEP meetings increased

the amount of consultation between the RSP teacher and the general education teacher from 30 minutes a month to 60 minutes a month.

83. The District's draft IEP had proposed that Student receive 90 minutes a month of direct SL services delivered outside of his general education classroom. Based upon discussion with Parents and based upon the recommendations in their SL IEE and the resulting addition of an SL goal, the District IEP team increased its offer of SL to 120 minutes a month of direct pull-out services in addition to the 30 minutes a month of consultation between the SLP and Student's general education teacher that were already proposed in the draft IEP.

84. The IEP meeting notes, as well as notes independently taken by Parents, are replete with references to Parents' questions, their concerns, their proposals, and their IEES. Parents were encouraged to participate in the IEP during all IEP meetings. District team members asked for their opinions, concerns and questions as the team discussed each portion of the IEP. Parents were asked to give input to the process, to give suggestions to the IEP team and to comment about the all assessments, Student's present levels of performance, the proposed goals and placement. Additionally, Parents presented information from different sources about what they considered to be Student's needs and the best ways to address them, and gave power point presentations in support of their positions. The evidence demonstrates that the District conferred with Parents during the IEP meetings, discussed their concerns and the content of the IEES Parents brought to the meetings, and made significant changes to the draft IEP based upon Parents' input. The District came to the meeting prepared to discuss options appropriate for Student and prepared to make revisions in the IEP based upon Parent input and information obtained from Parents' IEES.

85. Student offered the testimony of his Uncle, who is a teacher in the District, and who also has a child in the District with an IEP, as support for his assertion that the

District has a policy of predetermining IEPS. Uncle's testimony did not support that assertion. Uncle testified that he has attended IEP meetings as a general education teacher participant for many years and that during that time the District has only changed one of the draft IEPS on which Uncle was asked to sign off. However, Uncle did not testify that the parents in those IEP meetings had attempted to institute changes and had been unsuccessful or that the District in those cases refused to consider input from the respective parents. Uncle also testified that he has participated in IEPS as a parent. He testified that he recently wanted the District to add adaptive physical education services for his child but that the District declined to do so. However, lacking from Uncle's testimony was any assertion that he was dissatisfied with any other aspect of his child's IEPS and that the District had consistently failed to consider his views, concerns or input in developing his child's IEPS. His testimony therefore did not advance Student's position that the District has a policy of predetermining each and every one of the many IEPS it develops each year, and did not support any specific contention that the District predetermined Student's IEP.

86. At hearing, Parents appeared sincere in their belief that their concerns were not considered. However, a district is not required to adopt parents' suggestions or implement parents' suggested goals or services if the district does not believe those suggestions are necessary in order to provide a student with FAPE. Here, the weight of the evidence does not support Parents' belief that the District's IEP was predetermined or that Parents were prevented from meaningfully participating in the IEP process. Rather, the evidence supports the District's contention that it did not predetermine Student's IEP and at all times considered the concerns, views, and information provided by Parents during the IEP process. As to whether the District failed to provide Parents with information they required in order to participate in the IEP process, Parents' primary contention appears to be that the District refused to provide them with

descriptions of the methodologies the District intended to employ in the classroom. That contention is addressed below.

Did the District Adequately Address Student's Present Levels of Performance? (Issues 2, 7 and 20)

87. Student contends that the District ignored the assessment data from his own IEES, ignored the results of statewide testing, and ignored the results of classroom based testing when it developed Student's present levels of performance (PLOPS) during the January 14 and 16 IEP meetings. Student also argues that his scores from various assessments and tests, such as the California English Language Development Test (CELDT) and his science score from the California Statewide Tests should have been specifically listed in his IEP. Neither the evidence nor the law supports Student's contentions.

88. There is no requirement that all test scores pertinent to a student be identified separately on an IEP. While an IEP team is free to include as much information as it wishes in an IEP, the law only requires certain defined criteria to be addressed on the IEP. This includes a statement of the student's present levels of academic performance (generally referred to as present levels of performance or PLOPS), including how the student's disability affects his or her involvement and progress in the general education curriculum; a statement of measurable annual goals; a description of how the student's progress toward meeting the annual goals will be measured and when periodic reports on the student's progress towards the goals will be provided; a statement of the special education and related services and supplementary aides and services the student will be provided; an explanation to the extent the student will be not be participating in the general education curriculum; a statement of any accommodations and/or alternate assessments necessary for the student; and the projected start date of the services to be provided, as well as the anticipated frequency,

location, and duration of the services. The District's January 2009 IEP met and exceeded these requirements.

89. Student takes issue with the fact that his science score from state testing results in spring 2008 were not specifically listed on his IEP. Ms. Huerta credibly testified that she was aware of the score just as she was aware of Student's math and language scores, but merely forgot to list it on the IEP as she had the other scores. Similarly, the District did not list Student's scores from the CELDT or the scores from his IEES. However, in all cases, the full IEP team, including Parents, discussed the scores, what the scores implied as it related to Student's needs, and how the scores impacted Student's PLOPS. Additionally, all test scores, including those from Student's IEES, are documented and the documents are part of Student's records. It was not necessary or required that the scores be listed separately on the IEP.

90. Nor is there any evidence that the District either misstated Student's present levels or failed to adequately address them. To the contrary, the IEP team spent hours of time during the IEP process reviewing all of Student's assessment and test results, including his IEES, all of which is documented in the IEP notes. Parents testified at hearing and the evidence supports the conclusion that Student's assessment results and identified areas of need from his IEES were fairly consistent with the District's assessment and testing results. The IEP team based its statement of Student's present levels on all assessment results, including the IEES, on input from Student's teachers, and on input from Parents. In determining Student's unique needs and thereafter developing goals for him, the District considered all information it had obtained itself and all information provided by Parents, including all assessment and test results. The District was not required to do more than that when considering and developing Student's present levels of performance.

Did the District Develop Appropriate and Adequate Goals and Objectives?
(Issues 2, 8, and 20)

91. Student contends that the District denied him a FAPE because it did not formulate sufficient appropriate academic goals for him at the January IEP meetings. Student contended at hearing that the District should have developed goals in the area of vocabulary, a goal for every genre of writing covered by the California curriculum standards, and separate academic goals for science and social studies because Student scored low in academic knowledge on the WJ-III. In his closing brief, Student asserts that the District should have developed goals for him in the areas of listening comprehension, passage comprehension, and academic knowledge. As stated above, an IEP is required to contain goals that are measurable, including academic and functional goals that will meet the needs of the individual student. However, there is no requirement that every academic subject be addressed by goals in the IEP.

92. The District developed seven goals for Student based upon its assessment data, input from Student's teachers, input from Parents, and review of Student's IEES. The goals covered the areas of inferencing, reading, reading comprehension and analysis, pragmatic, social and pragmatic language skills, verbal expression of cause/effect relationships, and writing organization and focus. Each goal was designed to address Student's unique needs in the areas of written language, reading comprehension, and social pragmatics.

93. Student witness Cheryle Anderson testified that the baseline for each goal appeared correct and that each goal was appropriate and measurable. Student witness Susan Neufer, who is an experienced SLP, also testified that the speech and language goals were appropriate and that the District's baselines matched her own assessment results of Student. Both of Student's witnesses testified that their dispute with the goals was not the content of each, but with the number of goals developed; both would have written more specific goals. However, they also recognized that it is up to a student's full

IEP team to develop an adequate amount of goals, and recognized as well that if a student has a problem with reading comprehension it will affect the student across all academic subjects. Therefore, if the student is provided with goals in reading comprehension which he or she is able to reach, the student will also eventually be successful in other subjects. Neither Ms. Anderson nor Ms. Neufer testified that Student would not be able to access his education or that he would not be able to progress in the curriculum with the amount of goals the District developed for him. Indeed, Ms. Neufer testified that her belief is that great deference should be given to the decisions of a student's IEP team.

94. District IEP team members Huerta, Soemali, Puentes, Hansen and Adolph all credibly testified that the goals were appropriate because they covered each of Student's areas of need and because they were designed to work on the basic pre-requisites Student needed, such as an ability to make inferences from both written and spoken language, before Student could move to more complicated language concepts. They all credibly testified that the California standards and basic vocabulary were subsumed both in the goals as written and in the standard curriculum that Student would receive in his general education classroom. Ms. Adolph persuasively testified that vocabulary would also be included in the goals the IEP team developed for Student in the area of speech and language, which would provide an appropriate context for vocabulary in much the same way that reading and writing would. Therefore, writing separate goals for each area would be redundant.

95. With regard to Student's poor results in the academic achievement portion of the WJ-III, the District IEP members were consistent in their belief and credibly testified that Student's low scores were due not to difficulties he had with the subject matter per se but rather due to his difficulties with reading comprehension and writing. Therefore, the most appropriate manner of addressing Student's ability to learn and

retain information in all academic subjects was to focus on increasing Student's reading comprehension and written language, which is the basis for all aspects of higher level learning. As the witnesses stated, while children start out learning to read, by the time they get to fourth or fifth grade, they are reading to learn. If they cannot read and comprehend the material, they will not learn it, whether it is science, history, or any other subject in which reading is the basis for acquiring information on the subject matter. As an example, the District IEP members pointed to Student's difficulties with mathematical word problems. While Student is concededly at or above grade level in mathematics, he has significant difficulties with word problems. His teacher, Ms. Puentes, accommodated his difficulties by giving Student the key words from each problem and having him focus on them in order to understand the gist of the problem. This served to increase Student's ability to successfully complete word problems in math. Therefore, once Student's reading comprehension abilities are addressed, Student will be more successful in understanding science and social studies.

96. Based on the foregoing, it was not necessary for the District to develop more goals in each of Student's areas of need. The goals the District developed were sufficient in order for Student to be able to be involved in and make progress in the general education curriculum.

Did the District Violate the IDEA by Failing to Discuss and Disclose What if Any Scientifically Based Methods of Instruction Would be Utilized in its January and February 2009 IEPs? (Issues 2, 9, and 20)

97. Parents spent considerable time during the IEP meetings attempting to get the District team members to disclose what, if any, scientifically based methodologies the District intended to employ with regard to Student's instruction. The District took the same position during the IEP meetings as it did at hearing, to wit, that it

had no obligation to disclose the teaching methodologies it intended to use. The District is correct.

98. Parents' contention stems from that portion of the IDEA that states that an IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to a child or on behalf of a child. However, while special education and related services are to be based on peer-reviewed research if practicable, there is no requirement that the methodologies themselves be discussed or disclosed at the IEP meetings. This is even more significant in light of the fact that the District's IEP originally proposed maintaining Student in the general education classroom for all his academic instruction. The District's original offer therefore contemplated that Student would receive instruction through the general education curriculum program rather than a special education program. As stated below, the evidence showed that Student had still not demonstrated mastery of the V & V program even after more than 200 hours of instruction in it from Cullinan. Student had also received about 200 hours of instruction in the Orton-Gillingham reading program from Cullinan yet that had not proven successful, which is why Cullinan switched to V & V in order to address Student's reading needs. It is clear from Student's history with reading programs that his needs were not easily addressed. Student's teachers therefore needed the flexibility to use approaches which they, in their professional capacity, believed might be effective with Student, be it the general education curriculum being taught in Student's classroom, or another method which they felt might be appropriate.

99. While some educators, such as Ms. Neufer, believe it appropriate to identify in a goal the methodologies that will be utilized in a student's program, others, such as Ms. Adolph, believe that it is neither necessary nor appropriate. As the District educators testified, if only a specific methodology is indicated, and it is not proving

successful with the student, the instructors would not have the flexibility to attempt another strategy if the IEP was too specific. The District's position was therefore more persuasive than the position advanced by Student's witnesses. The District did not violate Parents' rights by failing to discuss methodologies at the IEP meetings or by failing to specify them in the IEP document.

Did the District fail to provide prior written notice when it declined to state what scientifically based, peer-reviewed, research-based intervention program and methodology would be utilized in the District's IEP offers of January 14, 16, 26, and February 12, 2009? (Issues 2, 10, and 20)

100. Prior written notice to parents is required any time a district refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. Student contends that the District committed a procedural violation when it failed to give prior written notice of the fact that it would not state which methodologies of instruction it planned to use with Student and failed to give prior written notice of why it was failing to indicate the methodologies. The IEP notes for January 26, 2009, state that the District would provide prior written notice to Parents of its refusal to specifically provide Student with 160-200 hours of V & V. The District never sent out the prior written notice as it indicated it would.

101. However, although the District stated it would send out the notice, it was not required to do so. The issue of whether the District would provide a V & V program to Student either at school or after school at an agency such as Cullinan was discussed in detail at Student's IEP team meetings. The District team members had responded numerous times over the course of all IEP meetings during the school year that they did not believe that Student required an after school intervention program and that they did not believe they were required to provide him with one. The District team members discussed with Parents their belief that the District could adequately address Student's needs through the general education curriculum. The District's recommendation for

placement and services was documented in detail on the IEP which was discussed with Parents and with which Parents were provided a copy. The IEP document itself therefore satisfied any written notice requirement. Additionally, as indicated below in Legal Conclusion 37, the United States Department of Education has specifically stated in its comments to the Code of Federal Regulations that it declined to require public agencies to provide prior written notice when an IEP team refuses to provide documentation of research-based methods. Therefore, the failure of the District to provide prior written notice to Parents did not violate their rights under the IDEA or deny Student a FAPE.

Was the Progress Monitoring of Student's January and February 2009 IEPS Developed to Meet Student's Unique Needs? (Issues 2, 11, and 20)

102. Student believes that the District's IEPS did not provide appropriate methods of monitoring Student's progress in his curriculum. Student specifically believes that using teacher observations as a method of monitoring progress is inappropriate because it is too "subjective."

103. Federal and state law require only that a student's IEP contain a description of how the student's progress toward meeting the annual goals will be measured and a statement of when periodic reports on the progress the student is making toward meeting his or her annual goals will be provided. There is no requirement that a district designate a specific method of monitoring or any prohibition against using teacher observation as one of the methods selected.

104. Student's IEP indicates that his progress in the curriculum would be monitored in a variety of ways. First, the IEP indicates that Student would participate in the California Statewide Assessment program (STAR) and that he would take the tests without accommodations. Student's IEP goals state that each goal would be measured through teacher-charted observation, anecdotal data and/or Student work samples, including his scores on testing. Additionally, Student's IEP indicates that Parents would

be informed of Student's progress through quarterly progress reports. The IEP thus indicates several methods by which the District would first determine and then report on Student's progress. The weight of the evidence therefore does not support Student's contention that the progress monitoring stated in the January 2009 IEP would not meet his unique needs.

Did the District alter Student's assessments and records in order to hide the fact that Student was not making the educational progress reported in his IEPs and educational records during the 2008-2009 school year?
(Issues 2, 12 and 20)

105. Student appears to contend that his teacher and one-on-one aide were altering his grades by doing his work for him, divulging correct answers to him, and/or changing incorrect responses. Student also contends that his teacher, Ms. Puentes, gave him grades that he did not deserve based solely on her subjective evaluation of his work rather than on any objective criteria. However, Student's argument is only supported by his Parents' speculation and not by the testimony at hearing or the documents in evidence.

106. Ms. Puentes, who was Student's sixth grade teacher for the entire year, credibly and expressively testified as to her teaching methods and how she grades all her students. She uses an explicit instruction model for teaching which includes direct instruction as well as guided instruction. Guided instruction involves modeling assignments for her students, generally using some type of overhead projector or the whiteboard. She takes an assignment and goes paragraph by paragraph explaining how the students should approach a similar assignment. Once Ms. Puentes completes her "model," she copies it and distributes it to the students. In another variation of guided instruction, Ms. Puentes again uses an overhead projector but rather than giving her own explicit model, Ms. Puentes discusses the assignment with the class and asks for input from the students. As each gives suggestions, Ms. Puentes writes them down. The

end result is an example of how the students should approach and complete similar assignments. Ms. Puentes then provides a copy of the assignment, which is the product of input from the entire class, to each student. The two assignments which Parents believed had been completed by Student's aide but attributed to him actually were guided practice instruction assignments that had never been intended by Ms. Puentes to be examples of Student's independent work and were never graded or otherwise used to demonstrate Student's progress at school.

107. Parents are correct that Student's aide prompted him on assignments in class as part of the accommodations given to Student by the District to address Student's deficits. For example, at the beginning of the school year, when Ms. Puentes realized that Student had failed a vocabulary test because he was not reading the entire definition for words he was supposed to define from a list at the bottom of the test, Ms. Puentes allowed Student to re-take the test by having his aide read the entire definition to Student. Student then passed the test with a grade of 87 percent. There is no evidence that Student's aide told him the answers or corrected wrong answers given by Student.

108. Hundreds of pages of Student's school work from the 2008 – 2009 school year were moved into evidence. A review of those assignments does not provide any evidence that the work was not the product of Student's own efforts. Student passed many assignments with high grades; others he did not. Ms. Puentes administered four writing prompt assessments to Student during the course of the year. He passed two of them with a score of 3, which is a "passing" or "proficient" score. He passed the other two with a score of 2, indicating that he did not pass or was not proficient in the type of writing assessed on those two prompts. There is no evidence that it was someone other than Student who completed the work on the writing prompts.

109. What is apparent is that Parents disagree with any sort of assistance or prompting that Student's aide provides, at least during the times Student is taking an assessment or test. It is unclear if Parents' disagreement with that type of accommodation extends to their not wanting Student's aide to prompt him on other types of class work, such as assignments and projects that are graded but are not considered "tests" or "assessments." Parents' disagreement with the use of the aide to prompt Student contradicts their position, discussed below, that Student's aide should not be faded and that Student, in fact, requires an aide indefinitely. The question is then presented as to for what, exactly, do Parents believe Student requires an aide? If Parents believe that Student only requires an aide for behavioral issues or to redirect or refocus him so that he remains on task, that is an issue that must be addressed by Student's IEP team. Parents presented no evidence at hearing that addressed the scope of what they believed the duties and responsibilities of Student's aide should have been or should be in the future.

110. In any case, Ms. Puentes persuasively testified that Student's aide only assisted him with prompts and redirection and that the aide did not complete assignments for Student or give him correct answers. Student offered no testimony or evidence to impeach this testimony. Student has therefore failed to meet his burden of proof with regard to this issue.

Substantive Aspects of FAPE

111. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be substantively appropriate, in that it is designed to meet the student's unique needs, is reasonably calculated to enable the student to receive educational benefit, and comports with the student's IEP, and places the student in the least restrictive environment. However, school districts are not required to provide

special education students with the best education available or to provide instruction or services that maximize a student's abilities.

112. Student essentially contends that every substantive aspect of the District's proposed January 2009 IEP is deficient and fails to offer him a FAPE.¹¹ Student contends that he needs more specialized academic instruction than that offered by the District, that the District's proposed accommodations are not sufficient and do not give specific enough notice of when the accommodations will be instituted, and that the District's offer of speech and language services does not address his speech and language and social pragmatic needs. Student also contends that the District's plan to fade his aide is inappropriate, that the AT offered by the District is both inappropriate and insufficient, that the District failed to address his English language needs, and that the District improperly found that he did not require ESY instruction. Finally, Student contends that he has regressed because of inadequacies in all the District's offers of FAPE during the 2008 – 2009 school year.

¹¹ While Student's complaint contends that the District failed to offer him an appropriate placement in the least restrictive environment (LRE), the issue was not litigated at hearing. It is thus unclear what Student's position is in that regard. Student did not offer evidence of what his LRE should be or why the District's original placement or the placement it proposed as a concession were not the LRE for Student. Since it was not litigated, the ALJ does not address the issue of LRE in this Decision.

Did the District fail to offer or provide Student an appropriate placement in the least restrictive environment at the January 14, 16, and 26, and February 12, 2009 IEP meetings? (Issues 2, 4, 13, and 20)

RSP Services (Issues 2, 4, 13, and 20)

113. Student's IEP team met on January 14, 16, and 26, 2009, to formulate his IEP. The offer of placement and services that the District ultimately made to Student consisted of the following: 60 minutes per month of specialized academic instruction through consultation between a special education (RSP) teacher and Student's general education teacher; 30 minutes a week of direct speech and language services on a pull-out¹² basis along with 30 minutes per month of consultation between the SLP and Student's general education teacher; provision of a one-on-one aide, to be faded out pursuant to a designated plan; assistive technology services on a consultation basis both to Student and to his teachers in order to implement his goals; and some 15 accommodations to assist Student in accessing his curriculum.

114. Student maintains that 60 minutes of RSP consultation is insufficient to meet his needs. In his closing brief he states that he requires "direct instruction on how to generate a specified theme or plot, to develop a character's personality, to employ an interesting and engaging prose, and to use mature and appropriate vocabulary" and that he "would benefit from a . . . researched based writing and grammar program focusing on the steps of composing a story, using graphic organizers to sequence his thoughts and with goals that targeted all genres mandated for instruction by the California Department of Education."

¹² "Pull-out" services refer to instruction or a service provided to a student outside of the regular classroom setting. "Push-in" services refer to instruction or a service provided to a student within the regular classroom setting.

115. At the prehearing conference in this matter, as formalized in the prehearing conference order, the District made certain concessions with regard to their offer of FAPE to Student. In light of this ALJ's Decision in *Case I*, the District indicated that it was now offering Student placement in an RSP class for 50 minutes per day, five days a week (an entire class period in intermediate school) for the remainder of the IEP period. The District indicated that it was offering Student placement in the RSP class during an elective period so that Student would still receive his period of English Language Arts instruction in general education in addition to a period of RSP. At hearing, the ALJ frequently discussed with Parents their need to demonstrate that the District's offer of RSP services was insufficient to provide Student a FAPE with regard to his written language and reading comprehension needs. Although Parents spend considerable time at hearing presenting documentary and testimonial evidence regarding Student's unique needs, what the results of his assessments indicated, and the type of reading intervention services Student received in the past, Parents failed to directly address the issue of whether the District's present offer would provide Student with a FAPE.

116. Ms. Hansen and Ms. Huerta addressed the District's new offer of specialized academic instruction. Both credibly testified that, in light of the ALJ's decision in *Case I*, 50 minutes a day in an RSP classroom that offered small group instruction as well as more opportunity for individualized instruction than did a general education classroom would adequately address Student's written language and reading comprehension deficits.

117. For the first time in Student's reply brief, Parents appear to assent to the District's offer. At page 11 of the brief, Student states "Parents will accept that in 7th grade [Student] receive Period 1: Academic Seminar/Direct RSP Specialized Academic Instruction for 60 minutes daily."

118. As discussed below in the section addressing compensatory education, the ALJ agrees with the District that it has demonstrated by the weight of the evidence that 50 minutes a day of RSP instruction and 175 hours of individualized instruction by a credentialed teacher adequately compensates Student for the lack of specialized academic instruction during his 2008 – 2009 school year. In conjunction with the 50 minutes of RSP instruction that Student will receive and the one period a day of language instruction in a general education classroom, Student will be receiving almost three hours of language instruction every day. Given the lack of any evidence to contradict the District's assertion that 50 minutes a day of RSP instruction is sufficient, the ALJ finds that the District's proposal offers Student a FAPE with regard to his unique needs in written language and reading comprehension.¹³

Fading of the One-on-One Instructional Aide (Issues 2, 4, 13, and 20)

119. Parents' position with regard to whether Student requires a full-time one-on-one aide has been inconsistent. During the IEP meetings, Father indicated that he did not anticipate that Student would require an aide once he reached intermediate school. Parents, however, would not consent to the District attempting to fade out the aide. At

¹³ Student also received two hours a week of intensive reading intervention during sixth grade that was provided as part of the general education program to address his reading deficits. Additionally, he received a half- hour of English Language Development intervention pursuant to his status as an ELL. There was no testimony at hearing as to whether Student will receive either or both of these services in seventh grade. Assuming he does, as both are mandated by the California Department of Education due to Student's unique needs outside the context of special education, Student will be receiving from the District almost 20 hours per week of different types of language services.

hearing, Father, without explanation, changed his position and testified that he now felt that it was inappropriate to fade the aide. In contrast, Mother testified that she agreed it would be appropriate to fade the aide during Student's math instruction since he was consistently strong in math. Then, in his reply brief, Student asserted that he requires a one-on-one aide until such time as he no longer meets the eligibility for autism. Student does not offer any explanation for this contention.

120. At the January IEP meetings, the IEP team reviewed the observations of Student by the District assessors as well as discussed Student's classroom behavior and needs with Ms. Puentes. The assessors and Ms. Puentes all agreed that Student was becoming less dependent on the assistance of his aide and was becoming more accustomed to turning to Ms. Puentes for assistance. They discussed the fact that Student was independent out of the classroom and was able to socialize with other children without intervention or assistance from his aide.

121. Ms. Soemali gave compelling testimony in support of fading Student's aide. She stated that it was her professional opinion, based upon her observation of Student, her assessment of him, and interviews with Ms. Puentes, and consultation with Ms. Huerta and Ms. Adolph, that Student would benefit from fading the aide and increasing his independence. Ms. Soemali indicated that it was important to slowly fade an aide rather than pull the aide abruptly from a student; otherwise, "you are setting the student up to fail." It was also important to implement benchmarks to determine whether it was appropriate to proceed to the next step of the fade out plan because the result the IEP team was looking for was not just for Student to be independent, but for him to be independent while maintaining accuracy in his work.

122. The District's plan included four distinct steps. The District proposed benchmarks as criteria for advancement to each step of the plan. It proposed fading Student's aide first during the time he did his daily math and language assignments

which Student already was doing independently. Step two involved fading the aide from instruction during math. In order to progress to step two, Student would have to demonstrate 80 percent accuracy in his daily math and language assignments over a 10 day period of time. Step three would involve fading the aide during physical education and "stack and pack" time. In order to advance to step three, Student would have to first demonstrate 80 percent accuracy in both daily math and language and during math instruction for another 10 day period. Step four of the fade out plan proposed fading the aide during recess and lunch. In order to proceed to step four, Student would have to have no more than one behavioral incident per quarter during physical education or during "pack and stack" time. The benchmark of one behavioral incident during the indicated time periods was based on the fact that Student was generally successful in extra curricular activities, but had had one behavior incident of note during those time periods. Had the fade out plan been implemented, the time the aide spent with Student would have eventually decreased from 1500 minutes per week to 525 minutes per week. The plan did not propose a total fade out of Student's aide. It specifically did not propose fading the aide during Student's language arts period where, due to Student's deficits in reading comprehension and written language, Student was most dependent on the aide.

123. The need to fade Student's aide was intensified by the fact that he was promoting from elementary school to intermediate school. As pointed out by Ms. Soemali, it is fairly easy to hide from other students the fact that an elementary school child has a one-on-one aide since the aide can move about the classroom assisting other children when the assigned special education student is not in need of help. Additionally, teacher's aides are common in elementary school classes and common on the playground. Conversely, it is much more difficult to conceal the fact that a student has an aide on an intermediate school campus. First, aides are not common in the

classroom. Second, students move from class to class rather than remain with one teacher. The presence of an aide following a student from class to class would be fairly obvious to the other children. Ms. Soemali expressed valid concerns that Student would be singled out and teased by his classmates if they realized he had an aide, particularly since teasing is prevalent amongst intermediate school children.

124. The weight of the evidence therefore supported the District's proposal to fade Student's aide during the second half of the 2008 – 2009 school year.

125. Student, however, has promoted from sixth grade to seventh grade. In light of the fact that he is now attending intermediate school,¹⁴ both Ms. Soemali and Ms. Hansen testified that while the fade-out plan the District IEP developed was appropriate at the time it was proposed, it is not suitable for Student now that he is at intermediate school. Ms. Soemali suggested that Student's IEP team meet approximately six weeks after Student began school in August 2009 in order to discuss how he had transitioned and what his present needs were. In light of her recommendations, the ALJ will order Student's IEP team to convene to discuss whether Student's aide should still be faded and, if so, to develop an appropriate plan.

Speech and Language Services (Issues 2, 4, 13, and 20)

126. The IEP Student had while enrolled at FUSD did not include any direct speech and language services. Rather, it provided that Student only receive consultation services between the SLP and Student's general education teacher. Student had not had a SL assessment for many years when he transferred to the District in August 2008 and there was no indication in his IEP that he required direct services. The District therefore

¹⁴ The parties indicated at hearing that Student would start intermediate school in mid to late August, just after the hearing ended in this matter and prior to issuance of this decision.

did not provide any direct services to Student when he enrolled at Ft. Washington. However, the District was aware from prior assessments that Student might have SL needs and therefore included an SL assessment in its assessment plan.

127. Student was assessed by Lindy Adolph on five days in November and December 2008. Ms. Adolph is a speech language specialist and has worked for the District for about 30 years, first as a teacher, then as an SLP. She has a Bachelor's degree in communicative disorders and a Master's degree in speech pathology. She has both a state and a national SLP license. Additionally, Ms. Adolph has a K-12 general education credential and a special education credential to teach communicatively handicapped children. Her duties as an SL specialist include providing SL intervention services to children from preschool through 12th grade, consulting with teachers, parents and outside agencies, being part of IEP teams, assessing and observing students, and providing therapy and intervention. In her career, she has conducted hundreds of assessments. Ms. Adolph's assessment of Student included observations of him in the classroom and during testing, consultation with Student's teacher and other District IEP team members, review of Student's records, review of parent responses to rating scales given to them by Ms. Soemali, and the administration of standardized and informal test instruments.

128. During the testing process, Ms. Adolph observed that Student was pleasant but anxious. He was initially overactive, kept moving around and exploring the room, and kept indicating that he wanted to return to his classroom. Ms. Adolph wrote a testing schedule for Student that appeared to ease his anxieties although he continued to exhibit agitation during the testing process. Ms. Adolph implemented rules for the testing process, to which Student was responsive with occasional reminders. During the testing process Student was often spontaneously verbal and produced random phrases and sentences about varied topics. He intermittently laughed out loud out of context.

129. Ms. Puentes' description of Student to Ms. Adolph conformed to those she had made to the other District assessors. She stated that Student functioned well in her class but continued to need assistance related to reading comprehension that required inferential tasks and written language organization. Ms. Puentes indicated that Student modeled the behavior of the peers nearest to him; when they were on task, he remained on task; when they were acting silly, he did the same. Ms. Puentes told Ms. Adolph that Student's strengths were related to language mechanics (such as punctuation and grammar), math, sports, and structured social interactions. In class, Student was cooperative, somewhat shy, but impulsive, and could become overly excited by topics that interested him. Ms. Puentes indicated that Student had more difficulty related to social communication in a small group setting or in one-on-one settings than he did in larger groups.

130. Ms. Adolph observed Student on two occasions, once during a math lesson and once during a vocabulary lesson. Student's aide was present during both observations but was interacting with and assisting other students who had questions. Student maintained his focus during both lessons and raised his hand appropriately to participate. He demonstrated appropriate smiles and social conversation with his peers and responded positively to reminders from them and his aide to maintain his focus. Student followed the teacher's directives to the class which related to the lesson and to what to do with the papers when the lesson ended.

131. Ms. Adolph also conducted an informal oral-motor examination of Student. Student's speech was 90 percent intelligible and his voice quality, pitch, intonation and fluency were within normal limits for a boy of his age. However, Student's rate of speech was often very rapid, and he spoke in a "choppy" style.

132. The first standardized test Ms. Adolph administered was the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4). It is a comprehensive

standardized assessment measure used to assess a student's general ability to understand and use verbal language. During the testing, Ms. Adolph noted that Student appeared familiar with the tasks and was able to predict which tasks were coming next. When he finished, Student stated that he had taken the same test the week before at the house of his Mother's friend. Although Ms. Adolph tried to determine whether Student had received a private assessment using the CELF-4, she did not discover that SLP Susan Neufer had assessed Student the week before Ms. Adolph did until after Ms. Adolph had prepared her assessment report.

133. Student's scores on the CELF-4 reflected that he was in the average range for core language skills, receptive/expressive language, and language memory skills. However, his skills related to language content were below average.

134. Because of the possibility that Student had recently been given the CELF-4 by another assessor, Ms. Adolph was concerned that his results on her administration of the assessment might not be valid. She therefore administered another standardized test to him, the Comprehensive Assessment of Spoken Language (CASL), which is a norm-referenced oral language assessment battery of individually administered core and supplementary tests. Each test of the CASL can be used independently to identify language difficulties, or test results can be combined to form composite of index scores. Ms. Adolph administered the following subtests of the CASL: antonyms (in which Student scored in the 12th percentile; grammatical morphemes (in which Student scored in the 34th percentile); sentence comprehension (in which Student scored in the 9th percentile); non-literal language (in which Student scored in the .2 percentile); and pragmatic judgment (in which Student scored in less than the .1 percentile).

135. Student's scores on the CASL demonstrated average skills related to awareness and usage of grammatical morphemes, while his usage of antonyms and sentence comprehension was below average. Student demonstrated great difficulty

related to interpretation of non-literal language and pragmatic judgment; his scores in those subtests were in the very low range.

136. Ms. Adolph also administered to Student the Test of Problem Solving, a standardized measure in which a student is shown colored photographs of 18 social scenes and then asked questions about them. The test assesses the student's ability to make inferences, sequence information, respond to negative questions, problem solve, predict, and determine causes. Student scored at the first percentile for his age on this test. He struggled with appropriately inferring information from pictures and recognizing appropriate responses.

137. As part of her assessment, Ms. Adolph observed Student for examples of reciprocal social interaction. She noted that he appropriately used eye gaze combined with language to initiate or terminate reciprocal social interaction. Student had a happy expression on his face at all times during the assessment process, even when the topics discussed related to other emotions. Therefore, Student's language production and nonverbal communication are rarely linked. Additionally, Ms. Adolph noted that Student's verbal comments consists more of a monologue related to his own experiences rather than using interacting language with another person or asking questions. Student, however, did demonstrate several spontaneous and creative activities or comments during Ms. Adolph's conversations with him.

138. Ms. Adolph also collected a conversational language sample from Student. Student was very verbal during this portion of the assessment and demonstrated social smiles and fleeting eye contact. However, he sometimes laughed out of context and, when queried, could not explain why. Student was able to maintain a topic of conversation through two to three exchanges, but then would change the topic abruptly without appropriate transitions. Sequencing and organization of targeted information was difficult for him and his sentences were sometimes incomplete and fragmented. At

times, in response to a question for more or different information, Student would continue on the topic he desired rather than responding to the specific question. Additionally, Student would often refer repetitively to specific time frames, such as referencing something he had done at 4:37, rather than rounding off the number. Student was inconsistent in his language, sometimes using immature phrasing and, at other times, using well-developed vocabulary when describing a photograph.

139. Ms. Adolph concluded that Student clearly demonstrated deficits related to social/pragmatic language functioning, which interfered with his performance and relationship with peers and adults in the school setting. She also noted that information provided by Mother on the SRS indicated that Student scored in the 8th percentile for his age related to social skills. On the communication domain of the Vineland teacher rating scales, Ms. Adolph noted that Ms. Puentes had scored Student in the 9th percentile for that area of assessment.

140. In contrast, Ms. Adolph noted that Student demonstrated an ability to initiate interactions or activities that were not routine, such as informing her when he arrived at her classroom that he was there for testing. Student said goodbye when he left the classroom without being prompted. This is the same type of appropriate social interaction Ms. Adolph observed in Student on the playground. However, Student still struggled with comprehension of abstract, inferential language and humor, which made it difficult for him to understand non-concrete or abstract concepts in materials he had to read. Similarly, Student's concrete interpretation of language has the potential of interfering with social relationships as the language of his peers becomes more sophisticated.

141. Finally, Ms. Adolph noted that Student demonstrated an emergent ability to consider and understand the perspective of others. He was able to correctly describe

various emotions in photographs, but had a difficult time responding to questions about his own emotions.

142. Overall, Ms. Adolph found that Student had skills in the average range related to overall receptive/expressive language and core language development, language memory and grammatical awareness. He demonstrated deficits related to language content, social/pragmatic language skills, and interpretation of non-literal language.

143. Based upon her assessment, and in conjunction with input from the other IEP team members, Ms. Adolph originally recommended that Student receive 90 minutes per month of direct SL services in addition to 30 minutes per month of consultation services between herself, or another SLP, and Student's teacher. However, after reviewing Student's IEE from Susan Neufer, she and the other members of the District IEP team developed a pragmatic goal for Student and increased their recommendation for direct SL services to 120 minutes per month based upon the addition of the new goal. As indicated above, Ms. Neufer recommended that Student receive a minimum of two, 30 minutes SL sessions a week.

144. Ms. Neufer and Ms. Adolph have equal educational backgrounds and amount of experience. Both were knowledgeable about their field of speech language pathology and about the assessment process. Ultimately, however, Ms. Adolph's recommendations regarding Student were the more persuasive. Significantly, Ms. Adolph had been able to observe Student in the classroom and on the playground and at lunch not only during her formal assessment of him, but also during the three months prior to her assessment when she was providing SL consultation to Ms. Puentes and Ms. Huerta. Observation of a student may not always be essential to the assessment process. For example, if cognitive ability was the only area being assessed, an observation of a student might not be essential to overall findings and recommendations. However,

given Student's diagnosis on the autism spectrum, and the core deficits he has in social and pragmatic language, observing how he interacts with teachers and peers and generally how he navigates and accesses his school environment, is essential in making final conclusions and recommendations about Student's unique needs and how to address those needs. Ms. Neufer's findings and ultimate recommendations were made in the vacuum of a formal testing atmosphere without any input from observing Student in his normal school environment and seeing how well his relationships impacted his ability to function there. Her findings and recommendations are therefore less persuasive than those of Ms. Adolph, who had the advantage of having had observed Student at school for three months.

145. Additionally, Ms. Adolph pointed out that recent research in the field of social pragmatics for autistic children has shown that the pull-out model of providing SL and social skills services has demonstrated disappointing results regarding the progress of the students in those areas. Rather, the studies found that it was more important to focus on implementing in the educational setting skills taught during direct services. Focusing on the transfer of the skills to a meaningful context was the most significant factor in addressing the students' pragmatic language deficits. For that reason, Ms. Adolph felt that 30 minutes a week of direct services, along with consultation with the general education teacher, would best address Student's needs.

146. Ms. Adolph also pointed to inconsistencies in Ms. Neufer's assessment report. In particular, Ms. Neufer had found that Student had a receptive language deficit. However, both she and Ms. Adolph obtained the same score for Student on the CELF-4 in expressive language: a score in the 39th percentile, which is in the average range. There is no basis, therefore, for Ms. Neufer's finding that Student has a receptive language deficit.

147. Therefore, the weight of the evidence supports the District's position that 120 minutes a month of direct SL services in addition to 30 minutes a month of SL consultation with Student's teacher would have provided Student with a meaningful benefit in the area of speech and language at the time the IEP was developed.

148. However, an issue left unaddressed at hearing was how, if at all, Student's transition to intermediate school would affect the District's offer of SL services. Discussion at hearing indicated that Student will have more than one teacher at middle school. It is unclear from the IEP if the District's offer of 30 minutes a month of consultation by the SLP will signify that 30 minutes consultation will be provided to each teacher, or if the 30 minutes will be divided between them. If Student has six different teachers that would mean each teacher would receive only five minutes of consultation per month. Based upon the testimony of Ms. Soemali, Ms. Adolph, and Ms. Pafford, the consultation portion of Student's SL services is a significant and necessary element of the District's offer of services. Five minutes a month does not appear to be sufficient time to address Student's needs. Based upon this ambiguity, the ALJ will order the parties to convene an IEP meeting to clarify how and to what extent the District will implement the consultation portion of Student's SLP services at the intermediate school.

Do the Accommodations, Modifications, Supports, and Supplementary Aids and Services in Student's IEP Meet His Unique Needs? (Issues 2, 14, and 20)

149. The District offered Student 15 accommodations in the January 2009 IEP offer as follows: provide visual enhancement of concepts; frequent checks with Student to see if he is understanding; reduce the length and complexity of directives when needed; provide more time for written and verbal responses when appropriate; preferential seating; break large assignments into smaller tasks; multi modality instruction; extra time on tests and assignments as needed; reduced number of items

where appropriate; access to word-processing software or to a computer as appropriate; support use of visualization to support directions and instructions; summarize topics of discussion and cue for what to listen for; use of visual and verbal cuing system to prompt Student to remain on topic; provide a list of key words and phrases specifically for solving math word problems; access to word processing software with spell and grammar check tools; and a system to predict scheduling out of routine.

150. It is unclear what Student objects to regarding these accommodations. To the extent that he objects to the fact that the IEP indicates that duration and frequency of the accommodations will be “as needed” and “when needed,” respectively, rather than specifying exact duration and frequency of the services, Student’s objection is not well-taken. As Dr. Glidden, Student’s expert, testified, accommodations are specifically meant to be implemented only when necessary. Dr. Glidden acknowledged that his use of the term “if necessary” to describe the frequency of the accommodations he recommended was the same as the District’s use of the terms “as needed” and “when needed.”

151. To the extent that Student argues that some of the accommodations, such as that of the use of predictive software, were not necessary for him because he has excellent spelling skills, his objection is equally unpersuasive. As stated above, all accommodations are indicated as being implemented only as needed. Therefore, if the need for a particular one does not arise, it will not be applied to Student. Student has failed to meet his burden of proof that the District’s proposed accommodations fail to meet his needs or fail to offer him a FAPE.

Did the District fail to provide adequate supports and services emphasizing special education and related services designed to meet Student's unique needs and prepare him for employment and independent living in its IEP offers of January 14, 16, 26, and February 12, 2009? (Issues 2, 15, and 20)

152. It is unclear what exactly Student means by this allegation. However, to the extent that it means to state that the District's January 2009 IEP failed to offer Student a FAPE, it is redundant of issue 20 and, specifically, of all the other issues that Student raised in his complaint, as reframed at the PHC and on the first day of hearing. As concluded throughout this Decision, and except as discussed below with regard to ESY, the District's January IEP, as amended by its concession at hearing that Student requires 50 minutes a day of RSP services in addition to a class period of general education language studies in order to address his written language and reading comprehension needs, provided Student with a FAPE. To the extent that this issue means to argue otherwise, Student has failed to meet his burden of proof that the District's IEP, as amended, will not provide him with educational benefit.

Did the District fail to address Student's English language development levels and his culturally linguistic language needs in its IEP offers of January 14, 16, and 26, 2009? (Issues 2, 16, and 20)

153. Student contends that due to his status as an English Language Learner, the District should have included specific goals to address his English language needs in his IEP. While Student is correct that he continues to qualify for English Language Development instruction, he has failed to demonstrate that he needed goals in that area in order to access the general education curriculum and in order to receive a FAPE.

154. As found by the ALJ in *Case I*, Student's Parents contributed to any initial confusion regarding Student's status as ELL when Father wrote in the initial English language survey that Student learned English when he first learned to speak, that Student most frequently used English at home, that he most frequently spoke English to

Student, and that English was the language most often spoken by the adults at home. At the January 2009 IEP meetings, Parents clarified that Student had, in fact, learned Spanish as his first language and that they wanted him to continue to be eligible for the program and receive ELD instruction. ELD standards, however, are state-mandated, and Student is entitled to ELD instruction whether he is a general education or special education student. Once the District became aware of Student's continued status as ELL, it implemented ELD instruction which continued until the end of the 2008 – 2009 school year. To the extent Student contends that his ELD instruction did not conform to state standards that issue is not within the jurisdiction of OAH in a special education due process hearing.

155. To the extent that Student believes that the failure to write specific ELD goals for him denied him a FAPE, Student has failed to meet his burden of proof. The flaw in Student's argument is that there is no evidence that he requires ELD instruction in order to access his education. To the contrary, all evidence indicates that he has very weak language skills in Spanish and that his English language skills are much stronger than his language skills in Spanish. That point was made by Dr. Corbett in her August 2006 assessment of Student and was emphasized by Patricia Carpio, Student's fifth grade teacher at FUSD, during her testimony in *Case I*. The same point was reiterated by Susan Neufer in her SL assessment of Student in November 2008. The weight of the evidence therefore supports a finding that once Parents clarified Student's eligibility for ELD services, the District immediately moved to assess Student and provide the state-mandated instruction. The District appropriately addressed Student's English language needs throughout the time period covered by this decision. Therefore, even assuming that it was a procedural error to fail to include ELD goals in his IEP, Student has not shown that Parents were prevented from participating in the IEP process or that his right

to a FAPE was impeded, or that he suffered a deprivation of educational benefits because the goals were not included.

Did the District unilaterally determine that Extended School Year (ESY) services in 2009 were not necessary for Student? (Issues 2, 17, and 20)

156. Student basically contends in this issue that the failure to provide him with special education services during the 2009 ESY denied him a FAPE. The District answers that the issue of ESY was fully discussed during Student's IEP team meeting on January 26, 2009 and that the District IEP team determined that Student did not require ESY in order to advance appropriately in meeting his annual goals or to be involved in and make progress in the general curriculum.

157. The flaw in the District's argument is that it is based upon the offer of FAPE made in January 2009, in which the District determined that Student's needs, with the exception of pull-out for direct SL services, could be met fully in the general education environment and that Student thus did not need specific special education intervention. The District's argument fails to account for two intervening events: 1) the ALJ's decision in *Case I* finding that the District's consultation model to address Student's written language and reading comprehension needs failed to provide him with a FAPE, and 2) the District's subsequent concession that Student needed 50 minutes a day of RSP special education services in order for his unique needs to be met.

158. The District provides summer school sessions only to those general education students who are having difficulties in class. Therefore, it is not offered to those students who are doing well. During the spring semester of the 2008 – 2009 school year, Ms. Puentes sent home a notice to Parents advising them that Student was a candidate for summer school. Parents chose not to enroll Student in the summer school program.

159. Since Student was not receiving special education services and because he was given the opportunity to go to summer school in the general education program, the District did not believe that Student required special education ESY. However, the District now concedes that Student should have been in a special education RSP program. Had he been receiving the program during the school year, he would have been eligible for special education ESY. Since the District believed that Student required general education summer school, and offered it to him on that basis, the inference is that he required summer school in order to prevent regression during the summer vacation month. The failure to provide Student with special education ESY therefore denied him a FAPE.

Did the District fail to offer necessary assistive technology (AT) equipment to Student in its IEP offers of January 14, 16, 26, and February 12, 2009? (Issues 2, 18, and 20)

160. It is the Student's position that the AT offered to Student was not adequate to address his needs. Student asserts that while the AT offered to him may have been appropriate, with the exception of prediction software, it was not sufficient. As he did in *Case I*, Student argues that he required specific software and advanced AT, such as a SmartBoard, in order to receive FAPE. Student has failed to meet his burden of proof in that regard.

161. AT specialist Amanda Fisher conducted an assessment of Student on December 3, 2008, as part of the District's multidisciplinary assessment of Student. Student does not argue that Ms. Fisher's assessment was inappropriate or somehow invalid. Rather, he disagrees with her recommendations.

162. Ms. Fisher has both a Bachelor's degree and a Master's degree in speech language pathology. She is also a credentialed AT specialist. Her duties include helping students access their curriculum through AT, which can be as simple as a pencil grip or

as complicated as a communication device, and consulting with teachers to determine the student's needs and how best to address those needs in the classroom.

163. Her assessment of Student included observations of Student in his classroom and during his OT assessment, and interviews with Student's teacher. As part of the OT assessment, Student was directed to write a paragraph using a pencil. He was able to produce a six-sentence paragraph in five minutes. Student's handwriting was legible with consistent letter size. Ms. Fisher then gave Student a word-processing device that had text prediction capabilities and text to speech features. Ms. Fisher demonstrated the features to Student who was then able to use them as directed. He typed a four-sentence paragraph which included a title. Student indicated that he did not wish to use the special features Ms. Fisher had demonstrated. Based upon her observations of Student, the OT assessment, her conversations with Ms. Puentes, and the findings of the other assessors, Ms. Fisher concluded that Student's greatest area of difficulty was the organization of his thoughts for written expression. Ms. Fisher recommended in her report that Student use graphic organizers to increase organization of his written expression and that he have access to word processing programs, such as text prediction software, for extensive writing assignments. The IEP team, in consultation with her, then added additional accommodations, as discussed above, and added Ms. Fisher as a person responsible for implementing Student's classroom goals, so that she could consult with Student's teacher in addressing his classroom needs.

164. Other than Parents' assertions that Student required the same AT he was given at FUSD in order to access the curriculum, Student provides no evidence to support his contention. Rather, the evidence supports the District's position that the accommodations it offered Student, in conjunction with the access to computer software as needed, and consultation by Ms. Fisher with Student's RSP and general

education teachers, would meet Student's needs. Certainly, the advanced assistive technology proposed by Parents as provided to Student by his former school district would maximize Student's ability to access his curriculum, as it would for any child. However, the District is not required to maximize or optimize Student's educational experience. It must only provide him a program that is reasonably calculated to provide him with educational benefit. The program the District developed, as amended by its concessions at hearing, including the AT consultative services, accommodations, and access to computer software it proposed, met that standard.

DID STUDENT SUFFER REGRESSION DURING THE 2008 – 2009 SCHOOL YEAR?¹⁵
(ISSUE 19)

165. Student contends that he did not make academic progress during the school year. It is unclear in what context Student makes this allegation. If it is in relation to the August 25, 2008 interim IEP - the only IEP implemented by the District since Parents declined to consent to implementation of any portion of the other IEPs offered by the District during the 2008 – 2009 school year – the District has already conceded that 30 minutes of RSP services were not sufficient to offer Student a FAPE. Additionally, as part of its interim offer, the District had implemented Student's IEP from FUSD which did not include any other direct related services, so Student did not have the benefit of direct SL intervention. If Student's argument is made in the context of the District's January 2009 IEP offer, that offer was never implemented. Therefore, the District never provided Student with the additional 30 minutes of RSP consultation services offered in that IEP (for a total of 60 minutes a month). Nor was the District able to implement the

¹⁵ In its briefs, the District characterizes this issue as only encompassing its January and February 2009 IEP offers. However, the PHC order of July 1, 2009, indicates that this issue encompasses all IEP offers made during the 2008 – 2009 school year.

30 minutes a week of SL direct services it offered, implement the additional accommodations offered, or implement the new goals proposed. Student's argument concerning lack of progress can therefore only be viewed in the context of his interim IEP, which the District concedes was insufficient. In light of that concession, the only material issues are whether the District's January IEP offer, as amended by its concession at hearing offering additional RSP services, was appropriate given the information known to the District at the time, and whether 175 hours of individual instruction is adequate to compensate Student for his loss of FAPE during the 2008 – 2009 school year.

166. However, assuming that lack of progress is at issue, the evidence demonstrates that Student made more than minimal progress in most areas during the school year. Student's grades indicate that he was accessing his curriculum and receiving passing grades or higher in all classes. Student's grades at the end of the school year were: A- in Math; B- in Science; C- in Social Science/World History; A+ in Spelling; A in Language; and a C- in Reading. A review of Student's schoolwork for the year (where legible), including homework assignments, supports these grades. Although Parents contend that Student received assistance from his aide in completing his assignments, the evidence does not support that the aide did more than prompt Student. There is no evidence that the aide fed Student the answers to his assignments or told Student the answers to incorrect responses. Nor is there any evidence that anyone other than Student completed his homework assignments.

167. A comparison of Student's scores on assessments done by LMB from January 2008, and January 2009, also indicates progress in some areas albeit lack of progress in others. On the Peabody Picture Vocabulary Test, Student advanced from the third percentile to the 13th percentile. On the Detroit Test of Learning Aptitude (DTLA) - word opposites, Student remained in the fifth percentile. On the DTLA – verbal

absurdities, Student's mental age (the only type of score indicated for the January 2009 testing) decreased from 6.3 to 5.3. On the DTLA – oral directions, Student's score decreased from the 16th percentile to the fifth percentile. On the Woodcock Reading Master Test – word attack, Student's score decreased from a 9.3 grade level to a 6.9 grade level. On the Slosson Oral Reading Rest, Student's scores decreased from an 8.1 grade level to a 7.6 grade level. On the Wide Range Achievement Test, Student's spelling score decreased from a 12.2 grade level to a 10.1 grade level. However, in math computation, Student's score increased from an 8.7 grade level to above a 12.9 grade level. On the GORT, Student's scores were similarly mixed. In rate of reading, Student's scores remained at the 6.4 grade level. In accuracy of reading, Student's grade level decreased from 6.4 to 5.4. In reading fluency, Student's scores decreased from a 6.2 to a 6.0 grade level. However, most interesting is Student's score on the GORT in reading comprehension, his area of need, which increased from a 2.2 grade level to a 3.7 grade level. On the reading passage portion of the GORT, Student showed an increase in reading passages at the fifth grade level, where he increased from a 75 percent score to a 100 percent score, as well as on the sixth grade reading passage, where he increased from 38 percent to 50 percent, and on the tenth grade reading passage, where Student increased from 0 percent to 25 percent. On the LMB Auditory Conceptualization Test, Student's scores increased from the 23rd percentile to the 27th percentile (an increase from a 4.0 grade level to a 4.7 grade level). Student's scores decreased on the LMB Informal Test of Writing. Unfortunately, no one from LMB testified to discuss the implication of its assessment. However, a review of all the subtest scores described above indicates that Student progressed in many areas, particularly with regard to reading comprehension on the GORT and the LMB Auditory Conceptualization Test, in spite of not receiving any direct special education reading intervention from the beginning of the school year until the time LMB assessed him.

168. Similarly, although the tests done by Cullinan indicate some lack of progress, Ms. Johnson's results from April 2009, were inconsistent, but generally indicated that Student was at a fifth grade instructional level at the time, which was higher than the fourth grade level earlier testing had indicated. Additionally, the results of the WJ-III administered to Student demonstrate that he was making progress in reading and writing although the results of the DRA indicate that Student still had unique needs in those areas. The discrepancies in Student's scores, based upon the test given to him, support Ms. Huerta's testimony at hearing that a student's scores may differ depending on which testing tool is administered.

169. A review of the in-class writing assessments (or "prompts") administered to Student by teacher Jennifer Puentes demonstrates that Student scored a 3 of 4 on two of the tests, indicating that he was proficient in writing on two of the tests, and score of 2 out of 4 on the other two tests, which indicate that Student was not proficient on those two tests. Of the two writing prompts on which Student scored a 3 (proficient), Student received assistance from his aide through prompting on only one. On the other test, the only assistance Student received was the explanation a word with which he was not familiar. Student's scores of proficient on two of the four writing assessments indicate that he was making more than minimal progress during the school year in writing, in spite of the lack of direct special education intervention.

170. Additionally, Student made progress in the Accelerated Reader program, where each student in class selects his or her own book, is tested on the contents. At the beginning of the school year Student was selecting books at a beginning third grade level and scoring anywhere from 50 percent to 100 percent correct on questions concerning each book's contents. By the end of the year, Student was selecting books at an early to late fourth grade level and scoring from 60 percent to 90 percent on the

questions concerning those books. This is another indicator that Student was progressing, rather than regressing, in reading.

171. The weight of the evidence therefore fails to support Student's contention that he regressed during the school year. However, even if he did, as discussed below, the District's offer of 175 hours of compensatory education is an appropriate remedy for any failures of the District to provide Student with a FAPE during the 2008 – 2009 school year, and as a remedy for any regression he might have had.

Did the District offer Student a FAPE in its IEP offers of January 14, 16, 26, and February 12, 2009, which covered the period of January 2009 to January 2010? (Issues 2, 3, and 5 – 20)

172. This issue basically aggregates the District's and Student's issues as to whether the District's January 2009 IEP offer provided Student a FAPE. As found more specifically in each part of this Decision, the weight of the evidence supports the conclusion that the District's IEP offer, as amended by its concessions at the PHC and the first day of hearing, provides Student a FAPE with three exceptions: 1) Student should have been provided with special education ESY during summer 2009; 2) Since Student has transitioned to middle school, he will have more than one teacher; and 3) The District fade-out plan must be revised now that Student has entered intermediate school. The ALJ will therefore order the District to provide SL consultation services to each of Student's intermediate school teachers.

COMPENSATORY EDUCATION (ISSUES 2, 4, 17, AND 20)

173. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. The purpose of compensatory education is to ensure that the student is appropriately

educated within the meaning of the law. Where the actions of parents are unreasonable, equitable relief may be reduced or denied.

174. Based upon her Decision in *Case I* finding that the District's consultation model for RSP services failed to offer Student a FAPE, Student is entitled to compensatory education. The District, at the PHC in this matter and during the course of these proceedings, has conceded liability and has offered Student 175 hours of individualized special education intervention by a credentialed teacher after school to compensate him for his loss of FAPE during the 2008 – 2009 school year. In light of that concession, the ALJ repeatedly informed Parents that they had to counter the District's contention that the 175 hours was adequate compensation. Student, however, failed to provide any evidence at hearing to counter the District's offer. Nor did Parents ever state during the hearing why the District's offer was inadequate or what amount and what type of compensation they believed would be adequate.

175. Rather, Student for the first time in his reply brief requests specific amounts of compensatory education. In one section of his brief, Student asserts that he is entitled to 1260 hours of compensatory education, one hour for every hour he was in school during the 2008 – 2009 school year. Student fails to identify who should provide him with this compensatory education, what the compensatory education should consist of, or how he is to receive it. More significantly, Student fails to provide any support for his demand of hours other than the assertion in his brief that he is entitled to it. Later in Student's reply brief, he requests 600 hours of compensatory education, to be provided by the Cullinan Center over three school years. Again, Student makes this request for the first time in his reply brief and again Student fails to offer any support for his request. It is unclear if this demand is in addition to the 1260 hours requested earlier in his brief, or in lieu of those hours. If in addition to the 1260 hours, it is unclear for what

alleged denial of FAPE the 600 hours are to compensate Student.¹⁶ Student's request is unclear, untimely, and unsupported by any evidence. His requested amount of compensatory hours is therefore denied.

176. As stated above, the District asserts that 175 hours of compensatory education is appropriate and will adequately compensate Student for the loss of FAPE. The District is basically agreeing to provide hour-for-hour compensatory education for Student for the loss of an adequate RSP intervention program for the entire 2008 – 2009 school year. All District IEP members stated that they believed the hours were adequate to address any losses suffered by Student. There is no evidence in the record to contradict the District's offer. Moreover, both the LMB recommendation that Student needs 200 hours of a reading program to address his needs, and Ms. Johnson's concurrence with the recommendation as well as her own recommendation that an hour a day of reading intervention is an appropriate amount, lend support to the District's offer. The ALJ thus finds that the District's offer of 175 hours of compensatory education is an appropriate amount of services to address the loss to Student of a special education program that would have addressed his unique needs.

177. Student is also entitled to compensatory education for the District's failure to provide him with ESY during summer 2009. At hearing, Student offered evidence that Parents had provided him with tutoring services by Jon Nikaido, who is a newly credentialed general education teacher. Mr. Nikaido testified that he had provided approximately 20 hours of services to Student as of the time he testified. Father testified

¹⁶ It is unclear how a 12 year old boy, who is a full-time intermediate school student with a significant amount of after school extra curricular activities in addition to his required homework, would have time to participate in all the compensatory education hours he proposes in his reply brief.

that Parents paid Mr. Nikaido \$30 an hour for his services. However, as discussed below, reimbursement for Mr. Nikaido's services is not warranted. Instead, the ALJ finds that an award of compensatory education is appropriate. In light of the fact that Student should have received an hour a day of RSP services during the school year, and assuming an ESY sessions of 20 days, the ALJ finds that 20 hours of compensatory education services is appropriate compensation for the loss to Student of ESY instruction. The 20 hours shall be in addition to the 175 hours of compensatory education already found to be appropriate, for a total award of 195 hours.

178. Lastly, the ALJ finds that Parents' have valid concerns regarding the potential loss to Student of extracurricular activities if the compensatory education is provided to him after school. The evidence at the instant hearing, as well as evidence presented in *Case I* indicated that Student participates in many after school sports, that he is enthusiastic about his involvement, and that he derives significant socialization benefits from his participation. The latter is particularly important in light of Student's social pragmatic deficits and in light of the testimony of District witnesses, particularly Ms. Adolph and Ms. Soemali that the best method of addressing Student's social pragmatic needs is by generalizing what he would learn in his SL pull-out sessions to other environments. Providing the compensatory education immediately after school may interfere with Student's ability to participate in sports, potentially deprive him of socialization opportunities, and possibly cause Student to have to choose between participating in sports activities and receiving compensatory education.

179. The ALJ therefore finds reasonable and equitable Student's suggestion that compensatory education be provided to him at sometime other than during the time he will be engaged in extracurricular activities; As Student notes in his brief, and as discussed at hearing, the District intermediate school provides a "0" period before regular school starts. Therefore, at the District's discretion, the District will provide the

175 hours of compensatory education either sometime during the regular school day, to include the 0 period, during a class time that does not conflict with any of Student's academic subjects, or in the afternoon after Student's sports activities. This order does not prevent the parties from independently and jointly determining another appropriate time for Student to receive the compensatory education services, such as during vacation periods or on weekends. The District will have the choice of providing the services either by a credentialed special education teacher or by an appropriate outside agency, at its discretion.

REIMBURSEMENT (ISSUES 1, 2, 3, 17, AND 20)

180. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Student requests reimbursement for the costs of his IEES. However, since the District has proven that its assessments of Student were all appropriate, Student is not entitled to reimbursement for the costs of any of its IEES, including the costs of Dr. Glidden's psychological assessment, or the testing done by either the LMB Center or the Cullinan Center.

181. In his reply brief, Student for the first time requests reimbursement of consultation services provided to him and his Parents by Cheryle Anderson. However, Student presented no evidence at hearing as to what those consultation services were, how many hours the services were provided, or the amount charged by Ms. Anderson for those services. Ms. Anderson was never asked those questions by Mother during Ms. Anderson's testimony and Father, who testified regarding the cost of Student's IEES and the cost of other summer intervention services paid for by Parents, did not address the cost of Ms. Anderson's services. Moreover, it is unclear upon what basis Student believes he has a right to reimbursement for her services. She did not provide an IEE, and in any

case, Student has not shown that any of the District's assessments were improper. If Student is contending that he is entitled to be reimbursed for Ms. Anderson's services because of the District's failure to provide him with ESY services, he has failed to demonstrate a correlation between the loss of ESY and Ms. Anderson's consultation services. Student's request for reimbursement of Ms. Anderson's services is therefore denied.

182. Student also requests reimbursement for the tutoring services provided to him over the summer by Mr. Nikaido. While the ALJ has found that Student suffered a loss of FAPE by the District's failure to provide him with summer 2009 ESY services, Student has failed to demonstrate that the services provided by Mr. Nikaido are appropriate. Although private services procured by a Student to compensate for services that should have been provided by a school district do not have to meet FAPE requirements, those services must still be appropriate. Student's argument regarding ESY is that he required specific special education instruction during ESY rather than the general education summer school program offered to him by the District. Mr. Nikaido is a general education teacher who provided general education tutoring services to Student. There is no evidence that he provided any type of specialized services to Student. The ALJ therefore finds that Parents are not entitled to reimbursement for Mr. Nikaido's tutoring.

183. Student also requests, for the first time in his reply brief, reimbursement for social skills services allegedly provided to him by Valerie Nikaido. However, there is no evidence in the record with regard to the amount, extent, or necessity of those services, or for what loss of FAPE the services were supposed to address. Ms. Nikaido did not testify and no other witness addressed this issue at hearing, other than a brief reference by Father during his testimony that Student received services from her. Having

failed to present evidence on this issue, Student's request for reimbursement of Ms. Nikaido's services is denied.

184. In his reply brief, Student also requests reimbursement for other costs incurred by Parents during the course of this litigation. Student has failed to prove that Parents are entitled to reimbursement of any of these costs. Moreover, to the extent that Parents are requesting reimbursement for their litigation costs, including loss of income, OAH does not have jurisdiction to award them. Parents' request for such reimbursement is therefore denied.

LEGAL CONCLUSIONS

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, the District has the burden of persuasion for the issues raised in OAH case numbers 2009020721 and 2009030990 (Issues 1 through 4) and Student has the burden of persuasion for the issues raised in OAH case number 2009050619 (Issues 5 through 20).

THE DISTRICT'S ACADEMIC AND PSYCHOLOGICAL ASSESSMENTS WERE PROPERLY CONDUCTED, SUCH THAT THE DISTRICT HAD NO DUTY TO FUND STUDENT'S IEES IN THOSE AREAS. (ISSUE 1)

2. District contends that it does not have a duty to provide Student with IEES at public expense in the areas of neuropsychology and academic achievement because the District's November and December 2008 assessments in those areas were properly conducted. Student disagrees. He contends that Ms. Soemali's psychological assessment was not proper because she failed to give Parents the parent rating scales as part of her administration of the Vineland to Student. Student also contends that the academic achievement assessment administered by Ms. Huerta was improper because she failed to administer more than one standardized test as part of the assessment process and

because she improperly administered the DRA portion of the assessment. As discussed below, the District has met its burden of demonstrating by a preponderance of the evidence that both assessments were properly conducted.

INDEPENDENT EDUCATIONAL EVALUATIONS

3. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)¹⁷; Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].)

“Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

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

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507

¹⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

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

ASSESSMENTS

5. “The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency.” (Ed. Code, § 56322.) Assessors must be knowledgeable about the student’s suspected disability and must pay attention to the student’s unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

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

7. Assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student’s native language or mode of communication unless it is not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also meet the following requirements:

- 1) are provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and

functionally, unless it is not feasible; 2) are used for purposes for which the assessments or measures are valid and reliable; and 3) are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

8. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

9. Here, both school psychologist Tamara Soemali and RSP teacher Wendie Huerta were well qualified to perform their respective assessments. Both assessed Student using a variety of assessment instruments, ranging from standardized tests to observation, in order to determine Student's unique needs in the areas. The assessments

were consistent with Student's history of autism and with his history of deficits in written language and reading comprehension. The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, and the assessments were valid for the purpose for which they were used. Student's eligibility for special education was not at issue at the time of the assessments. Parents were provided with a comprehensive report that explained all of the assessments, the results, and the assessors' recommendations. There is no contention that the District's filing for due process in case 2009020721 was not a timely response to Student's request for IEES.

10. Student contends that Ms. Soemali's assessment is inappropriate, and that Student is therefore entitled to an IEE at public expense, because Ms. Soemali should have given the Vineland scales to Parents to complete. However, there is no evidence that failure to give Parents the Vineland rating scale was improper or that Ms. Soemali's assessment is invalid because of her failure to do so. Ms. Soemali persuasively testified that it is not necessary to obtain a parent rating for the Vineland to be appropriate. She indicated that the Vineland Parent Scales only assess behavior that is occurring in the home. Given Student's age, and the fact that her concern was Student's behavior in the school setting, Ms. Soemali did not feel it was necessary for her to obtain parent input on the Vineland. Additionally, she gave Parents the BASC-2, the SSRS, and the SCQ rating scales to complete. She therefore had three other parent rating scales to give her a full overview of Student's behavior, including behavior only noted by Parents in the home.

11. Student submits that Dr. Glidden testified that Ms. Soemali's failure to provide the Vineland scales to Parents invalidated the test. However, the evidence does not support Parents' contention. Dr. Glidden was never shown Ms. Soemali's assessment report at the hearing and was never questioned about her assessment procedures and results. He did review her assessment as part of his assessment procedures in April 2009,

but his report does not criticize Ms. Soemali's assessment or state that her assessment was incomplete or in any way improper. Additionally, while Dr. Glidden did testify that he usually gives the Vineland scale to parents when he uses that assessment, he admitted that the testing tools to be used are within the discretion of the assessor. Dr. Glidden never testified that Ms. Soemali's failure to give Parents the Vineland scales invalidated her assessment. Moreover, there is no evidence that had Parents completed the Vineland, the results of Ms. Soemali's assessment would have been different. As stated above, Ms. Puentes' rating of Student indicated that his adaptive behaviors continued to meet the eligibility criteria of autistic-like. Her ratings, and Ms. Soemali's resultant findings, are consistent with the findings made by Dr. Glidden in his assessment of Student.

12. The District has therefore met its burden of proof in demonstrating that Ms. Soemali's psychological assessment of Student was appropriate. Student is not entitled to an IEE at public expense and Parents are therefore not entitled to reimbursement of the costs incurred for Dr. Glidden's assessment. (Factual Findings 17-37; Legal Conclusions 1-12.)

13. Likewise, the District had met its burden of proof that Ms. Huerta's academic achievement assessment was appropriate. There is no support for Student's contention that Ms. Huerta was required to administer a second standardized test to Student merely because his scores were better than expected on the WJ-III. In addition to the assertion of District staff that Ms. Huerta's assessment was appropriate, three of Student's witnesses (Dr. Glidden, Ms. Anderson, and Ms. Neuffer) all indicated that the assessment was proper. Dr. Glidden specifically testified that the WJ-III was an appropriate test and that he relied on Ms. Huerta's assessment during his own assessment. While Parents contend that Ms. Huerta should have administered the GORT to Student, no evidence supports their assertion. To the contrary, Dr. Glidden testified

that he does not believe that the GORT is a useful test because it measures reading out loud, which people rarely tend to do. He therefore has ceased administering it.

Moreover, the District met its burden of proof that Ms. Huerta properly administered the DRA to Student. There is no evidence that Level 40 was an inappropriate level at which to assess Student or that his scores would have been different had another level been used. The District has met its burden of proof in demonstrating that Ms. Huerta's academic achievement assessment of Student was appropriate. Student is not entitled to an IEE at public expense and Parents are therefore not entitled to reimbursement of the costs incurred for the testing done by LMB and/or the Cullinan Center. (Factual Findings 38-50; Legal Conclusions 1-13.)

WITH THE EXCEPTION OF ESY, THE EXTENT OF THE PLAN TO FADE-OUT STUDENT'S AIDE, AND THE SL CONSULTATION SERVICES, AS DISCUSSED BELOW, THE DISTRICT'S OFFER OF PLACEMENT AND SERVICES AT THE IEP MEETINGS OF JANUARY 14, 16, AND 26, 2009, AS MODIFIED BY THE DISTRICT'S CONCESSIONS AT HEARING, CONSTITUTED A FAPE (ISSUES 2 AND 4 – 20)

14. The District originally made an offer of FAPE to Student after a series of IEP meetings held on January 14, 16, and 26, 2009. That offer consisted of 60 minutes of RSP consultation services between Student's teacher and the RSP teacher; 120 minutes per month of direct speech and language pull-out services along with 30 minutes per month of consultative services between the SLP and Student's teacher; the provision of a one-on-one aide, with the aide to be faded out pursuant to a fade out plan; and accommodations for Student, including assistive technology and consultation between the AT specialist and Student's teachers. After the ALJ issued her Decision in *Case I*, the District modified its offer as a means of addressing its liability. The District conceded that 60 minutes per month of RSP consultative services was inadequate and instead offered Student 50 minutes per day in an RSP classroom during one of his elective

periods at intermediate school. The District contends that its January 2009 IEP offer, as modified, will provide Student with a FAPE. Student contends that the offer, even as modified is both procedurally and substantively flawed. Student's Parents did not consent to the implementation of any portion of the District's offer prior to the end of the instant hearing, although they appear to have accepted the offer of 50 minutes per day of RSP instruction in Student's reply brief. As discussed below with regard to each issue raised by Student, with the exception of its failure to offer ESY to Student, the fact that the fade-out plan for Student's aide is not appropriate now that he has transitioned to intermediate school, and its failure to address the need to provide SL consultation services to all of Student's teachers at his intermediate school, the weight of the evidence supports a finding that the District's January 2009 IEP, as modified by the District's concessions at hearing, provided Student with a FAPE. (Factual Findings 68-172, Legal Conclusions 14-59.)

Elements of a Free Appropriate Education (FAPE)

15. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)¹⁸ A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

16. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States

¹⁸ All statutory citations to the Education Code are to California law, unless otherwise noted.

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

17. The Ninth Circuit recently reaffirmed the validity of the *Rowley* standard in analyzing FAPE in the context of the 1997 version of the IDEA. In *J.L. v. Mercer Island School District* (9th Cir. August 6, 2009) _ F.3d _ [2009 WL 2393323] (hereafter *Mercer Island*), the Ninth Circuit overturned the district court's finding that *Rowley's* educational benefit standard had been superseded by Congress when it revised the IDEA in 1997. The court found that for all intents and purposes, Congress had retained the same

definition of a free appropriate public education when it reenacted the IDEA in 1997 and that it had not indicated any disapproval of *Rowley*. The court further found that Congress did not express any clear intent to change the *Rowley* FAPE standard. The court thus found that the proper standard to determine whether a disabled child has received a FAPE is the “educational benefit” standard set forth by the Supreme Court in *Rowley*. (*Id.* at *12) A review of the 2004 reauthorization of the IDEA does not indicate any substantive changes in the definition of FAPE or anything in the legislative history that would support a finding that Congress intended to change or modify the educational benefit standard enunciated in *Rowley* when it reauthorized the IDEA in 2004. The Ninth Circuit’s discussion regarding the lack of congressional intent to modify the *Rowley* standard is therefore equally applicable to IDEA 2004.¹⁹

18. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149,

¹⁹ Student’s reliance in his briefs on the underlying district court decision in *Mercer Island* is therefore misplaced as the district court’s decision has been superseded by the decision of the Ninth Circuit cited here.

citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*).

19. An IEP must be both procedurally and substantively valid. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*)). Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

20. As stated more fully herein with regard to the specific allegations raised by Student in his complaint, and based upon Factual Findings 68-172 and Legal Conclusions 14-59, the District's January 2009 proposed IEP, as modified by its concessions at hearing, offered FAPE to Student, with the exception of the District's failure to include an offer of ESY services, and the fade-out plan and SL consultation services as they apply to intermediate school.

THE DISTRICT DID NOT FAIL TO ALLOW PARENTS TO MEANINGFULLY PARTICIPATE IN THE IEP PROCESS AND DID NOT PREDETERMINE ITS IEP OFFER. (ISSUES 2, 5, 6, AND 20)

21. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) However, the fact that District staff

wrote draft proposed goals and objectives, or met with each other before an IEP meeting does not constitute predetermination; nor does providing a written offer to a Student before her parents have agreed to it. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262.) Indeed, a district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The Ninth Circuit reiterated this proposition in *Mercer Island, supra*, 2009 WL 2393323 at *13. The court quoted from 34 Code of Federal Regulations part 300.501(b)(3) which states that an IEP meeting “does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed a later meeting” in finding that a pre-IEP meeting held by district IEP team members did not constitute evidence in and of itself that the district had predetermined its IEP offer.

22. A school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student’s needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O’Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (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.)

23. However, the IDEA also imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*Target Range, supra*, 960 F.3d. at p. 1485.) Those parties who have first hand knowledge of the child’s needs and who are most concerned about the child must be involved in the IEP creation

process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d. 1072, 1079.) Parents play a “significant role” in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904].); 20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrmann supra*, 993 F.2d at p. 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

24. In the instant case, the weight of the evidence demonstrates that the District did not predetermine its offer of placement and services for Student. Although District IEP team members met with each other before the January 14 IEP meeting, the purpose of the meetings was merely to consult regarding Student’s present levels, to discuss how he was transitioning to his new school district, and to formulate draft proposals. There is no evidence that the District’s draft proposals were set in stone and no evidence that District policies were determining the type and amount of services that it would offer Student. Unlike the circumstances in the *Deal* case, Student presented no compelling evidence that the District here had a policy of refusing to offer specific placements or services to Students or of refusing to alter its draft proposals. Nor has Student proven that high-level District officials were dictating placement decisions concerning special education students. Unlike the school district in *Deal*, the District here provided many opportunities for Parents to provide their input, including by means of a power point presentation. There is no evidence that the District attempted to stifle

conversation concerning the Cullinan center or Parents' concerns. To the contrary, a review of both the official IEP notes and notes taken by Parents (including a Parent-generated transcription of one of the IEP meetings) indicates that the District spent considerable amount of time listening to and discussing Parent concerns.

25. The record is replete with evidence of the many changes the District made to its draft IEP based upon input from Parents and review of Student's IEES. The District added additional parent concerns, added vocational information, added a goal based upon information and recommendations in Student's SL IEE, added information about ELL services based upon teacher and parent input, modified goals and added additional staff responsible for implementing them, modified and added additional accommodations, changed or added to the baselines of goals, and increased proposed services in RSP consultation and SL based upon Parents' concerns and their IEES. To the extent Parents are contending that the District failed to provide them with information, as discussed below, the District was not required to provide Parents with the teaching methodologies it contemplated using as part of Student's curriculum.

26. The evidence thus fails to support Student's position that the District predetermined its offer of placement and services for Student or prevented Parents from meaningfully participating in the IEP process. To the contrary, the evidence supports a conclusion that the District devoted many hours to discussing Student's needs, Parents' concerns, had best to address both. None of the cases cited above stand for the proposition that a district is required to offer a placement that is suggested by parents, or that the failure to accept parents' suggested placement means, ipso facto, that a district has predetermined placement. Student has therefore failed to meet his burden of persuasion that the District's offer of placement and services was predetermined or that they were denied the right to meaningfully participate in the process. Student has therefore failed to meet his burden of proof that the District

procedurally violated his rights or Parents' rights under the IDEA. (Factual Findings 73-86; Legal Conclusions 21-26.)

THE DISTRICT ADEQUATELY ADDRESSED STUDENT'S PRESENT LEVELS OF PERFORMANCE (ISSUES 2, 7 AND 20)

27. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

28. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § (d)(1)(A)(ii); Ed. Code § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.320(a)(1)(i); Ed. Code, § 56345.)

29. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular

educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

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

31. Parents appear to contend that the District did not adequately address his PLOPS because it failed to list the information and results of each and every one of his private assessments on his IEP document and failed to list the result of some of his state-mandated testing, such as his CST results in science, on the IEP. Student's contentions are misplaced. The District included all information from its own assessments in the IEP document, but was not required to do so. It incorporated the information from other sources, such as from Student's IEES, by reviewing and discussing the information and by including references to it in the IEP notes. Additionally, Student's IEES and state-mandated test scores are all a part of his record

irrespective of whether the information is listed in the IEP document. As stated in Legal Conclusions 26-28, the IDEA specifically states what information must be included in an IEP. That information is narrow and specific; while the IEP document may contain more, it is not required to do so. Furthermore, even if the law required the District to include the information urged by Student, Student has failed to show that he was deprived of educational benefit or that the ability of Parents to participate in the IEP process was impeded because the information in Student's IEES was not transferred verbatim to the IEP document. The District did not fail to adequately address Students present levels of performance. (Factual Findings 17-72 and 87-9-; Legal Conclusions 27-31.)

THE DISTRICT DEVELOPED APPROPRIATE AND ADEQUATE GOALS AND OBJECTIVES FOR STUDENT (ISSUES 2, 8, AND 20)

32. Legal Conclusions 27 through 30 concern the IEP process and the development of appropriate goals and objectives. As discussed above, the District considered Student's unique needs as a child with autism, and developed inferencing, reading, reading comprehension and analysis, pragmatic, social/pragmatic language skills, verbal expression of cause and effect relationships, and writing goals based upon Student's demonstrated needs. District IEP team members credibly testified that Student's inferencing deficits needed to be addressed before Student could proceed to higher levels of pragmatics. The IEP team developed appropriate goals in all of Student's areas of needs. Although it is always possible to write more goals for a child, the District demonstrated that its goals were reasonably calculated to provide Student with educational benefit. While the goals might not have optimized Student's access to his education, the law does not require that they do so. The evidence established that the District did provide Student with appropriate goals to address his unique needs. (Factual Findings 17-72 and 91-96; Legal Conclusions 27-30.)

THE DISTRICT DID NOT VIOLATE THE IDEA BY FAILING TO DISCUSS AND DISCLOSE
WHAT IF ANY SCIENTIFICALLY BASED METHODS OF INSTRUCTION WOULD BE
UTILIZED IN ITS JANUARY AND FEBRUARY 2009 IEPS (ISSUES 2, 9, AND 20)

33. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

34. The reauthorized IDEA does not mandate that a district use a particular methodology. For example, courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. Lexis 27570, pp. 51-57; 46 IDELR 45, 106 LRP 29290, (which provides a comprehensive summary of decisions discussing the matter).) Rather, courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Id.* at pp. 65-68.) Title 34 Code of Federal Regulations part 300.320(a)(4), states that IEPS shall include a statement of the special education and related services and supplementary aids and services, *based on*

peer-reviewed research to the extent practicable. The language “to the extent practicable” regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program.

35. Recently, the Ninth Circuit Court of Appeals, in the case of *Mercer Island, supra*, 2009 WL 2393323 at *13, reiterated its position that a district is not necessarily required to disclose its methodologies. The Court found that it is not always necessary for a school district to specify a methodology for each student with an IEP if specificity is not necessary to enable the student to receive an appropriate education. In finding that the district had not committed a procedural violation of the Act by failing to specify the teaching methodologies it intended to use, the court stated, “We accord deference to the District’s determination and the ALJ’s finding that K.L.’s teachers needed flexibility in teaching methodologies because there was not a single methodology that would always be effective.” (*Ibid.*) Here, the District has shown that it needed to be flexible in addressing Student’s educational needs. Additionally, Parents have failed to show that a specific methodology was necessary in order for Student to receive a FAPE. The District’s failure to discuss or disclose methodologies at the IEP meeting did not deny Student a FAPE. (Factual Findings 97-99; Legal Conclusions 33-35.)

THE DISTRICT DID NOT DENY STUDENT A FAPE BY FAILING TO GIVE PRIOR WRITTEN NOTICE WHEN IT DECLINED TO STATE WHAT METHODOLOGIES WOULD BE USED IN THE DISTRICT’S JANUARY AND FEBRUARY IEP OFFERS (ISSUES (ISSUES 2, 10, AND 20)

36. A district is required to provide prior written notice to the parents of a child whenever it proposes to initiate or change, or 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.) The notice given to the

parents or guardian must meet the requirements specified in United States Code, title 20, section 1415(c)(1). However, a district may use the IEP as the prior written notice as long as it meets all of the requirements of the IDEA. (34 C.F.R. § 300.503(a); 71 Fed.Reg. 46691 (August 14, 2006).) For example, in the case of *A.B. v. San Francisco Unified School District* (N.D.Cal. 2008) 2008 WL 4773417, 51 IDELR 158, 108 LRP 64677, the court held that the district's IEP offer itself constituted prior written notice to a student's parent of the district's refusal to fund a summer camp program the parent desired in lieu of the District's offer of ESY. The court stated that the ESY offer in the IEP put the parent on notice that the district had denied her request.

37. Additionally, the United States Department of Education, in its comments to the federal regulations implementing the IDEA, states that "[w]e decline to require all IEP team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome." (71 Fed.Reg. 46665 (August 14, 2006).)

38. The District's position that it was not required to identify methodologies it would use in instructing Student was discussed at the IEP meetings as was the District's position that it would not provide an after school V & V language program as requested by Parents. The written IEP document includes the specific offer the District made to Student. Even had prior written notice of its decision not to identify methodologies been required, the written IEP document from January 2009 constituted prior written notice of the District's proposals for placement, services, goals, and services, and of its refusal to provide an after school V & V program. Since the IEP contained the requisite elements of prior written notice, no further written notice was required. Since there was no procedural violation, there was no denial of FAPE. However, even if there had been a

procedural violation, the lack of a separate document providing prior written notice of the District's position did not impede Student's right to a FAPE, cause a deprivation of educational benefits or impede the parents' opportunity to participate in the decision making process. (Factual Findings 100-101; Legal Conclusions 36-38.)

THE PROGRESS MONITORING OF STUDENT'S JANUARY AND FEBRUARY 2009 IEPs WAS DEVELOPED TO MEET STUDENT'S UNIQUE NEEDS (ISSUES 2, 11, AND 20)

39. As stated in Legal Conclusion 29, a Student's IEP is required to contain a description of the manner in which progress of the student towards meeting his annual goals will be measured. Student's IEP included various methods of monitoring his progress: through participation, without accommodations in state-mandated student assessment tests, through his quarterly report cards, and through quarterly progress reports based upon teacher observations and work samples.

40. Student reliance on the case of *Bonadonna v. Cooperman* (D.N.J. 1985) 619 F.Supp. 975, is misplaced. *Bonadonna* addresses inadequacies in a school district's formal assessment process. The district court found that district assessments that consisted only of teacher observations and failed to include standardized assessments did not meet legal requirements for formal assessments. The case did not address the issue of progress reporting and whether teacher observations are inadequate as a basis for reporting a student's progress during the school year. Student has been formally assessed by the District and by his private assessors. The District utilized those assessments in developing its IEP offer for Student. Student's baselines for his goals were based in substantial part on the formal assessments. If Parents believe that future formal assessment is required to measure Student's progress, they may request it. However, they have not provided any persuasive argument that the progress monitoring included in Student's IEP was so inadequate that it denied him a FAPE. The progress

monitoring referenced in Student's IEP adequately addressed his needs. There was no violation of FAPE. (Factual Findings 102-104; Legal Conclusions 39-40.)

THE DISTRICT DID NOT ALTER STUDENT'S ASSESSMENTS AND RECORDS IN ORDER TO HIDE THE FACT THAT STUDENT WAS NOT MAKING THE EDUCATIONAL PROGRESS REPORTED IN HIS IEPs AND EDUCATIONAL RECORDS DURING THE 2008-2009 SCHOOL YEAR (ISSUES 2, 12 AND 20)

41. The basis for this allegation is Parents' belief that Student's aide was either completing Student's work for him or providing Student with the correct answers on tests and assignments. Parents question Student's ability to achieve his scores on his own. However, the only evidence in support of Parents' contention is their assertions. Student's teacher testified credibly with regard to which class assignments were completed by the entire class as guided instruction, which assignments Student completed independently, and on which assignments Student received assistance in the form of prompts from his one-on-one aide. If Parents wish to decrease the amount of interaction that Student's aide has with him, they may do so through the IEP process. The evidence however does not support their contention that the District, through Ms. Puentes, altered Student's grade or other records in order to bolster the District's position that Student was making some progress during the school year. (Factual Findings 105-110; Legal Conclusion 41.)

THE DISTRICT DID NOT FAIL TO OFFER OR PROVIDE STUDENT AN APPROPRIATE PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT AT THE JANUARY 14, 16, AND 26, AND FEBRUARY 12, 2009 IEP MEETINGS (ISSUES 2, 4, 13, AND 20)

RSP Instruction

42. The District made a final IEP offer to Student after IEP meetings held on January 14, 16, and 26, 2009. The meeting held on February 12, 2009, was at Parents' request so that Parents could respond in-person to the District IEP offer. The District's

offer consisted of placement in a general education classroom with special education RSP services provided through a consultation model 60 minutes per month; provision of a one-on-one aide for Student's entire school day subject to a fade out plan that would fade the aide from 1500 minutes a week to 525 minutes a week over a three month period given certain contingencies; 120 minutes per month of direct SL services in a pull-out model as well as 30 minutes per month of consultation between the SLP and Student's teacher; various accommodations in the classroom as well as access to computer software as needed; and consultation between the AT specialist and Student's teachers to assist in implementing Student's goals. Subsequent to the issuance of the ALJ's Decision in *Case I*, the District conceded that 60 minutes of RSP consultation was insufficient to offer Student a FAPE. As an offer of compensatory education, the District modified its offer, replacing the RSP consultative model with an offer of 50 minutes a day in an RSP classroom during one of Student's elective periods. The District also offered 175 hours of compensatory education to address Student's loss of FAPE during the 2008 – 2009 school year. The District did not offer Student any ESY services for summer 2009.

43. The evidence supports the District's contention that its concession offer of 50 minutes per day of RSP services is reasonably calculated to offer student educational benefit. Taking into consideration all services now being offered to Student, his school day will now include a full class period of language arts instruction in the general education classroom, a full class period of small group instruction in the RSP classroom, and an hour per day of individual instruction either before or after school, for a total of almost three hours per day of language arts instruction to address his reading comprehension and written expression deficits. Student did not offer any evidence to contradict the testimony of the District witnesses that all of Student's needs in those areas would be adequately addressed by this modified offer. The totality of the evidence

thus weighs in favor of the District. Its concession offer will provide a FAPE to Student. (Factual Findings 14-70 and 111-118; Legal Conclusions 14-20, 27-32, and 42-43.)

Fading of Student's Aide

44. The weight of the evidence also supports a finding that at the time the District made its offer of FAPE in January 2009, the District's plan for fading out Student's aide was appropriate. Student's teacher and the District IEP assessors who observed Student in the classroom all noted that he was independently accessing his curriculum in the classroom and was independent at recess and lunch. The District's plan was developed to provide a safety net for Student in that certain benchmarks had to be met before the plan moved to its next phase of decreasing the time the aide was assigned to Student. If the benchmark was not met, the next step of the plan would not take effect. Therefore, Student's needs would determine if fading of the aide would continue. The plan was specifically designed to address his needs and therefore did not contemplate removing the aide during Student's language arts class time when he was most dependent on assistance.

45. However, while the plan to fade the aide was appropriate at the time it developed, it no longer is. As explained by Ms. Hansen and Ms. Soemali, the plan was designed to address Student's needs at elementary school. Since Student has promoted to intermediate school, Student's IEP team needs to review and address his needs in this new environment in order to develop an appropriate plan. The fade out plan as it relates to intermediate school therefore did not offer Student a FAPE. (Factual Findings 119-125; Legal Conclusions 14-20 and 44-45.)

Speech and Language Services

46. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as

may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. B. Smith, supra*, 15 F.3d at p.1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

47. Student contends that the District's offer of 120 minutes per month of SL direct services, in addition to 30 minutes per month of consultation between the SLP and Student's teacher, did not meet his needs. Student first contended at hearing that he should receive a minimum of two, 30 minute direct SL sessions as recommended by Susan Neufer, his private assessor. In his closing briefs Student now contends that he requires 30 minutes of direct SL each day to meet his social and pragmatic language needs.

48. Ms. Neufer and Ms. Adolph are equally qualified speech pathologists. They have similar education and employment histories. Both administered appropriate assessments to Student, which produced fairly consistent results. Where they diverge is in their respective recommendations for services. Ms. Neufer believes Student requires a minimum of two, 30 minute SL sessions per week to address his needs. Ms. Adolph believes that Student's unique needs, which include his need to develop his inferencing skills and to focus on his other pragmatic language and social skills, would best be addressed by generalizing those skills into Student's class environment rather than emphasizing a pull out model of service delivery.

49. Ms. Neufer did not have an opportunity to observe Student and did not attempt to consult with his teachers. Ms. Adolph consulted with Student's special education teacher and with his general education teacher. She also had the advantage of three months of observations of Student. In the context of an autistic child whose

deficits are primarily based on a lack of ability to draw inferences and a lack of pragmatic language and social skills, observations of him in his school environment were critical to developing a full understanding of his needs and how to address those needs. Additionally, Ms. Neufer's finding that Student had a receptive language need is belied by the results of her assessment, in which Student scored in 39th percentile in receptive language just as he had on the assessment administered to him by Ms. Adolph. Therefore, because Ms. Adolph based her findings and recommendations on the totality of testing results, observations, and consultation with the educators who had direct knowledge of how Student was navigating his school environment, her opinion and recommendations are more persuasive than those of Ms. Neufer. (*R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 942.) The amount and type of SL services offered by the District were reasonably calculated to provide educational benefit to Student and thus offered him a FAPE. (Factual Findings 17-70 and 126-148; Legal Conclusions 14-20 and 46-49.)

THE ACCOMMODATIONS, MODIFICATIONS, SUPPORTS AND SUPPLEMENTARY AIDS AND SERVICES OFFERED BY THE DISTRICT IN THE JANUARY 2009 IEP MET STUDENT'S UNIQUE NEEDS (ISSUES 2, 14, 15, AND 20)

50. The District offered Student 15 accommodations to assist him in accessing his curriculum. They were based upon the recommendations of the District IEP team members who had assessed Student, as well as the recommendations of Ms. Neufer. Although Dr. Glidden had not yet assessed Student in January 2009, his recommendations are consistent with those of the District assessors. The accommodations focus on providing Student with extra time to complete his work, breaking up assignments and instructions into smaller pieces, and helping him visualize his assignments and his school day in general. The accommodations were appropriate as were the recommendation that they be provided only when Student required them.

Student has failed to provide persuasive evidence that the accommodations did not offer him FAPE or that they were deficient in any way. (Factual Findings 17-70 and 149-152; Legal Conclusions 14-20 and 50.)

THE DISTRICT DID NOT FAIL TO ADDRESS STUDENT'S ENGLISH LANGUAGE DEVELOPMENT LEVELS OR HIS CULTURALLY LINGUISTIC LANGUAGE NEEDS

51. The District's initial confusion over whether Student should have been classified as an ELL was based on Parents' inconsistent position as to whether Student qualified for that status. After Parents clarified that Student did meet the criteria, the District immediately tested Student and, thereafter, began providing him with ELD instruction in the classroom. The District provided Student with ELD instruction for the remainder of the school year. They also acknowledged Student's ELL status on his IEP and indicated that he would receive ELD instruction. However, ELD is a state-mandated program. (Ed. Code, § 52163.) Student would have received ELD instruction irrespective of his eligibility for special education based solely on his designation as an ELL.

52. The weight of the evidence, however, is that Student did not require ELD services in order to access his education. All of Student's private assessors acknowledged that Student's English language abilities exceeded his Spanish language abilities. Susan Neufer administered an assessment to Student in Spanish to determine if she needed to administer the full array of assessments to him in that language. She determined from that initial test that Student's Spanish language skills were deficient. She therefore administered the remainder of the tests to Student in English. Parents presented no evidence, other than the fact that Student technically qualifies for the ELD program, that he has English language development needs that must be addressed in his IEP. Therefore, even if the District committed a procedural error by not developing ELD goals for Student (and there is no evidence that they were required to do so), Student has failed to demonstrate that he has lost any educational benefit or that

Parents' rights to participate in the IEP process was infringed. Therefore, even assuming a procedural error occurred, there was no violation of FAPE. (Factual Findings 7, 9, 17-70, and 153-155; Legal Conclusions 14-20 and 51-52.)

THE FAILURE TO PROVIDE STUDENT WITH ESY IN SUMMER 2009 DENIED HIM FAPE (ISSUES 2, 13, 17, AND 20)

53. An IEP must include extended school year services if they are necessary for provision of FAPE to the Student. (34.C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) The District IEP members determined that Student did not require ESY primarily because he was not receiving special education services at the time of the January 2009 IEP meetings and because their IEP offer did not place Student in a special education program. In the context of its general education program, District policy is to offer summer school sessions only to those students who are struggling in class. Since Student demonstrated weaknesses in reading comprehension and written language irrespective of his special education status, the District offered to provide him with general education summer school classes. However, the District's position with regard to ESY is premised upon its original IEP offer which only provided Student with RSP services through a consultation model. Since the District now concedes that Student should have had direct RSP services for approximately an hour a day, and since, by offering Student general education summer school classes the District is admitting that Student requires them due to his struggles in school, the implication is that Student required ESY in order to prevent regression. The failure to offer Student ESY in the summer of 2009 therefore denied him a FAPE. Student is entitled to 20 hours of compensatory education to compensate him for that denial. (Factual Findings 17-70 and 156-159; Legal Conclusions 14-20 and 53.)

THE DISTRICT DID NOT DENY STUDENT NECESSARY ASSISTIVE TECHNOLOGY EQUIPMENT (ISSUES 2, 13, 18, AND 20)

54. Student contends that he requires the assistive technology provided to him under his June 4 FUSD IEP in order to gain meaningful benefit from his education. Specifically, Student wants the District to provide him with specific computer software and with devices such as a Smartboard, which is a large interactive whiteboard that is connected to a laptop computer that can both project images from the computer and which can, itself, be used as a writing board on which a student can directly write and create other images. A school district is required to consider whether a child needs assistive technology devices and/or services in order to receive a FAPE. (34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) In this case, the District has met its burden of showing that its decision to provide Student with supports and other accommodations, access to computer software, and the consultative services of an AT specialist, instead of the AT devices requested by Parents, offered Student a FAPE.

55. Both speech and language pathologists who observed Student, Melinda Adolph and Theresa Pafford, found that Student was accessing the curriculum in his classroom without the use of any AT devices. While Mother frequently referenced the technology in her testimony, the evidence Student presented did not address why he would not be able to progress in his curriculum without it. The January 2009 IEP proposed extensive accommodations, modifications, and supports to be implemented in Student's classroom. Additionally, as stated in *Case I*, Ms. Puentes' classroom was constructed in such a way that visualization of schedules and assignments was integrated into her normal classroom teaching model.

56. The District, through AT specialist Amanda Fisher, administered an AT assessment to Student to determine his AT needs. Student does not dispute the validity of Ms. Fisher's assessment. The assessment consisted of observations of Student in the

classroom and during his OT assessment as well as consultation between Ms. Fisher and the OT and Student's teacher. Based upon her assessment, Ms. Fisher determined that Student would benefit from computer software programs in the classroom. However, she did not feel it was appropriate to identify each program she might consider. Rather, she stated that if Student demonstrated a need, she would address it through the many types of software programs available at the District. In order to ensure Student's access to the software, and to ensure that his AT needs were addressed in the classroom, Student's IEP team added Ms. Fisher as a person responsible for implementing many of Student's goals. They did this specifically to ensure that AT needs that may not have been apparent would be addressed as they arose. Certainly, the advanced technology FUSD provided to Student helped to maximize Student's potential, but the District here was not required to do so. While additional AT may have been beneficial, there was no persuasive evidence that Student needed any additional AT device or equipment in order to receive educational benefit in his classroom. The District has therefore met its burden that its decision not to provide Student with the AT equipment requested by Parents did not deny Student a FAPE. (Factual Findings 17-70 and 160-164, Legal Conclusions 14-20 and 54-56.)

STUDENT DID NOT REGRESS DURING THE SCHOOL YEAR. HOWEVER, EVEN IF THE EVIDENCE SUPPORTED THAT CONCLUSION, THE DISTRICT'S OFFER OF 175 HOURS OF INDIVIDUALIZED INSTRUCTION ADEQUATELY COMPENSATES STUDENT FOR ANY LOSS OF FAPE

57. The totality of the evidence indicates that Student made some progress during the 2008 – 2009 school year. Student's grades were good; the only subjects with which he struggled were reading, social science and history. Student received a grade of C- in each of those subjects at the end of the school year. However, his grades in those subjects were directly correlated to his deficits in reading comprehension and writing.

Student showed general progress in his curriculum, and his grades in sixth grade were consistent with the grades he received at the end of fifth grade. Since Parents never consented to the January 2009 IEP, it is impossible to determine if Student would have demonstrated even more progress with the additional RSP services offered, as well as because of the addition of SL services and the proposed consultation between the AT specialist and Student's teachers.

58. However, assuming that Student did suffer regression, the District has offered 175 hours of compensatory education to address its failure to provide direct specialized academic instruction services to Student. The District has shown by a preponderance of the evidence that 175 hours is an adequate amount of services to compensate Student for any loss of FAPE during the 2008 – 2009 school year. (Factual Findings 17-70 and 165-171, Legal Conclusions 14-20 and 57-58.)

THE DISTRICT'S JANUARY 2009 IEP OFFERED STUDENT A FAPE IN ALL AREAS EXCEPT FOR THE TYPE AND AMOUNT OF RSP SERVICES, THE FAPE-OUT PLAN AND SL CONSULTATION SERVICES AS THEY APPLIED TO INTERMEDIATE SCHOOL, AND THE FAILURE TO PROVIDE SUMMER 2009 ESY (ISSUES 2-20)

59. The totality of the evidence presented at hearing supports the conclusion that the District's IEP offer of January 2009 provided Student a FAPE based upon the information known to the District at the time. The District conceded that 60 minutes of RSP consultation services to address Student's reading comprehension and written language deficits was insufficient. It has therefore offered to provide Student with 50 minutes a day of direct RSP services to address his needs. The evidence supports the District's position that the amount and type of services it is now offering will provide Student with a FAPE. Student appears to concede as much in reply brief. The evidence also weighs in favor of the District's contention that 120 minutes of direct SL pull-out services, in conjunction with 30 minutes a month of SL consultation services, addresses

Student's social and pragmatic language needs and thus provides him with a FAPE. Likewise, the District's proposed IEP provided Student with adequate AT services and appropriate and adequate accommodations. Moreover, the District has met its burden of proof that at the time the IEP was developed, it was appropriate to attempt to fade out Student's one-on-one aide. Student, however, has met his burden of proof that he required ESY services during summer 2009. Because the District failed to provide ESY, Student is entitled to an award of compensatory education in addition to the compensation for his loss of FAPE based upon the District's conceded failure to provide appropriate RSP services. (Factual Findings 17-172, Legal Conclusions 14-59.)

COMPENSATORY EDUCATION

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

61. The District has offered to provide Student with 175 hours of compensatory education. Although Student contends that he is entitled to upwards of 1850 of compensatory education, he failed to provide any evidence in support of his request. In contrast, the District has provided evidence through the testimony of Ms.

Hansen, Ms. Huerta, and Ms. Puentes, that the amount of compensation proposed by the District will adequately compensate Student for his loss of FAPE. The District has offered to provide Student with almost an hour-for-hour amount of services to address its failure to furnish him with an appropriate RSP program. Student's school program will therefore include a minimum of three hours a day of language services consisting of an hour of individualized instruction as compensatory education, an hour of RSP instruction in reading comprehension and written language, and an hour in a general education language arts class. The District has shown that its offer of compensatory education is adequate and appropriate. However, the ALJ agrees with Parents that the compensatory education must be provided in such a way that it does not prevent Student from participating in extracurricular activities after school. (Factual Findings 173-179, Legal Conclusions 60-61.)

62. Student has also demonstrated that the District should have provided him with ESY in the summer of 2009. The parties did not indicate at hearing how many days the District's summer school or ESY programs last. The ALJ will therefore presume a summer school session of 20 days. Based upon the District's concession that Student should have received approximately one hour a day of RSP services during the school year, an award of compensatory education in the amount of additional 20 hours of individualized instruction is reasonably calculated to compensate Student for his loss of FAPE during ESY 2009. Student is therefore entitled to a total award of 195 hours of compensatory education for his loss of FAPE. (Factual Findings 156-159 and 173-179; Legal Conclusions 53, 59, and 61-62.)

REIMBURSEMENT

63. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA.

(*School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359; *Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1496.)

However, parents are not required to have procured an exact proper placement under the IDEA in order to be entitled to reimbursement. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir.1986) 79 F.2d 1153, 1161.) The parents may receive reimbursement so long as their placement met the student's unique needs and provided the student with educational benefit. (*Ibid.*)

64. Student has failed to prove that he is entitled to reimbursement for any of the IEES he obtained because the District's assessments challenged by Student were appropriate. With regard to reimbursement of any amounts charged by Ms. Anderson for her services, Student failed to provide any evidence that support his request for reimbursement of her fees. Likewise, Student presented no persuasive evidence at hearing that support his request for reimbursement of the cost of Ms. Nikaido's services. Additionally, Student has failed to show that Mr. Nikaido's tutorial services were appropriate to address Student's loss of ESY because he only provided general education instruction rather than the special education instruction Student proved he required during the summer. Finally, Parents appear to be requesting reimbursement for their litigation costs. OAH, however, does not have jurisdiction to order reimbursement of those types of costs. (Factual Findings 180-184; Legal Conclusions 63-64.)

ORDER

1. The District shall provide Student with 195 hours of compensatory education in the areas of reading comprehension and written language, to be used within two school years from the date of this order, for failure to provide Student with appropriate specialized academic instruction during the 2008 – 2009 school year and summer 2009 ESY. The District shall provide the compensatory education either any time during the school day, including during the 0 period, which does not interfere with

Student's academic classes, or in the afternoon after Student's extracurricular activities, at the District's discretion. Alternatively, Parents and the District may mutually determine another appropriate time for Student to receive the compensatory education services. The District will have the discretion to use either a credentialed special education teacher or an outside agency to provide the services.

2. The District shall convene an IEP meeting for Student within 45 days of this order to determine whether a plan to fade-out Student's one-on-one aide is still appropriate and, if so, to develop such a plan, and in order to determine the amount of speech language consultation services to be provided to Student's intermediate school teachers by a speech language pathologist.

3. Other than the fade-out plan, and as amended by paragraph 2 of this Order, the District may implement its January 2009 IEP, as modified by its concession that it will provide Student with 50 minutes per day of specialized academic instruction (or RSP instruction) during a non-academic period of Student's school day, in addition to Student's one period a day of general education language arts instruction, over Parents' objection.

4. All other requests for relief of the Parties are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed fully on Issues 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, and 19. The District partially prevailed on Issues 2, 13, and 20. Student fully prevailed on Issue 17, and partially prevailed on Issues 2, 13, and 20.

RIGHT TO APPEAL

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

Dated: September 9, 2009

/s/

Darrell Lepkowsky

Administrative Law Judge

Office of Administrative Hearings