

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BUCKEYE UNION SCHOOL DISTRICT.

OAH CASE NO. 2009040469

AMENDED DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on June 15, 16, 17, and 18, 2009, in Shingle Springs, California.

Bob N. Varma, Attorney at Law, represented Student. Student's father (Father) attended portions of the hearing on June 16 and 17, 2009. Student's mother (Mother) attended all four days of hearing.

Marcy Gutierrez, Attorney at Law, represented the Buckeye Union School District (District). District representative, Nancy Dickerson, Director of Student Services, attended all four days of the hearing.

Student filed his request for due process hearing on April 8, 2009. On May 21, 2009, OAH granted a continuance for good cause. On June 18, 2009, at the close of the hearing, the parties were granted permission to file written closing arguments by June 30, 2009. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

On July 28, 2009, ALJ Garrett issued a written Decision in this matter. On August 13, 2009, the parties filed a joint request for reconsideration of the Decision on the ground that the Decision should have, but did not, address an issue related to an April

14, 2009 individualized education plan (IEP). On August 26, 2009, ALJ Garrett issued an order granting the parties' request for reconsideration, and hereby issues this Amended Decision.

ISSUES

1. Did District deny Student a free and appropriate public education (FAPE) by failing to find Student eligible for special education services prior to February 13, 2009?
2. Did District deny Student a FAPE by failing to provide Student with an appropriate placement and services in an IEP dated February 13, 2009, and in the modified IEP dated April 14, 2009?

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is an eight-year-old boy, who was born on December 12, 2000. At all relevant times, Student resided within the boundaries of the District.
2. Student had speech and language deficits in his early development, which qualified Student for special education services in preschool. Specifically, Student did not begin speaking until the age of four. In July 2006, Student was exited from the special education program, just prior to his kindergarten year.

STUDENT'S KINDERGARTEN YEAR (2006-2007 SCHOOL YEAR)

3. Student began kindergarten at the District's Oak Meadow School, and was assigned to Joan Gayle Linda's kindergarten class. At the time Student was assigned to Ms. Linda's class, she had been teaching school for over 35 years, and had been teaching kindergarten for two years.

4. At the beginning of the school year, Student exhibited behavior difficulties. Many times, Student would become upset and run out of the classroom, fall to his knees, or become non-compliant. In particular, these behaviors would arise when Student wished to avoid language arts assignments. As a result, Mother would be required to pick up Student early from school multiple days a week. Student's elopement episodes and non-compliant behavior would decrease when Ms. Linda employed positive reinforcement techniques with the Student, and when she would arrange for Student to receive one-on-one attention from one of the aides in the classroom. Also, Ms. Linda created a "safe spot" in the classroom for Student, where Student could go to decompress when he felt angry or anxious. By the end of the school year, Student's behavior had improved significantly.

5. Student's kindergarten report card indicated that by the end of the first trimester, Student had mastered two of 31 criteria in language arts, specifically, recognizing his own name in print, and recognizing high frequency words. Student could recognize 15 of 26 lower case letters, 15 of 26 upper case letters, and could give 12 of 26 sounds for letter symbols. By the end of the second trimester, Student had mastered six of the 31 criteria, could recognize 26 of 26 lower case letters, 21 of 26 upper case letters, and could give 21 of 26 sounds for letter symbols. By the end of the third trimester, Student had mastered 26 of the 31 criteria, could recognize 26 of 26 upper case letters, and could give 24 of 26 sounds for letter symbols. In mathematics, Student had not mastered any of the 16 criteria by the end of the first trimester, but had mastered five of the 16 criteria by the end of the second trimester, and 14 of the 16 criteria by the end of the third trimester. In science and health, Student had not mastered any of the three criteria by the end of the first and second trimester, but had mastered all three by the end of the third trimester. In technology and physical education, Student had not mastered any of the criteria by the end of the first trimester,

but had mastered all of the criteria in those areas by the end of the third trimester. In fine arts, Student had not mastered the two criteria by the end of the first trimester, but mastered them by the end of the second trimester.

6. Ms. Linda noted in Student's kindergarten report card that, with the exception of completing his homework, Student had shown improvement, but had not mastered the following learning skills: (1) working independently and staying on task; (2) working neatly and carefully; and (3) putting forth his best effort. In the comment section of the third trimester report, Ms. Linda stated that Student needed to be encouraged to complete assignments in class, that Student had the skills to be successful, but had difficulty with compliance. Ms. Linda also indicated in Student's report card that Student had improved, but had not mastered the following social skills: (1) following classroom rules; (2) following school rules; (3) cooperating with others; (4) accepting responsibility for behavior; and (5) using self-control. In addition, Ms. Linda noted that Student had not mastered the elements of good citizenship. Because Student had difficulty making friends, Ms. Linda also recommended at the time that Student participate in "Friendship Group," which was a small group of students led by a counselor to help students learn skills and strategies to communicate successfully with their peers. Student began participating in Friendship Group during the last trimester of his kindergarten year.

7. Ms. Linda recommended that Student attend summer school in order to help Student maintain the skills he acquired in kindergarten, as well as give Student an opportunity to work on making friends. Ms. Linda was concerned that if Student lost his newly acquired academic skills, Student would be negatively impacted in the first grade. Student attended the first day of summer school, but was asked not to return after Student exhibited a problem behavior. No further evidence about this incident was produced at hearing.

STUDENT'S FIRST GRADE YEAR (2007-2008 SCHOOL YEAR)

8. On August 12, 2007, prior to the commencement of the 2007-2008 school year, Mother wrote a letter to Nicki Alexander, who was the first grade teacher to whom Student had been assigned. The purpose of the letter was to provide Ms. Alexander with background information concerning Student, as well as techniques Ms. Alexander could use to manage Student's behavior. Specifically, the letter indicated that Student's response to being anxious and upset was usually extreme and inappropriate, but that touching Student on his shoulder, head, or hand worked to calm and center Student during the early stages of an upset. Mother also recommended that Ms. Alexander provide a safe place for Student to go when he felt overwhelmed, such as a private corner or a special chair, like Ms. Linda had done.

9. Once Student began attending her class, Ms. Alexander provided a "safe spot" for Student. However, Student continued to have anxiety attacks everyday. When Student felt anxious, his behaviors included kicking, hitting, slapping, lashing out, holding his pencil like a weapon, and running out of the class. Many times when Student engaged in any aggressive physical contact, Student was suspended from school, or was otherwise disciplined by the school's administration, such as requiring Student to spend time in the office, requiring Student to miss recess, or by contacting Parents. During the fall of 2007, Assistant Principal Paul Stewart had to interact with Student approximately once every other week for negative behavior, mostly for physical contact against Ms. Alexander, or for running out of the classroom. In total, during Student's first grade year, he was suspended for 12.75 days,¹ and was disciplined by the administration in other

¹ The parties stipulated that Student had been suspended for 12.75 days during his first grade year.

ways on a number of other occasions. Specific instances of Student's behavior during this school year are set out below.

10. On August 28, 2007, Student was disciplined for hitting a girl in his class. Student was required to spend time in the office discussing proper behavior, and Parents were called notifying them of Student's behavior. On August 29, 2007, Student was disciplined for poking and pinching a girl in his class, for having no reason for doing so, and for holding his chair over his head. Student was required to miss recess and write a note of apology, and Parents were called notifying them of Student's behavior. On August 30, 2007, Student was removed from class for refusing to listen to Ms. Alexander and for hitting a classmate, which resulted in a phone call to Parents advising of Student's behavior. On September 6, 2007, Student was disciplined for pushing pencils into his classmates' backs, and refusing to stop when asked to do so, which resulted in the teacher sending Student to the principal's office.

11. On September 10, 2007, District held a Student Success Team (SST) meeting concerning Student. A SST is a problem-solving team that helps teachers and staff with interventions and strategies to address the behavioral, academic, or emotional issues concerning a student. Classroom teachers typically refer students to the SST who have learning, behavior, or emotional needs that are not being met under existing circumstances. Prior to the first formal SST meeting, teachers must meet to review classroom modifications that enhance learning for students. A modification may be as simple as a change in seating location, a daily assignment sheet, or an increase in visual teaching aids.

12. The purpose of Student's SST meeting was to address Student's behavioral issues, specifically Student's noncompliance and physical aggression, as well as Student's academic issues in the areas of reading and writing. Student's parents, Ms. Alexander, and Mr. Stewart were present at the meeting, and agreed to the following: (1)

Mother, of her own volition, would adjust Student's diet to replace synthetic food with organic food; (2) Ms. Alexander would provide Parents with daily reports concerning Student's behavior; (3) Ms. Alexander would send home as much pre-learning information as possible so that Parents could help introduce Student to upcoming lessons; (4) Ms. Alexander would continue to provide a "safe spot" for Student; (5) Ms. Alexander would monitor possible bullying and teasing by classmates against Student by occasionally observing the playground and checking with yard duty teachers; (6) Student would miss a few minutes of recess without social interaction with Ms. Alexander, should Student engage in negative behavior; (7) the SST team would meet again the following month; (8) Ms. Alexander and Parents would talk to Student to explain that there would be no more physical aggression at school, and if there was, Student would be sent home each time; and (9) Ms. Alexander and Parents would stay in contact to monitor Student's improvements and successes.

13. On September 10, 2007, Student was disciplined for growling, swinging his arms near his classmates, kicking his feet, hitting, kicking, and scratching Ms. Alexander, and throwing chairs. On September 12, 2007, Student was suspended for refusing to listen to Ms. Alexander's directions and for hitting Ms. Alexander on her arm. On September 14, 2007, Student was disciplined for urinating on the grass by the school's baseball field. On September 20, 2007, Student was suspended for hitting Ms. Alexander.

14. The SST met again on September 27, 2007, concerning Student. Present at the meeting were Parents, Ms. Alexander, Ms. Linda, Kristen Phillips, who was the school's counselor, Mr. Stewart, and Barbara Narez, who was the school's principal. In addition, Estella Marquez, school psychologist for the District, participated in the meeting.

15. Ms. Marquez had a Master's Degree in psychology and had been a credentialed school psychologist for eight years. Ms. Marquez had received the following trainings: Asperger's training in 2008 at the Northern California Diagnostic Center; 20 hours of autism training from the El Dorado County Office of Education (EDCOE) in 2008 and 2009; crisis prevention intervention training in 2008 and 2009; behavior management strategies training in 2008; autism and behavior training in 2009; a seminar on aggression, rage, and meltdowns in 2008; teaching children with autism in 2007; social skills training in 2000; Asperger's training in 2003; behavior intervention case manager training in 2003; and training from Behaviorist Diane Stepnitz in Asperger's, bipolar disorder, conduct disorder and behavior. In her capacity as a school psychologist, Ms. Marquez routinely facilitated IEP meetings, attended SST meetings, helped school staff members develop goals for children, and conducted assessments. Ms. Marquez' role in Student's SST meeting was to hear the areas of concern and to discuss strategies and interventions that could help Student become successful in school.

16. At the September 27, 2008 SST meeting, the team addressed the following areas of concern: (1) Student's attendance as it related to the school sending Student home early due to Student's behavioral issues; (2) Student's low frustration level; (3) Student's tendency to give up easily; (4) Student's physical aggression; (5) Student's anxiety; (6) Student's behavioral issues that arose at recess; (7) Student's aggression and non-compliance; (8) Student's difficulty with writing assignments and how his non-compliance has caused him to fall behind; and (9) Student's trimester progress report, to be distributed on September 28, 2008, indicating the need for Student to improve in all areas. The team developed new strategies and agreed to continue employing previously established strategies as follows: (1) Parents and teachers to place their hand on Student's shoulder to reassure him; (2) additional reading practice at home; (3) Ms.

Alexander to use a visual schedule in the classroom; (4) Parents and teachers to continue positive reinforcement; (5) Student to practice daily writing at home; (6) Ms. Alexander to employ "chunk writing" into small sections; (7) Ms. Alexander to report percentage of assignments Student completes in class; and (8) Parents to use "positive notes" for writing practice. Shortly after the SST meeting, Ms. Marquez initiated a referral to behaviorist Dianne Stepnitz. Ms. Marquez requested that Ms. Stepnitz observe Student and assist in developing a behavior support plan for Student to be implemented by general education teachers, staff, and counselors.

17. On September 28, 2007, Ms. Alexander completed Student's progress report for the first trimester, and indicated that Student needed improvement in reading, particularly in the areas of phonics, strategies, comprehension, and fluency. In regard to writing, Ms. Alexander indicated that Student needed improvement in the areas of capitalizing, punctuating, and writing sentences. In regard to spelling, Student needed improvement in the areas of daily writing assignments and spelling tests, and with respect to penmanship, Student needed improvement in the areas of accuracy and neatness. In the area of math, Student needed improvement mastering basic math facts. Ms. Alexander stated that Student's class work required improvement in the areas of timeliness, completeness, and accuracy. Finally, Ms. Alexander indicated that, with respect to Student's behavior, Student had been aggressive and non-compliant, and stated that Student was falling behind as a result of his non-compliance.

18. On October 2, 2007, Student was suspended for hitting and kicking Ms. Alexander. Student also stabbed Ms. Alexander in the hand with a pencil. When another teacher attempted to assist Ms. Alexander, Student hit and kicked that teacher, as well. Thereafter, Assistant Principal Stewart met with Mother, and agreed to remove Student from Ms. Alexander's class and place Student in Kevin Cadden's first grade class.

19. On October 9, 2007, Student was transferred to Mr. Cadden's class. At the time, Mr. Cadden had been teaching for approximately five years. Mr. Cadden observed that Student did not enjoy language arts activities, particularly writing, and would engage in task avoidance, delay, non-compliance, and would walk out of the classroom. Mr. Cadden stated that Student was a sweet kid who showed compassion towards other kids, and could relate to his peers, although would quickly become frustrated with them. Student had continued participating in Friendship Group for the majority of his first grade year. Mr. Cadden testified that it took a lot of energy to get Student to start and complete his class assignments, specifically in the form of negotiations with Student to motivate him to do his work. For example, in order to get Student to begin an assignment, Mr. Cadden would tell Student that he could complete two sentences of the assignment as opposed to the four that his classmates were required to complete. Mr. Cadden recommended that Student attend intercession classes during the upcoming winter break so that Student could continue working on his academic issues.

20. On October 18, 2007, Mother referred Student to Dr. Jenifer R. Jacobs, a clinical psychologist, for a psychological evaluation. Mother advised Dr. Jacobs that Student always had great difficulty with focus, concentration, compliance, transitions, and respecting other people's personal space. Mother advised Dr. Jacobs that Student did not seem to "connect" with others, with the exception of his family, and showed little responsibility and an even less desire to please. After conducting an evaluation on October 18, 2007, Dr. Jacobs prepared a two-page document setting forth her diagnostic impressions, and stated that Student met the criteria for Attention Deficit Disorder (ADD). Dr. Jacobs also found that Student manifested many symptoms of Asperger's. Dr. Jacobs indicated that Student would benefit from wrap-around services from the District, as well as other community mental health programs to address Student's numerous needs. District received a copy of Dr. Jacobs' impressions in

October 2007. The document setting forth Dr. Jacobs' impressions did not include the tests Dr. Jacobs' conducted, nor did it include any test results. Dr. Jacobs, pursuant to Mother's request, subsequently prepared a second draft of her impressions, which clarified that Student not only manifested many symptoms of Asperger's, but also met the criteria for Asperger's, and she diagnosed him as such. District did not receive a copy of Dr. Jacobs' second draft of her diagnostic impressions until some time in 2008, subsequent to a February 6, 2008 IEP meeting held concerning Student.²

21. On October 24, 2007, Student was disciplined for hitting a girl in the stomach at recess and for running away from yard duty attendants. Student claimed he did not know why he had done it. On October 31, 2007, Student was disciplined for hitting a boy in the stomach during class, resulting in Student having to stay in the office. The school also contacted Student's parents.

22. At the end of the first trimester, Mr. Cadden completed Student's report card and noted that in life-long skills, Student needed improvement in nine of the 12 areas, namely assuming responsibility for learning, listening to and following directions, working independently, working cooperatively, using class time wisely, completing class work on time, demonstrating effort, and choosing appropriate strategies to resolve conflicts. Student received satisfactory marks for completing homework on time, following school and class rules, and showing respect for peers and adults. In the area of language arts, specifically in reading skills and strategies, Student scored below the standard in six of the eight criteria: creating and stating a series of rhyming words; blending sounds into recognizable words; decoding short vowel sounds; decoding words containing long vowels; recognizing high frequency words; and decoding words containing diagraphs and blends. Student had not met the standard in the other two

² The February 6, 2008 IEP is discussed in more detail below.

reading criteria (i.e., identifying sounds in words, and separating words into sounds), but was noted as progressing toward the standard. In the area of reading comprehension, Student scored below the standard in two of the three criteria: retelling a story in sequence; and self-correcting while reading. Student had not met the standard in the other reading comprehension criterion (i.e., comprehending what is read), but was noted as progressing toward the standard. In the area of writing, Student scored below the standard in one of the 12 criteria (i.e., writing upper and lower case letters correctly on lined paper), and was progressing toward the standard in the following areas: writing left to right; top to bottom; leaving spaces between words; spelling phonetically; using some correct spelling; writing complete sentences using capitals and correct ending punctuation; writing on topic given a variety of prompts and/or self-generated ideas; and taking weekly spelling tests. In the areas of listening and speaking, Mr. Cadden noted that Student was progressing toward the standard in listening attentively, speaking clearly and audibly, participating in group discussions, and reciting poems, rhymes, songs, and stories with repeated patterns.

23. Mr. Cadden also noted that in regard to mathematics, specifically in the area of number sense, Student was progressing toward the standard in each criteria except for identifying and knowing the value of coins. Student was also progressing toward the standard in the areas of algebra and functions, statistics, data analysis, probability, and mathematical reasoning. With respect to history, social science, science, health, and physical education, Mr. Cadden noted that Student was progressing toward the standard, and in regard to technology and fine arts, Student had met the standard. Mr. Cadden noted that Student was adjusting well to his new class, but that Student was far below where he should have been for that time of the year. Also, Mr. Cadden noted that an area of concern was Student's focus, as well as his effort.

24. On November 6, 2007, School Psychologist Marquez sent Parents an assessment plan proposing to evaluate Student's academic achievement, social/adaptive development, psycho-motor development, intellectual development, behavior, and health to determine whether Student was eligible for special education services. Parents consented to the assessment plan on November 8, 2007.

25. On December 7, 2007, Student was disciplined for hitting a boy in the face at recess, and kicking a girl in his class. As a result, Student was required to miss recess. In addition, the school contacted Student's parents.

26. Winter break at Student's school began in December 2007. During the winter break, Student attended the first day of intercession. However, the school asked Student not to return for the remainder of the intercession, because Student had acted out in class. No further evidence about this incident was produced at hearing.

27. On January 16, 2008, Mr. Cadden completed Student's progress report for the second trimester, and indicated that Student needed improvement in reading, particularly in the areas of recognizing high frequency words and phonics. In regard to writing, Mr. Cadden indicated that Student needed improvement in the area of sentence writing. In regard to spelling, Student needed improvement in the areas of daily writing assignments and spelling tests, and with respect to penmanship, Student needed improvement in the area of neatness. In the area of math, Student needed improvement mastering basic math facts, concepts, and problem solving. Mr. Cadden stated that Student's class work required improvement in the area of completeness. Finally, Mr. Cadden indicated that Student was learning how to work a littler harder in class, but Student still did not want to work his best. Mr. Cadden stated that Student would compromise and do some work, but he was concerned that Student would not meet grade level benchmarks by the end of the year if Student did not begin to work harder. Mr. Cadden did not list any behavioral or social concerns on this progress report.

28. On January 21, 2008, as part of District's assessments to determine if Student qualified for special education, Mr. Cadden received a request to complete a "Pupil Information Request/Assessment Report." Mr. Cadden was asked to outline his classroom observations of Student, Student's classroom performance, and interventions tried. Mr. Cadden indicated that Student was a sweet, affectionate child who was kind to other students. Mr. Cadden mentioned that Student was a good listener during classroom carpet time, but avoided doing many of the tasks required for him to do in class. Although Student had been making improvement in doing his work without as much complaining, Mr. Cadden stated that the quantity of all of Student's work had to be modified, as well as modified to a lower level of difficulty to match Student's reading ability in language arts. Mr. Cadden also indicated that he had to implement a reward system to help Student complete his work. For example, when Student would complete a phonics assignment, Mr. Cadden would allow Student to play on the computer afterwards. Despite the reward system, Student still required a great deal of redirection. Also, Mr. Cadden indicated that Student only wanted to do a minimum amount of work, and would often question why he had to do the work.

29. In January 2008, Ms. Marquez and Suzanne Lewis, a special education teacher with the District, conducted an assessment of Student to determine whether Student qualified for special education services. Ms. Marquez and Ms. Lewis conducted the following battery of tests for the assessment: Wechsler Intelligence Scale for Children-IV (WISC-IV); Woodcock-Johnson III Tests of Achievement (WJ-III); Behavior Assessment System for Children; Second Edition (BASC-2); Structured Developmental History (SDH); District Nurse Interview; Vision Screening; Hearing Screening, Review of School Records; Beery-Buktenica Developmental Test of Visual-Motor Integration (Beery VMI Fifth Edition); Conners' Rating Scales (Teacher/Parent); Gilliam Autism Rating Scale; Second Edition (GARS-2); and Gilliam Asperger's Disorder Scale (GADS). The assessment

results, set forth in Ms. Marquez' February 1, 2008 report, demonstrated that Student's general cognitive ability, as estimated by the WISC-IV, was in the average range, and that Student's verbal comprehension and perceptual reasoning abilities were also in the average range. Student's general working memory abilities were in the average range, and Student's general processing speed abilities were in the average range. Student's academic skills, as measured by the WJ-III, indicated that Student's reading skills were in the low average range, while math and writing were found to be in the average range. Ms. Marquez also stated in the report that Student did not demonstrate any evidence of a disorder in any of the basic psychological processes that manifests itself as an impaired ability to learn, and that there was no severe discrepancy between Student's intellectual ability and achievement. Ms. Marquez acknowledged that Student had some educational gaps, but concluded that the educational gaps had not resulted in a severe loss of learning. Consequently, Ms. Marquez concluded that Student did not meet the eligibility criteria for special education services as a student with a specific learning disability, but recommended that Student participate in school intervention programs to address his academic areas of need.

30. Ms. Marquez also stated in her report that, in regard to the diagnosis of Asperger's by Dr. Jacobs, Student did not meet eligibility criteria under autistic-like behaviors. Ms. Marquez indicated that based on the rating scales completed by Mother and Mr. Cadden, Student demonstrated average ability to use oral language for appropriate communication, and he did not have a history of extreme withdrawal or relating to people inappropriately or demonstrating continued impairment in social interaction from infancy through early childhood. Also, Student did not have an obsession to maintain sameness or an extreme preoccupation with objects, or a desire to use objects inappropriately. Moreover, Ms. Marquez stated Student did not display an

extreme resistance to controls and did not display peculiar motoric mannerisms, motility patterns, or self-stimulating, ritualistic behaviors.

31. Ms. Marquez' report also stated that the Conners' Rating Scales showed that Student scored in the significant range in the areas of oppositional behavior, cognitive problems, inattention, and social problems, identifying Student as "at risk" for Attention Deficit Hyperactivity Disorder (ADHD), and prone to more emotional responses and behaviors (e.g., crying, anger, etc.) than typical. Ms. Marquez provided testimony indicating that she did not make any recommendations for further testing in these areas because, in order to determine whether a child is eligible for special education, the child must test at a level of clinical significance, not simply "at risk." Ms. Marquez stated in her report that although Student demonstrated some behavioral difficulties at school in the past, Student appeared to be making behavioral progress. Ms. Marquez testified that because of the improvement Student had been making behaviorally, emotional disturbance was not a suspected area of disability, and therefore, Ms. Marquez did not test Student for an emotional disturbance. Ms. Marquez also indicated that, based on Mr. Cadden's report, Student had increased his ability to complete class work, and was making academic progress.

32. On February 6, 2008, the District conducted an IEP team meeting to review the results of Student's assessment, and to make a determination whether Student qualified for special education services. Present at the meeting were Parents, Mr. Cadden, Ms. Lewis, Ms. Marquez, Principal Barbara Narez, and Parents' advocate, Marilyn Maggio. During the meeting, Ms. Marquez advised the team that Student's verbal and nonverbal reasoning abilities were in the average range, his ability to sustain attention, concentrate, or exert mental control was in the average range, and his ability in processing simple or routine visual material without making errors was in the average range when compared to his peers. Ms. Marquez also advised the team that Student

performed better than approximately 34 percent of his peers on processing speed tasks. In addition, Ms. Marquez advised the team that her assessment results identified Student as “at risk” for Attention Deficit Hyperactivity Disorder (ADHD), and prone to more emotional responses and behaviors (e.g., crying, anger, etc.) than typical. Also, Ms. Marquez advised the team that Student scored within the “unlikely” category regarding the probability of autism, and in the “low/not probable” category regarding the probability of Asperger’s. Ms. Lewis advised the team that, based on the tests she had given Student, Student’s fluency with academic tasks was within the low average range, his academic skills and his ability to apply those academic skills were within the average range, and his performance in mathematics, math calculation skills, written language, and written expression were in the average range, while broad reading fell in the low average category. Ms. Marquez advised the team that although Student demonstrated some behavioral difficulties at school in the past, Student appeared to be making behavioral progress and had been making academic progress, and had not demonstrated any evidence of a disorder in any of the basic psychological processes that manifests itself as an impaired ability to learn. Because there was no severe discrepancy between Student’s intellectual ability and achievement, despite some educational gaps, Ms. Marquez advised the team that Student did not meet the eligibility criteria for special education services as a student with a specific learning ability. Ms. Marquez recommended to the team that Student participate in school intervention programs to address his academic areas of need.

33. Based on the assessments conducted by Ms. Marquez and Ms. Lewis, the District determined that Student did not meet eligibility criteria for special education services and that Student would be remaining in the general education classroom and participating in the school’s reading intervention services such as SIPPS (Systematic Instruction in Phoneme Awareness, Phonics, and Sight Words), which met 30 minutes a

day, four days a week, and Read Naturally, which was a program that focused on reading fluency and reading comprehension. Parents did not agree with the assessment, and requested an independent psycho-educational evaluation (IEE), an occupational therapy assessment, a functional behavioral assessment, and a 504 plan. District later advised Parents that it would not conduct an occupational therapy assessment on Student because, in order to qualify, Student would have had to qualify for special education services, which he did not. However, District would accommodate Parents with their other requests.

34. On February 6, 2008, Student was disciplined for hitting a student in the stomach and running away from yard duty attendants. Student's parents were called and Student missed recess.

35. On February 12, 2008, Behavior Specialist Stepnitz prepared a report after observing Student at school over a two day period, for a total of three hours. Ms. Stepnitz indicated that Student interrupted instruction an average of every four minutes by making statements or asking questions that had nothing to do with the task at hand, asking to have his seat changed, or complaining about other students in the classroom. Ms. Stepnitz concluded that Student's conduct was attention-seeking behavior, as he appeared to require the direct attention of his teacher, Mr. Cadden, every four minutes. Ms. Stepnitz made the following suggestions for behavioral interventions: (1) positive support with "Star Chart of Point Sheet" to give student reinforcement for positive behavior; (2) use social stories to help Student understand appropriate ways of asking for and receiving attention; and (3) continued use the "Special Time" strategy, which Mr. Cadden had previously implemented. "Special Time" was a daily time where Mr. Cadden and Student would have some alone time together where the two of them would play basketball or do something else together. Mr. Cadden indicated that the "Special Time" strategy was very effective.

36. The SST team met on February 19, 2008 regarding Student, and agreed to keep Student in Friendship Group for the remainder of the school year, and that Student would begin participating in the SIPPS program in the third trimester. The SST team also agreed that Student would be eligible to participate in the next after-school math program. Also, the SST team agreed that Mr. Cadden would update Student's remediation plan in accordance with Student's assessment, and that the remediation plan would follow Student to second grade. At the SST meeting, Mother advised the team that she did not want to pursue a 504 plan at that time, and wanted to continue with the modifications that were discussed for the remainder of Student's first grade year.

37. On February 28, 2008, Mr. Cadden completed a remediation plan for Student. The plan indicated that Student would receive the following school interventions in language arts: (1) intersession and summer school; (2) flexible grouping; (3) work with parent volunteers; (4) computer skill tutorials; (5) 10-20 minutes of daily reading practice; (6) "No Excuse Spelling" word list practice; and (7) high frequency words through SIPPS. The plan also provided that at home Student would receive 10-20 minutes of daily reading practice, and a "No Excuse Spelling" word list to practice at home, along with a home study packet. In regard to mathematics, the plan provided the following interventions: (1) intersession and summer school; (2) work with classroom aides; (3) flexible grouping; (4) computer skill tutorials; (4) work with concrete manipulatives; and (5) math fact drills. The plan also provided for Student to work with concrete manipulatives at home, along with a mathematics home study packet.

38. At the end of the second trimester, Mr. Cadden completed Student's report card and noted that in life-long skills, instead of needing improvement in nine of the 12 areas as he had at the end of the first trimester, Student needed improvement in only four: assuming responsibility for learning; working independently; using class time

wisely; and completing class work on time. Student received satisfactory marks for listening and following directions, working cooperatively, completing homework on time, following school and class rules, showing respect for peers and adults, demonstrating effort, and choosing appropriate strategies to resolve conflicts. In the area of language arts, specifically in reading skills and strategies, instead of scoring below the standard in two of the eight criteria, Student only scored below the standard in one (i.e., decoding words containing diagraphs and blends). Mr. Cadden noted Student was progressing toward the standard in the other reading skills and strategies areas, and was progressing toward the standard in the reading comprehension area, with the exception of one (i.e., self-correcting while reading), where he remained below the standard. In the area of writing, Student continued to remain below the standard in one of the 12 criteria (i.e., writing upper and lower case letters correctly on lined paper), was progressing toward the standard in the other writing areas, and continued to progress toward the standard in the areas of listening and speaking.

39. Mr. Cadden also noted in Student's report card that in regard to mathematics, specifically in the area of number sense, Student was progressing toward the standard in all criteria except for using the inverse relationship between addition and subtraction to solve problems. Student also continued to progress toward the standard in the areas of algebra and functions, statistics, data analysis, probability, and mathematical reasoning. With respect to history, social science, science, health, and physical education, Student continued to progress toward the standard, and in regard to technology and fine arts, Student had met the standard. Mr. Cadden noted that Student had shown some improvement over the second trimester, had completed a portion of the language arts program, but needed a lot of help. Mr. Cadden noted that Student did better in math, but often struggled because of a lack of interest and focus. Mr. Cadden

stated that he was concerned about Student's ability to meet the standards, but would continue to work hard with Student to help to get Student's grades up.

40. On April 7, 2008, Student was disciplined for pulling a boy's ear and hitting him. Student's parents were called and Student missed recess.

41. On April 30, 2008, Mr. Cadden completed Student's progress report for the third trimester, and indicated that Student needed improvement in reading, particularly in the areas of phonics and fluency. Mr. Cadden had commented that Student's reading had shown some improvement, but that he was still below grade level. Mr. Cadden also stated that Student's participation in the SIPPS program would help him address his phonics skills. In the area of writing, Mr. Cadden indicated that Student needed improvement with sentence writing. In the area of spelling, Student needed improvement with daily writing assignments and spelling tests, and in the area of penmanship, Student needed improvement with neatness. In the area of math, Student needed improvement mastering basic math facts. Mr. Cadden stated that Student's class work required improvement in the areas of completeness and timeliness. Mr. Cadden commented that Student needed improvement with his behavior. Specifically, Mr. Cadden stated that, to avoid Student becoming too upset, Student required intervention from a "wise" person to help him solve a problem. Finally, Mr. Cadden indicated that if Student would stay focused and applied himself more, his skills would improve at a much faster rate.

42. On May 15, 2008, Student was suspended for hitting a boy in the chest and in the face.

43. At the end of the third trimester, Mr. Cadden completed Student's report card and noted that in life-long skills, Student still needed improvement, specifically in six of nine areas: assuming responsibility for learning; working independently; using class time wisely; completing class work on time; demonstrating effort; and choosing

appropriate strategies to resolve conflicts. Student received satisfactory marks for listening and following directions, working cooperatively, completing homework on time, following school and class rules, and showing respect for peers and adults. In the area of language arts, specifically in reading skills and strategies, Student met the standard in the following areas: creating and stating a series of rhyming words; identifying beginning, middle, and ending sounds in words; separating words into sounds; blending sounds into recognizable words; and decoding short vowel words. Student did not meet the standard in decoding words containing long vowels, recognizing high frequency words, and decoding words containing digraphs and blends. In the area of reading comprehension, Student did not meet the standard in any of the three criteria: retelling a story in sequence; comprehending what was read; and self-correcting while reading. In the area of writing, Student met the standard in the following areas: writing left to right; top to bottom; leaving spaces between words; spelling phonetically; and using some correct spelling. However, Student did not meet the standard in writing upper and lower case letter correctly on lined paper, writing complete sentences using capital letters and correcting ending punctuation, writing on a topic given a variety of prompts and/or self-generated ideas, and passing weekly spelling tests. Student met the standard in the areas of listening and speaking.

44. Mr. Cadden also noted in Student's report card that in regard to mathematics, specifically in the area of number sense, Student met the standard in counting, reading, and writing whole numbers up to 100, comparing and ordering whole numbers to 100 using symbols for less than, equal to, or greater than, identifying and knowing the value of coins, counting by twos, fives, and tens with numbers to 100, and showing the meaning of addition (putting together, increasing) and subtraction (taking away, comparing, finding the difference). However, Student did not meet the standard in counting and grouping objects into ones and tens, showing different combinations of

coins that equal the same value, knowing the addition facts (sums to 20) and the corresponding subtraction facts and committing them to memory, using the inverse relationship between addition and subtraction to solve problems, identifying one more, one less, ten more, and ten less than a number. In the areas of algebra and functions, Student did not meet the standard identifying common geometric figures, classifying them by common attributes, and describing their relative position or location in space. Student met the standard in all other areas of math, as well as met the standard in history, social science, science, health, technology, fine arts, and physical education. Mr. Cadden noted that although Student was being promoted to second grade, Student had not met crucial benchmarks, in that he still struggled with both reading and writing. Mr. Cadden stated that Student needed to show more of an active investment in his own desire to learn. At hearing, Mr. Cadden testified that, at the beginning of the 2007-2008 school year, Student was behind academically, but by the end of the school year, he was well below his peers.

STUDENT'S SECOND GRADE YEAR (2008-2009 SCHOOL YEAR)

45. For second grade, Student was assigned to the classroom of Dan Lewandowski. Mr. Lewandowski had been teaching for approximately 18 years at the time Student was assigned to his classroom. Mr. Lewandowski concluded that Student was at least a half grade below grade level at the beginning of the school year. On October 3, 2008, Mr. Lewandowski prepared Student's progress report, and noted that Student needed improvement in all areas, with the exception of homework. Mr. Lewandowski indicated that Student demonstrated difficulty following instructions and exhibiting self-control, and stated that Student was far below academic the standard in the areas of reading, writing, spelling, D'Nealian printing, mathematics, class work, and behavior. Mr. Lewandowski also indicated that Student's greatest academic obstacles

were Student's confidence and his lack of desire to start and complete work. Mr. Lewandowski stated that an intense remediation plan of basic skills was greatly needed.

46. On September 18, 2008, Student was suspended for kicking Mr. Lewandowski and for misbehaving at lunch time.

47. On October 7, 2008, Mr. Lewandowski prepared recommendations for a remediation plan addressing Student's reading and language arts issues, as well as Student's math issues. The recommendations were that Student continue phonic skill practice, as well as work on blending, daily oral reading fluency in the SIPPS program, daily reading of scholastic readers, reading at home, daily writing and handwriting practice, irregular word flashcards practice, flash card practice of basic math facts at home and at school, counting change, and completing incomplete work at home.

48. On October 9, 2008, Student was disciplined for hitting, choking, and kicking four girls at recess. Student was required to miss two recesses.

49. On October 10, 2008, Student was transferred from Mr. Lewandowski's class to Ms. Ghilarducci's class. Mr. Lewandowski forwarded his recommendations for a remediation plan to Ms. Ghilarducci. On October 10, 2008, Ms. Ghilarducci prepared a remediation plan for Student based on Mr. Lewandowski's recommendations. The plan indicated that Student would receive the following school interventions in language arts: (1) flexible grouping; (2) work with parent volunteers; (3) computer skill tutorials; (4) 20-30 minutes of daily reading practice; (5) "No Excuse Spelling" word list practice; (7) SIPPS; and (8) one-on-one instruction. The plan also provided that Student would receive 20 minutes of daily reading practice, daily writing practice, and "No Excuse Spelling" word list practice at home, along with home study packets containing Read Naturally assignments, sight words, and HM Blackline books. In regard to mathematics, the plan provided the following interventions: (1) work with parent volunteers; (2) flexible grouping; (3) computer skill tutorials; (4) work with concrete manipulatives; (5)

math fact drills; and (6) one-on-one instruction. The plan also provided for Student to work at home with concrete manipulatives, computer skills tutorials, math fact drills, daily homework, along with a mathematic home study packet.

50. Ms. Ghilarducci had been teaching for nearly five years when Student was transferred to her class. When Student first came to Ms. Ghilarducci's class, Student displayed academic difficulties in reading, writing, and in some areas of math. Ms. Ghilarducci concluded that Student lacked self-confidence when it came to completing his assignments, lacked the intrinsic motivation to complete work in class, and had an inability to solve problems when he became really upset. Several times a week, Student would leave the classroom whenever he did not want to complete an assignment or had become upset. Ms. Ghilarducci believed that Student's refusal to complete assignments had interfered with his academic progress.

51. On October 15, 2008, Student was disciplined for being defiant towards Ms. Ghilarducci, and for refusing to complete his assignments. The school contacted Student's mother and advised her about Student's behavior.

52. On November 14, 2008, Student was disciplined for refusing to come in from recess, for refusing to come in from lunch, and for breaking his fork and poking a classmate with the sharp end. The school contacted Student's mother and advised her about Student's behavior.

53. On November 25, 2008, and on December 9, 12, and 16, 2008, Dr. Maria Moleski, conducted an IEE of Student's neuropsychological, behavioral/emotional, intellectual, and academic assessments. Dr. Moleski is a licensed psychologist, child and adolescent neuropsychologist, a licensed educational psychologist, and a certified school psychologist. Dr. Moleski assessed Student using the following assessment battery and evaluation procedures: Reynolds Intellectual Assessment Scales (RIAS); California Verbal Learning Test (CVLT-C); Comprehensive Assessment of Spoken

Language (CASL); Delis-Kaplan Executive Functioning System (D-KEFS); Expressive Vocabulary Test – 2nd Edition (EVT-2); Gray Oral Reading Test (GORT-4); Grooved Pegboard, NEPSY-2nd Edition (NEPSY-II); Peabody Picture Vocabulary Test – 4th Edition (PPVT-4); Test of Everyday Attention for Children (TEA-Ch); Test of Word Reading Efficiency (TOWRE); AIMSweb Curriculum-Based Measurement Probes (CMB); Woodcock Johnson Tests of Achievement – III (WJ-III); Child Behavior Checklist – Parent Rating Scale; The Childhood Autism Rating Scale (CARS); Social Communication Questionnaire (SCQ); Social Responsiveness Scale – Parent Report (SRS); Depression Inventory for Youth; Anxiety Inventory for Youth; Anger Inventory for Youth; Disruptive Behavior Inventory for Youth; Self-Concept Inventory for Youth; interviews with Parents, Student, and Student’s teacher; observations of Student at school; and review of Student’s school and medical records. Dr. Moleski wrote a report in January 2009.

54. Dr. Moleski concluded that Student’s intellectual ability was in the average range, and that Student’s performance on tests that measure sight word reading, reading fluency (speed and errors), and reading comprehension was significantly lower than his intellectual ability level. Dr. Moleski also found that Student’s performance was low average to average on language processing tasks that research has shown to be critical for reading: phonological processing; processing tasks; and rapid naming. Additionally, Dr. Moleski concluded that Student exhibited significant difficulties with reading comprehension that were likely secondary to fluency deficits. Also, Student evidenced weaknesses in written language that were likely secondary not only to Student’s reading difficulties, but also because of attention and executive function (organization) problems.

55. Dr. Moleski found that Student’s attention and executive functioning were areas of relative weakness. Components of “attention” included attention span, divided attention, regulation of arousal and vigilance, selective attention, and sustained

attention. Components of “executive function” included planning and strategy employment, the ability to adopt, maintain, and shift cognitive set, the ability to resist or inhibit the impulse to respond to salient but unrelated aspects of a task, the ability to use organized search strategies, and the inhibition and control of behavior. On standardized attention tests, Student presented with significant attention problems, and his performance fell into the “very low” to “borderline” range. Student had difficulty with all aspects of attention: sustaining attention over time; selective attention (for both auditory and visual stimuli); and engaging in tests of divided attention (performing two simple tasks simultaneously). Student’s performance on tasks that required planning, cognitive flexibility, and behavioral inhibition was impaired. Because Student’s deficits in attention and executive function skills were pervasive, Dr. Moleski concluded that it was likely that these deficits influenced Student’s performance in other areas. Student would perform better when provided with structured tasks and questions (“convergent” thinking) than he did when the task or question was more open-ended and required that he organize his thoughts (“divergent” thinking). Clinically, Student exhibited problems with impulsivity. Overall, Student’s executive functioning was an area of deficiency, and Student’s performance on tasks that measured behavioral inhibition, cognitive set-shifting, and vigilance was impaired. Clinically and upon standardized testing, Student appeared to have difficulty with organization and self-monitoring.

56. Dr. Moleski found that Student was experiencing symptoms of Major Depressive Disorder and Generalized Anxiety Disorder without all of the adaptive skills necessary to cope with his feelings and problems. Student did not report positive emotions, harbored perceptions of not having control over successes and failures, and displayed significant fear of losing control of his environment. Student also exhibited extremely poor self-concept and pervasive unhappiness, and often felt overwhelmed by his feelings and problems to the extent that Student could not fully utilize his adaptive

skills. Student also exhibited a pattern of negativism that significantly impaired all areas of functioning, lacked insight into emotional difficulties, and was often unable to sufficiently respond to emotional stimuli. Dr. Moleski also found that Student exhibited behaviors associated with oppositional defiant disorder, and concluded that Student's tendencies to be overly sensitive and to be noncompliant were manifestations of depression rather than a conduct problem, as depression is often expressed as irritability rather than a sad affect in children.

57. Dr. Moleski also concluded that the results of the assessment indicated that Student had difficulties associated with Attention Deficit Hyperactivity Disorder, Inattentive Type (ADHD-1). Dr. Moleski's report explained that children with the inattentive subtype of ADHD were often impaired on tasks that required sustained attention, executive functions, or both. Student's performance on tasks that measured sustained attention (vigilance), selective attention, and divided attention was impaired.

58. Dr. Moleski's diagnostic impressions of ADHD, Major Depressive Disorder, Generalized Anxiety Disorder, Reading Disorder, and Enuresis (bedwetting) supported her conclusion that Student met the criteria for learning disabled, other health impairment, and emotionally disturbed, thereby qualifying for special education.

59. Dr. Moleski made a number of recommendations to address Student's medical and psychological needs, including medication therapy for Student's ADHD and depression, a referral by the school district to County Mental Health, and the development of a positive behavior plan to be integrated between home and school. In regard to Student's educational needs, Dr. Moleski recommended that an academic intervention include direct reading remediation, alleviate school-related stress, provide additional support in organizational and other skills underlying successful writing, and use a positive behavioral plan to keep Student's motivation high. Dr. Moleski also recommended that Student participate in a reading intervention program that focused

on fluency and comprehension, and that Student receive RSP services that focused on reading, reading comprehension, and written language. Dr. Moleski indicated that although Student did not exhibit difficulties with understanding math concepts, his performance was variable. As such, Dr. Moleski noted that Student could use additional help in this area, as well.

60. Dr. Moleski also recommended that, in order to address Student's executive function impairments, Student would need to be taught organizational skills and help with generating strategies. Steps to accomplish this included the following: (1) Student identifying goals or setting goals; (2) developing steps toward a goal, including identifying the necessary materials (planning); (3) arranging the steps in proper order (sequencing); (4) stopping himself from responding to distractions and delaying gratification to achieve goal (inhibiting); (5) obtaining and maintaining necessary materials for achieving goal (organizing); (6) assessing his own performance and progress towards goal (self-monitoring); (7) responding to feedback by adjusting original plan when necessary (cognitive shifting); and (8) modulating emotional responses (regulating). Dr. Moleski also recommended that Student practice the pre-writing skills of brainstorming and organizing thoughts through word webs or semantic clusters.

61. Dr. Moleski recommended that Student's progress be closely monitored, and that Student receive another formal academic evaluation in six to nine months. Dr. Moleski advised Mother that she should investigate Lindamood-Bell Learning Centers (Lindamood-Bell), which was an organization that provided individualized instruction to children and adults with reading difficulties, comprehension issues, and sensory-cognitive disorders.

62. On January 9, 2009, Student was suspended for punching a boy in the face at recess and for running away from an administrator.

63. On January 19, 2009, Ms. Ghilarducci prepared Student's progress report and indicated that, with the exception of homework, Student needed to improve in all areas. Ms. Ghilarducci also commented that Student was below the standard in most academic areas, but had been responsive to working in small groups or working one-on-one to complete his assignments. Ms. Ghilarducci stated that Student's biggest obstacle was his lack of confidence in reading and his clear displeasure at writing. To address this, Ms. Ghilarducci indicated that Student was participating in the SIPPS program, was participating in the Read Naturally program, had begun the Accelerated Reader program, and had a set of phonics readers at home, in addition to instruction in a leveled small group. Ms. Ghilarducci stated that Student's writing and spelling assignments had been modified by decreasing the amount of his work, while ensuring that Student got the same information and practice as the rest of his class. In addition, Ms. Ghilarducci indicated that Student was much more confident in mathematics, although he needed to learn his math facts to avoid counting on his fingers. Also, Ms. Ghilarducci indicated that Student's behavior had been fairly good overall, although he could still be very stubborn at times and defiant, which had caused Ms. Ghilarducci to involve the school's administration to get Student to move to a safe place where Student and staff could work out the problem. Finally, Ms. Ghilarducci stated that a lot of patience, minor accommodations, and understanding were needed to help Student to be successful both academically and socially.

64. On January 26, 2009, Mother brought Student to Lindamood-Bell for an assessment. Emily Jayne, Lindamood-Bell's Associate Center Director, who had been employed by Lindamood-Bell for the last 12 years, provided testimony at hearing. Ms. Jayne has a Bachelor's degree in speech pathology, and explained that Lindamood-Bell was a non-public agency that works with children and adults addressing the underlying skills necessary for an individual to efficiently process information by listening or

reading. Lindamood-Bell offered year-around services, including summers, and has worked with individuals with learning disabilities, Asperger's, autism spectrum disorders, ADD, ADHD, and other disorders. Lindamood-Bell employed programs designed to develop the ability to process language in the areas of decoding, comprehending written language, comprehending oral language, spelling, and thinking critically. Specifically, Lindamood-Bell's programs included the following: (1) "Seeing Stars," which taught symbol imagery for phonetic awareness, sight words, and spelling; (2) "Visualizing and Verbalizing" for language comprehension and thinking; (3) "Lindamood Phoneme Sequencing Program" for reading, spelling, and speech; (4) "Talkies" for strengthening imagery visualizing and verbalizing to stimulate the imagery-language connection, increase oral vocabulary, and improve language comprehension and expression; and (5) the "On Cloud Nine" math program to stimulate the ability to image and verbalize the concepts underlying math processes. Lindamood-Bell's research and development department examined data from its learning centers and school projects, which demonstrated Lindamood-Bell's ability to help individuals address their learning needs. Ms. Jayne indicated that Lindamood-Bell's intensive one-on-one instruction, which was four hours a day, often resulted in years of learning in just weeks of intensive instruction.

65. Although Ms. Jayne has conducted at least 100 assessments in the course of her career, she did not personally conduct the assessment of Student. A Lindamood-Bell assessor completed the evaluation. Ms. Jayne reviewed the assessment results from the Lindamood-Bell diagnostic evaluation of Student, and shared those results with Parents. The assessment showed that Student took the following tests: Peabody Picture Vocabulary Test - IV, where Student scored in the 75th percentile (3.4 grade level); Detroit Tests of Learning Aptitude (Word Opposites), where Student scored in the 16th percentile; Detroit Tests of Learning Aptitude (Verbal Absurdities), where Student

demonstrated a mental age of 7.0; Detroit Test Of Learning Aptitude (Oral Directions), where Student scored in the 9th percentile; Woodcock Reading Mastery Test (Word Attack) where Student scored in the 47th percentile (3.2 grade level); Slosson Oral Reading Test, where Student scored in the 18th percentile (1.6 grade level); Wide Range Achievement Test, where Student scored in the 30th percentile (2.1 grade level) for spelling, and in the 2nd percentile (K.5 grade level) for math computation; Gray Oral Reading Test, where Student scored in the 1.5 grade level for paragraph reading, less than the 1.0 grade level for reading rate, less than the 1.0 grade level for accuracy, less than the 1.0 grade level for fluency, and less than the 1.0 grade level for comprehension; Lindamood Auditory Conceptualization Test, where Student scored in the 10th percentile (1.2 grade level); Informal Tests of Writing, where Student recognized 28 out of 50 symbols to sounds, and one out of three nonsense spelling words; and Symbol Imagery Test, where Student scored in the 14th percentile.

66. Based on the assessment results, Ms. Jayne concluded that Student would benefit from intervention to develop Student's language and literacy skills, and recommended that Student receive intensive instruction for four hours a day, five days a week, for an initial period of eight to ten weeks. Ms. Jayne also recommended that the Seeing Stars program of Lindamood-Bell be included in the instruction, which was designed to provide the sensory-cognitive development of symbol imagery (i.e., the ability to visually image sounds and letters within words). Ms. Jayne stated that this dual coding processing with imagery and language would support the development of phonemic awareness through the multisyllable level, visual memory, word attack, word recognition, spelling, contextual reading (both accuracy and fluency), and reading comprehension. Also, the Seeing Stars program would develop the imagery-language connection for spontaneous self-correction and accurate, fluent contextual reading.

67. Ms. Jayne also recommended that the Visualizing and Verbalizing for Language Comprehension and Thinking program be included in the instruction, which was designed to provide sensory cognitive development of concept imagery (i.e., the ability to create an imaged gestalt (whole) from oral and written language). Ms. Jayne stated that this dual coding processing with imagery and language would support the development of oral vocabulary, oral language comprehension, reading comprehension, written language expression, ability to follow directions, and critical and analytical thinking.

68. Ms. Jayne indicated that Student could benefit from an additional period of instruction to develop his mathematic computation and reasoning skills, and indicated that recommendations for the On Cloud Nine math program would be made after a retest or during Student's instruction in language processing.

69. A copy of Lindamood-Bell's assessment results of Student, as well as Ms. Jayne's recommendations, was submitted to the District in January of 2009.

70. At hearing, Ms. Jayne testified that she had reviewed some of Student's school file, including Dr. Moleski's report and some progress reports, but did not review Ms. Marquez' report, and was not aware of what type of interventions had been offered to Student in the past. Also, Ms. Jayne admitted that she did not have a clear working knowledge of what executive functioning was, so she could not offer an opinion whether the programs at Lindamood-Bell could address the executive functioning deficits diagnosed by Dr. Moleski. However, Ms. Jayne had seen children with Student's profile in Lindamood-Bell's programs, and while she could not offer any guarantees, anticipated that, based on other children similar to Student, there was approximately a 70 percent chance that Student would be caught up to the third grade level in reading after an initial eight to ten weeks of intensive instruction at Lindamood-Bell.

71. On January 29, 2009, as well as on January 30, 2009, Student was disciplined for leaving the classroom, which resulted in the school contacting Mother. On February 2, 2009, Student was disciplined for refusing to do his class work, leaving the classroom, and banging on the classroom window and door, which resulted in the school requesting Mother to take Student home. On February 3, 2009, Student was disciplined for refusing to come into the classroom after recess.

72. In preparation for an upcoming IEP meeting concerning Student, Ms. Ghilarducci prepared a report indicating that Student was below the standard in most academic areas, and that her main areas of concern affecting Student's academic achievement were his self-confidence, desire to work, and absence from the classroom due to behavior or Student's frequent need to use the restroom. Ms. Ghilarducci noted that when given a reading test, comprehension assignments, or small group books to read, Student lacked self-confidence, because, almost immediately, Student would state that he could not read it. However, Student has read words and sentences with ease when he did not think anyone was listening to him, but whenever Ms. Ghilarducci would ask him to repeat what he had just read, Student either had difficulty or refused to do so. In regard to writing, Ms. Ghilarducci indicated that she must do a lot of negotiating to get Student to write, and Student would usually complain of having a headache or foot pain, ask to use the restroom, or would refuse to write. In regard to social behavior with his peers, Student's behavior had been fairly good overall, as he got along with most of his classmates, worked well with a partner, and worked well with table group peers. Ms. Ghilarducci noted that she was very concerned about the amount of classroom time Student would miss on a weekly basis due to his behavior and physical needs. Specifically, Ms. Ghilarducci indicated that if Student did not agree with one of her rules, Student would simply refuse to do the work, would not join the class in the present activity, or would walk out of the classroom. Additionally, if Student got in

trouble for unacceptable behavior, Student would usually refuse to accept the terms of the punishment and would either walk out of the classroom, refuse to move from a spot outside the classroom to go to the office or back to class, or would refuse to leave the classroom to go to the office. All of these incidences have required Ms. Ghilarducci to call an administrator, causing Student to miss academic class time, as it generally took anywhere from 15 to 45 minutes to get Student to the point where he could return to class and engage in work. At other times, Ms. Ghilarducci or administrators would have to call Mother to come and get him, which resulted in more missed class time.

73. On February 13, 2009, the IEP team met to review the independent educational evaluation completed by Dr. Moleski, as well as Ms. Ghilarducci's report, and the report completed by Lindamood-Bell. After reviewing Dr. Moleski's report, the team concluded that Student was eligible for special education services under the category of specific learning disability. The team also noted that ADHD appeared to influence Student's abilities to access the learning environment, and that Student's behavior difficulties appeared to arise from Student's difficulty with academics. The team identified Student's areas of need as reading, math, writing, behavior, and executive functioning. Also the team decided that it would make a referral to the county behavior specialist for a Functional Behavioral Assessment (FBA). The IEP team concluded that a referral for a full mental health assessment was not needed at that time, and that the team would look to making the referral at a later time should behavior interventions prove to be unsuccessful. The team developed goals in the areas of reading fluency, phonics, writing, math (addition/subtraction and money), and executive functioning in the areas of organization (e.g., using planners and agendas), and breaking subjects into "chunks." The District then made the following offer of FAPE: placement in general education with specialized academic instruction for reading (SIPPS and Read Naturally), writing, and math for one hour a day, five days a week. Ms. Lewis, a

special education teacher with 17 years of experience, explained at hearing that she had envisioned spending 15 to 20 minutes instructing Student in SIPPS, 15 to 20 minutes instructing Student in Read Naturally, 15 to 20 minutes instructing Student in math, and there would be a component of writing instruction that she would alternate with the math instruction.

74. On February 24, 2009, Parents submitted to District a "Parent Addendum & Partial Consent," stating that Parents consented to Student's qualification for special education services under the category of learning disabled. Parents also consented to a FBA, and Student's continued participation in Friendship Group. Parents also wanted Student to have private weekly counseling sessions with Kristin McKelvey, counselor. Parents also stated that they declined to accept SIPPS for Student, as he had participated for 12 months with no success, declined to accept Read Naturally, as Student had participated for five months with no success, and declined to consent to all other recommendations due to lack of effectiveness or success. Parents then requested that Student be assigned an aide until the behaviorist made her recommendations in a FBA, that Student begin receiving services from Lindamood-Bell, that Student receive no aggressive physical contact unless for his safety or for the safety of those around him, and that there be zero tolerance for any bullying of Student by other students. That same day, Student was suspended for punching a girl in the nose, claiming that the devil made him do it, and for writing on the bathroom walls with crayon.

75. On March 11, 2009, in response to the "Parent Addendum & Partial Consent," District notified Parents that District would continue the weekly Friendship Group, but would not be agreeable to funding any private counseling sessions. Also, the letter indicated that Parents' statements regarding the effectiveness of prior interventions were misleading, as the time periods that Parents referenced were not accurate. Specifically, Student was exposed to SIPPS for only a limited and inconsistent

time period, with 36 sessions (30 minutes each) provided at the end of the 2007-2008 school year, and 30 sessions (30 minutes each) between December 2008 and March 2009. Also, there were notable differences between the prior SIPPS program and the SIPPS program offered as a component of Student's February 13, 2009 IEP: (1) the prior program was a general education intervention, while the District's offer provided intervention by a credentialed special education teacher; (2) the prior program consisted of a group of five to six students, while the District's offer provided for reading intervention on a one-to-one or two-to-one ratio; (3) the prior program's pace was based upon the group's progress, while the District's offer provided individualized instruction based upon Student's individual needs and rate of progress; and (4) the prior program included intervention for 30 minutes per day, four days per week, while the District's offer provided one hour per day, five days per week. As to the Read Naturally program, District commented that school staff had not fully implemented the Read Naturally approach with Student at school, and should be allowed the opportunity to do so.

76. District also informed Parents that until the completion of the pending FBA, District would provide Student with aide support. District also notified Parents that Student would receive no aggressive physical contact unless for his safety or for the safety of those around him, and that there would be zero tolerance for any bullying of Student by other students. However, District would not agree to fund a Lindamood-Bell program as Parents had requested. Instead, during the remainder of the 2008-2009 school year, District proposed that Student receive after-school tutoring two days a week, 60 minutes per session, during the school year and ESY by District staff trained in the Lindamood-Bell approach. Parents rejected this proposal.

77. On March 20, 2009, Student was disciplined for leaving the classroom twice, hiding in a bush, making disruptive noises, and for being defiant towards the

teacher. The school called Student's mother and advised her about Student's behavior. On March 24, 2009, Student was disciplined for refusing to return to class. Student was required to go to the office to complete his work.

78. On April 6, 2009, Cheryl Turnboo, a behavioral specialist with the District, prepared a FBA report based on her direct behavioral observations of Student, and informal interviews of Parents, Ms. Ghilarducci, and recess support staff. Ms. Turnboo, who provided testimony at hearing, had been a behavioral specialist with District for the past two years, and prior to that, was a supervisor at the Center for Autism and Related Disorders. In her capacity as a behavioral specialist, Ms. Turnboo provided behavioral support to students in need and conducted FBA's to determine the function of a behavior in question. Ms. Turnboo has conducted over 20 FBA's, has also written behavior support plans for students, and provided training to help teachers implement the strategies set forth in a behavior support plan. Ms. Turnboo earned a Bachelor's degree in teaching, as well as a Master's degree in teaching with a specialization in applied behavioral analysis, and a board certified behavior analyst. Ms. Turnboo had been working in the field of behavioral analysis for 16 years. Ms. Turnboo testified that it was important to understand the function of behavior, because function drives the behavior. Ms. Turnboo stated that the ultimate goal was to have an individual obtain a function without engaging in inappropriate behavior.

79. Ms. Turnboo observed Student on five separate occasions for a total of six hours and 35 minutes, to determine how often Student engaged in elopement and noncompliant behaviors. These observations occurred in Student's classroom, at lunch, and at recess. Ms. Turnboo reported that during small group instruction, which involved two to four children, Student would get up, wander around the room, and attempt to leave. However, after some redirection from Ms. Ghilarducci, Student, on one occasion, was able to complete an entire assignment. During whole group instruction, Student

displayed elopement and noncompliant behavior at a higher rate than in small group instruction. Ms. Turnboo observed Student falling to the floor, taking off his shoes, fidgeting with items, and blurting off-topic statements. On another occasion, Student refused to come into the classroom, ran around the building, and hid from Ms. Ghilarducci, while shouting at other students as they walked by him. At one point, when Ms. Ghilarducci instructed Student to sit down and do the work in front of him, Student knocked over a chair, stated, "I am getting out of here," and walked out of the classroom. During recess, Ms. Turnboo observed Student receiving additional supervision from an aide. Ms. Turnboo hypothesized that the function of Student's noncompliant and elopement behaviors was control, attention, avoidance, and escape. Due to the contrasting rate of noncompliant and elopement behaviors during large group and small group instruction, Ms. Turnboo concluded that Student would benefit from additional small group and one-on-one instruction opportunities. Ms. Turnboo also recommended that Student be taught appropriate ways to address his attention, control, avoidance, and escape functions, and that Student be introduced to the Incredible 5-Point Scale, which was a system designed to help students in understanding social interactions and controlling their emotional responses. Ms. Turnboo also recommended that the school investigate ways to implement a positive reinforcement system, as well as explore opportunities to implement a sensory diet for Student throughout the day, which should include proprioceptive activities for body awareness, vestibular activities for the sense of movement and balance, tactile activities for the sense of touch, texture, or temperature, and auditory activities involving hearing and listening. Finally, Ms. Turnboo recommended that the school contrive situations for Student to engage in positive social interactions throughout the day, and investigate the implementation of a buddy system for Student.

80. On April 14, 2009, an IEP team met to review the results of the FBA completed by Ms. Turnboo. Mother attended with her attorney. Ms. Turnboo, who was present at the meeting, shared the results of her assessment, as well as the recommendations set forth in her report. The team decided that, within two weeks, Ms. Turnboo and Ms. Marquez would develop behavioral goals to address Student's elopement and noncompliance issues. Mother requested that District place Student in the Lindamood-Bell program for four hours per day, five days a week, for a total of 20 hours per week. District offered the following: (1) Ms. Turnboo to develop a Behavior Support Plan (BSP) within the next 30 days; (2) two and one-half hours per month of consultation from Ms. Turnboo with staff and Parents for the first month in order to establish the BSP; thereafter, the consultation time would be reduced to one hour per month; (3) an occupational therapy assessment for Student; and (4) an increase of specialized academic instruction from one hour per day to 20 hours per week, which was recommended by Ms. Lewis. Ms. Lewis explained at hearing that, although the IEP did not specify how the 20 hours a week would be implemented, she had recommended to the team an increase in the hours of specialized academic instruction for Student because of the frequency of elopement issues, making one-on-one instruction even more necessary. Ms. Lewis indicated that the 20 hours of one-on-one instruction would not only address Student's reading, math, and writing issues, but would also address Student's behavior issues, based on the recommendations discussed by Ms. Turnboo at the IEP meeting, and based on Ms. Turnboo's anticipated BSP.

81. Mother did not accept the offer of an increase in specialized academic instruction. Mother agreed to the development of a BSP, occupational therapy assessment, and consultation with Ms. Turnboo.

82. On April 28, 2009, Ms. Turnboo drafted a BSP for Student, and recommended the following: (1) school staff review with Student a list of classroom

rules, and connect these rules with a reinforcement-consequence system that can be implemented at school and at home; (2) Student to be provided with a lot of verbal and gestural praise for positive behavior throughout the day; (3) school staff implement Differential Reinforcement of Alternative Behaviors (DRA) procedures by teaching Student appropriate ways to access items or attention, and appropriate ways to take a break from a situation; (4) school staff to introduce Student to the Incredible 5-Point Scale or a similar self-monitoring system; (5) school staff to provide Student with some control over his day by offering Student a choice of activities; (6) Student to be provided with multiple opportunities throughout the day to engage in gross and fine motor activities; (7) school staff contrive situations for Student to engage in positive social interactions throughout the day; (8) school staff investigate the implementation of a buddy system for Student; (9) the school design and implement a reinforcement system to be delivered in equal intervals throughout the day to avoid an all or nothing effect; (10) Student to receive reinforcement immediately and consistently; (11) Student receive a school-home reinforcement system, meaning that if Student demonstrates appropriate behavior at school, he would earn special privileges at home; and (12) Student receive consequence manipulations should problem behavior occur. Ms. Turnboo also recommended that two to three times a week, school staff collect frequency and duration data on Student's noncompliant and elopement behaviors, and that the data be reviewed bi-weekly or bi-monthly to assist in determining the effectiveness of the interventions. Ms. Turnboo emailed the BSP to Parents on April 30, 2009.

83. Ms. Turnboo testified that she wanted the BSP implemented in a special education setting, as opposed to a general education setting, because Student needed more intensive instruction, and the general education class was not designed for that.

Ms. Turnboo also indicated that the BSP was fluid, as it was designed to change as Student progressed. Parents did not immediately consent to the BSP.

84. On April 28, 2009, Student was suspended for spitting in a boy's face, for pinching another boy, for noncompliance, and for punching Mr. Stewart in the rear, arm, and back. Student was also suspended on May 14, 2009 for punching a staff member in the stomach.

85. On June 8, 2009, at Parents' request, Ms. Turnboo modified the BSP to include that Student be redirected or prompted to his behavior management/self-monitoring system at the onset of elopement or noncompliant behaviors, and that Student be provided the support and reassurance needed for Student to recognize and understand his situation. After Ms. Turnboo's modification, Parents consented to the BSP.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The Petitioner in a special education due process hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528].) As the petitioning party, Student has the burden of proof on all issues.

ISSUE ONE: CHILD FIND

2. Student contends that District failed to provide him a FAPE by failing to find Student eligible for special education services prior to February 13, 2009, pursuant to its "child find" obligation. Specifically, Student contends that District should have found Student eligible for special education services as early as his kindergarten year (2006-2007) under the eligibility categories of learning disabled, emotionally disturbed, autistic-like behavior, or a combination of all of three, due to Student's display of

significant behavioral, social, emotional, and academic difficulties. In particular, Student contends that based on his academic difficulties and his frequent acts of elopement, non-compliance, and disruptive behavior, District should have qualified Student for special education services. Student further contends that District had notice of Student's diagnosis of Asperger's rendered during his first grade year, which, in conjunction with Student's behavioral, social, emotional, and academic difficulties, placed District on notice that Student required special education services under the eligibility categories of learning disabled, emotionally disturbed, autistic-like behavior, or a combination of all of three. Moreover, Student contends that in his second grade year (2008-2009), Student continued to display elopement, non-compliance, and disruptive behavior, as well as continued academic difficulties, that should have alerted District to find Student eligible for special education services prior to February 13, 2009. As a remedy for the alleged denial of FAPE, Student seeks compensatory education in the form of intensive academic intervention from Lindamood-Bell, as well as transportation reimbursement, and reimbursement for childcare costs for Student's siblings if services are delivered during the summer when Mother must take Student to and from Lindamood-Bell. District contends that its determination of eligibility for special education on February 13, 2009, was appropriate, and that, prior to that date, Student did not meet any of the eligibility criteria for special education. Specifically, District argues that a February 1, 2008 assessment showed no evidence of a severe discrepancy between Student's ability and academic achievement that required special education. Also, District contends that Student did not have a processing disorder or any other basis to qualify for special education. Furthermore, District contends that Student's first grade teacher reported that Student had been making behavioral progress, had increased his ability to complete his class work, and had been making academic progress. Finally, District contends that it appropriately determined Student was eligible for special education on

February 13, 2009, after an independent assessment completed in late December 2008 determined that Student had deficits in attention and executive functioning. As discussed below, Student has not met his burden of demonstrating by a preponderance of the evidence that District denied Student a FAPE by failing to find Student eligible for special education services prior to February 13, 2009.

3. California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

4. A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including

those individuals advancing from grade to grade. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171, 56301, subds. (a) and (b).) A child must be assessed by a school district in all areas related to the suspected disability. No single procedure may be used as the sole criterion for determining whether the child has a disability or for determining an appropriate educational program for the child. (20 U.S.C. § 1414(a)(2), (3); 34 C.F.R. § 300.304(b)(2)(2006); Ed. Code, § 56320. subd. (f).) A district is also responsible for the planning of an instructional program to meet the assessed needs. (Ed. Code, § 56301.) These duties are often described as a district's "child find" obligations. "The purpose of the child-find evaluation is to provide access to special education." (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) A district's child find obligation toward a specific child is triggered when there is reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Rae* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

5. A pupil shall be referred for special education instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.) A pupil shall not be determined to be an individual with exceptional needs if the prevailing factor for the determination is one of the following: (A) lack of appropriate instruction in reading; (B) lack of appropriate instruction in mathematics; (C) limited English proficiency; or (D) if the pupil does not otherwise meet the eligibility criteria under federal and California law. (Ed. Code, § 56329, subd. (a)(2).) The law defines an individual with exceptional needs as one who, because of a disability requires instruction and services which cannot be provided with

modification of the regular school program in order to ensure that the individual is provided a FAPE. (Ed. Code, § 56026, subd. (b).)

6. A district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district is not held to a standard based on "hindsight." (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

7. California Code of Regulations, title 5, section 3030, subdivision (i), describes the criteria for determining whether a child qualifies for special education under the category of emotional disturbance:

Because of a serious emotional disturbance, a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance:

- (1) An inability to learn which cannot be explained by intellectual, sensory or health factors.
- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (3) Inappropriate types of behaviors or feelings under normal circumstances exhibited in several situations.
- (4) A general pervasive mood of unhappiness or depression.
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

8. A child qualifies for special education under the category of specific learning disability (SLD) if a child has "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or

written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations.” (Ed. Code, § 56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, and cognitive abilities including association, conceptualization and expression. (Cal.Code Regs., tit. 5, § 3030, subd. (j))(1).)

9. California law provides two alternative methods that a school district may use to determine whether a child requires special education due to SLD. (Ed. Code, § 56337.) A district may use a “process that determines if the pupil responds to scientific, research-based intervention” as part of the assessment procedures (the RTI approach). (Ed. Code, § 56337, subd. (c).) Alternatively, a district may “take into consideration whether a pupil has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning” (the severe discrepancy approach). (Ed. Code, § 56337, subd. (b).)

10. SLD eligibility does not include a learning problem “that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.” (Ed. Code, §56337, subd. (a).) In addition, a discrepancy “shall not be primarily the result of limited school experience or poor school attendance.” (Cal. Code Regs., tit. 5, § 3030, subd. (j))(5).)

11. California Code of Regulations, title 5, section 3030, subdivision (g), describes the criteria for determining whether a child qualifies for special education under the category of autistic-like behaviors:

A pupil exhibits any combination of the following autistic-like behaviors, to include but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating ritualistic behavior.

12. A procedural violation only constitutes a denial of a FAPE if the violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process, or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

13. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) *Rowley* expressly states that as long as a child is offered a FAPE as defined above, questions of educational methodology are left to the discretion of the state and local educational agencies. (*Id.* at p. 208.) Courts are ill-equipped to second-guess reasonable choices that

school districts have made among appropriate instructional methods. (*T.B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.)

14. A request for a due process hearing “shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.” (Ed. Code, § 56505, subd. (I).) Here, Student did not produce evidence at hearing to show that any exception to the statute of limitations applied. Accordingly, Student’s earliest claim begins April 8, 2007, two years prior to the filing of the complaint.

ANALYSIS OF ISSUE ONE

Kindergarten Year

15. Student argues that, during his kindergarten year, due to academic difficulties and frequent acts of elopement and disruptive behavior, Student should have been found eligible for special education services under the eligibility categories of specific learning disability, emotional disturbed, autistic-like behavior, or a combination of the three. However, the issue of whether Student should have been found eligible under any one of these categories is not determinative. The question is whether District’s child find obligations were triggered by the child’s noted behavior. Child find obligations are triggered when there is reason to suspect a disability that requires special education services, thereby necessitating an assessment in all areas of suspected disability.

16. Here, the evidence does not support a finding that the District had a reason to suspect a disability in Student during his kindergarten year. The relevant time period for the purpose of this analysis is from April 8, 2007, which represents the two year statute of limitations from Student’s April 8, 2009 due process complaint, to the end of Student’s kindergarten school year, June 2007. During this time period, Student

was a six year old child who, according to the evidence and the credible testimony of Ms. Linda, had progressed academically, and had made significant behavioral improvements. Specifically, by the end of the third trimester, Student had mastered 26 of the 31 criteria in language arts, 14 of the 16 criteria in mathematics, and had mastered all the criteria in science, health, technology, and physical education. Also, Student's noncompliance and elopement issues had decreased substantially by the end of the school year due to the positive reinforcement techniques Ms. Linda had employed, and the "safe spot" designated for Student to use to decompress. Moreover, Student presented no other evidence showing that during this two month time period, District had reason to suspect that Student was a child with a disability and that special education services may have been needed to address that disability, thus triggering its child find obligations. (Factual Findings 3-7; Legal Conclusions 3-6, 12-14.)

First Grade

17. Student argues that District had notice of Student's diagnosis of Asperger's rendered during his first grade year, which, in conjunction with Student's behavioral, social, emotional, and academic difficulties, placed District on notice that Student required special education services under the eligibility categories of learning disabled, emotionally disturbed, autistic-like behavior, or a combination of all of three. As stated above in Legal Conclusion 15, the only relevant issues are whether District's child find obligations were triggered during Student's first grade year, and if so, whether District appropriately assessed Student.³

³ As discussed in more detail below, District conducted an assessment of Student during his first grade year. Student did not raise in his due process complaint an issue claiming the assessments were conducted improperly, or that the methodologies or

18. Here, the evidence demonstrated that District appropriately assessed Student when it had reason to suspect that Student had a disability requiring special education services. The basis for this suspicion began immediately following his kindergarten year, when Student attended one day of summer school, but was asked not to return after exhibiting problem behavior. Student continued to exhibit behavioral difficulties when he began first grade in Ms. Alexander's class. According to school records, Student was suspended three times, and received other forms of discipline on six other occasions during the six weeks he was in Ms. Alexander's class. Ms. Alexander also reported on Student's first trimester progress report that Student's noncompliant behavior had caused Student to fall behind academically. Ms. Alexander further stated that Student had been experiencing academic difficulties in the area of reading, and required considerable improvement in the areas of writing, spelling, penmanship, and math. However, when Student transferred to Mr. Cadden's class in October of 2007, Student began showing improvement behaviorally and academically, largely due to the implementation of a reward system to help Student complete his work, the modification of the quantity and difficulty level of Student's assignments, and the implementation of strategies developed at an SST meeting conducted days prior to Student's transfer to Mr. Cadden's class. Specifically, the frequency of problem behavior had decreased significantly, as evidenced by school records showing only three instances of discipline imposed by the school during Student's first quarter in Mr. Cadden's class, representing a 50% decrease in school imposed discipline since Student's transfer to Mr. Cadden's class. Also, as evidenced from Mr. Cadden's assessment report, as well as his credible testimony, that Student had increased his ability to complete class work, Student was

techniques used to elicit the data were inappropriate. As such, it will not be the basis of this Decision.

making academic progress during that period, as well. Despite District's implementation of general education supports for Student, by November 2007, District had developed an assessment plan to assess Student for special education eligibility after receiving, in October 2007, Dr. Jacobs' impressions that Student manifested Asperger's symptoms. Specifically, District planned to assess Student's academic achievement, social/adaptive development, psycho-motor development, intellectual development, behavior, and health, representing every area of suspected disability concerning Student. After conducting a comprehensive assessment in January 2008, Ms. Marquez prepared a report, and advised the February 6, 2008 IEP team, that Student had no disability requiring special education services. As a result, the IEP team determined that Student was not eligible for special education services. District, therefore, met its child-find obligations when it appropriately assessed Student after having reason to suspect a disability that required special education services.

19. Student argues that Dr. Moleski's findings showed that Student did, in fact, qualify for special education services, and that Ms. Marquez' failure to find the same at the time of her assessment, constituted a violation of the District's child find duties. However, the law provides that child find obligations are not violated when an assessment does not result in an eligibility finding. The District's duty is to assess a student in all areas of suspected disability when it has reason to suspect that a student may have a disability that requires special education services and address those assessments at an IEP team meeting. In the case at hand, District developed an assessment plan just two months into Student's first grade year, and then tested Student's academic achievement, social/adaptive development, psycho-motor development, intellectual development, behavior, and health. Because District appropriately tested in all areas of suspected disability after its child find obligations were triggered by Student's academic and behavioral problems, as well as by Dr. Jacob's

diagnostic impressions, District met its child find obligations. Furthermore, the law provides that eligibility determinations made by the IEP team must not be held to a standard based on hindsight. The fact, therefore, that Dr. Moleski found eligibility 11 months after Mr. Marquez determined that Student was not eligible is irrelevant, as Dr. Moleski's report was subsequently developed evidence that was not available to the IEP team in February 2008.

20. Student argues that District should have found Student eligible for special education services during his first grade year, subsequent to the February 6, 2008 IEP meeting determining Student was not eligible. Student bases this argument on the fact that Student continued to display academic, behavioral, and social skills problems throughout the school year. However, District did not received sufficient information from the time of the February 6, 2008 IEP meeting to the end of the school year, that should have triggered District's child find duties. After District's February 6, 2008 finding of ineligibility, District continued to implement interventions of the regular education program to address Student's academic, behavioral, and social needs. Specifically, in regard to Student's behavioral and social needs, District implemented the intervention recommendations of Behavior Specialist Stepnitz dated February 12, 2008 that Student receive reinforcement for positive behavior, listen to social stories to teach appropriate ways of asking for and receiving attention, and continued use of the "special time" that Mr. Cadden had previously implemented. Also, District implemented strategies from its February 19, 2008 SST meeting that Student would remain in Friendship Group for the remainder of the school year. As a result of these efforts, as evidenced by the school's records, two months had elapsed before Student's next school imposed discipline on April 7, 2008. Subsequent to that, Student had received only one other imposition of discipline in May 2008. These two instances of school imposed discipline represented a decrease in the frequency of problem behavior since Student's first quarter in Mr.

Cadden's class. In regard to Student's academic needs, the SST team on February 19, 2008 recommended that Student begin participating in the SIPPS program in the third trimester. In addition, Mr. Cadden developed a remediation plan for Student on February 28, 2008 recommending computer skill tutorials, flexible groupings, work with parent volunteers and classroom aides, reading practice, word list practice, work with concrete manipulatives, and math fact drills. However, by the end of April 2008, Mr. Cadden reported that, although Student had been making some improvement, particularly in the area of reading, Student was below grade level. In that regard, District reasonably allowed for more time to determine the overall effectiveness of its general education interventions. By the end of the school year, Mr. Cadden noted that Student had not met crucial benchmarks, and still struggled with both reading and writing. However, this end result did not imply, as Student contends, that District's child find duties should have been triggered before the end of Student's first grade school year. Again, the law does not permit hindsight or retroactive application of subsequently developed evidence in determining whether a district had a reasonable basis to suspect a disability requiring special education services. Given that Student had been found ineligible for special education services in February 2008, had made behavioral and social progress since the February 6, 2008 IEP, and had been making, though limited, some academic improvement through District's general education interventions, District had no reason to suspect a disability requiring special education services. For these reasons, District did not violate its child find duties by not conducting a second assessment during the remainder of Student's first grade year. Student, therefore, did not meet its burden of establishing that District failed to meet its child find obligations during Student's first grade year. (Factual Findings 8-44; Legal Conclusions 3-6, 12-13.)

Second Grade

21. Student argues that Student's behavioral, social, emotional, and academic difficulties placed District on notice that Student required special education services during his second grade year. However, the evidence does not support a finding that the District failed in its child find obligations during Student's second grade year. The relevant period for the purpose of this analysis is the beginning of the 2008-2009 school year to February 13, 2009, the time District found Student eligible for special education services. District had knowledge that Student displayed considerable academic difficulties, as evidenced by Student's final first grade report card indicating that Student had not met crucial benchmarks, Mr. Lewandowski's credible testimony that Student was at least a half grade below grade level at the beginning of Student's second grade year, and Ms. Ghilarducci's credible testimony that Student's refusal to complete assignments interfered with his academic progress. Also, as evidenced by the school's records, Student received school imposed discipline on four occasions during his first trimester of second grade. District prepared a remediation plan in October 2008 to address Student's academic and behavioral issues, however, just one month later, and only two months into the school year, Dr. Moleski began assessing Student, pursuant to an IEE, to determine, among other things, whether Student met the criteria for special education services. After Dr. Moleski issued her report in December 2008 indicating that Student did, in fact, qualify for special education services, District promptly held an IEP meeting on February 13, 2009, and declared Student eligible under the category of specific learning disability. Given the fact that Student began the assessment process early in his second grade year, and District found Student eligible for special education services following that assessment, Student failed to meet its burden of demonstrating that District failed to meet its child find obligations during Student's second grade year. (Factual Findings 45-63, 71-75; Legal Conclusions 3-6, 12-13.)

ISSUE TWO: FAPE SINCE FEBRUARY 13, 2009

22. Student contends that the February 13, 2009 IEP, and the modified April 14, 2009 IEP, failed to offer Student a FAPE because the IEPs failed to offer services designed to remediate Student's academic deficits to allow him to receive a meaningful educational benefit. Student further contends that the District failed to properly address Student's behavioral challenges, as well as Student's social skills issues. Also, Student contends that the April 14, 2009 IEP, which increased the period for specialized instruction from five hours per week to 20 hours per week, did not specifically delineate how District would carry out the 20 hours per week of specialized instruction, and, as such, violated the Ninth Circuit's mandate under *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519 (*Union*) that the IEP offer be specific. Finally, in regard to the April 14, 2009 IEP, Student contends that District had no reasonable basis to place Student in a more restrictive environment for 20 hours per week, as no behavior support plan or behavior goals had been developed to justify the placement. District contends that its offer of placement and services in the February 13, 2009 and April 14, 2009 IEPs provided Student with a FAPE because they provided an appropriate educational program designed to allow Student the opportunity to remediate his academic deficits and receive meaningful educational benefit. Specifically, District contends that Student's unique needs related to reading would be addressed by the SIPPS and Read Naturally programs in the Learning Center. Also, Student's behavioral and social issues would be addressed through participation in the Friendship Group, a therapeutic and social skills group for elementary school children to help them develop positive, effective social skills. Finally, District contends that District's revised offer of placement and services in the April 14, 2009 IEP provided Student appropriate support for his unique needs related to his academic and behavioral issues, evident from its increase in the amount of small group instruction for Student from five hours per week to 20 hours per week, as

well as its agreement to develop a behavioral support plan for Student. As discussed below, Student has not met his burden of demonstrating by a preponderance of the evidence that District denied Student a FAPE by failing to provide Student with an appropriate placement and services pursuant to the February 13, 2009 and April 14, 2009 IEPs.

23. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) (*See* Legal Conclusion 3, incorporated by reference.)

24. As discussed above, *Rowley* held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs, and reasonably calculated to "confer some educational benefit" upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) (*See* Legal Conclusions 12 and 13, incorporated by reference.)

25. In *Union*, the Ninth Circuit held that the IDEA requires school districts to make a single, formal, written offer of placement and services. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union, supra*, 15 F.3d at p. 1526). In other words, a formal, written offer

alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra*, 15 F.3d at p. 1526).)

26. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

27. The IDEA requires that a due process decision be based on substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a

FAPE. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.)

28. 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.*) An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p.1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 93 F.2d 1031, 1041.) Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Ibid.*) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular educational environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031.)

29. In order to provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal

of children with disabilities from the regular educational environment occurs only when the nature and the severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) "the educational benefits of placement full-time in a regular class," (2) "the non-academic benefits of such placement," (3) "the effect [the student] had on the teacher and children in the regular class," and (4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome.]) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra.*, 874 F.2d at p. 1050.)

ANALYSIS OF ISSUE TWO

A. February 13, 2009 IEP

30. At the February 13, 2009 IEP meeting, the team identified Student's areas of need as reading, math, writing, behavior, and executive functioning, based on Dr. Moleski's finding that Student had deficits in these areas. In order to remediate

Student's academic deficits, District offered specialized academic instruction in writing and math, as well as in reading via the SIPPS and Read Naturally programs. The SIPPS and Read Naturally programs focused on phoneme awareness, phonics, sight words, reading fluency, and reading comprehension. Student argues that District had provided Student with prior instruction in the SIPPS and Read Naturally programs, but that that instruction had not been successful. Consequently, Student argues that its inclusion in District's offer would not serve to remediate Student's academic needs. However, Ms. Lewis provided credible testimony that Student's prior exposure to the SIPPS and Read Naturally programs had occurred in a general education environment, whereas those programs in a special education setting would be presented differently. Specifically, the special education setting would provide Student with reading intervention on a one-to-one or two-to-one basis, based upon Student's individual needs, whereas the general education setting provided the instruction in a group. Consequently, Student would receive more individualized attention to address Student's academic deficits. Also, Student presented no evidence indicating that the SIPPS or Read Naturally programs in the special education setting were deficient, inadequate, or otherwise inappropriate.

31. In addition to the specialized academic instruction offered by District, the team developed goals in the areas of reading fluency, phonics, writing, math, and executive functioning to help remediate Student's academic needs. However, the team did not develop goals addressing Student's behavioral needs at the February 13, 2009 IEP meeting, despite the team's identification of behavior as an area of need. This, Student argues, demonstrated a failure on District's part to properly address Student's behavioral challenges. However, the February 13, 2009 IEP arranged for a functional behavioral assessment (FBA) of Student, and pursuant to Parents' February 24, 2009 request presented in their letter of partial consent, District agreed to provide Student with aide support until the completion of the FBA, as well as Student's continued

participation in Friendship Group. Student presented no evidence indicating that an aide would be insufficient to meet Student's behavioral needs until the completion of the FBA. These measures were specifically designed to provide Student with an educational benefit, namely, behavioral intervention to help Student access the academic curriculum. As such, and given the reasons stated above, District provided Student a FAPE in the February 13, 2009 IEP. (Factual Findings 45-63, 71-76; Legal Conclusions 23, 24, and 28.)

B. April 14, 2009 IEP

32. As an initial matter, Student did not meet his burden of showing that he was procedurally denied a FAPE because the IEP offer was not sufficiently specific under *Union*. At the April 14, 2009 IEP meeting, Ms. Turnboo shared the results of the FBA she conducted, as well as her hypothesis that the function of Student's noncompliant and elopement behaviors was control, attention, avoidance, and escape. In addition, Ms. Turnboo advised the team that Student would benefit from additional small group and one-on-one instruction opportunities, as Student's noncompliant and elopement behaviors increased significantly during large group instruction. As such, and according to the credible testimony of Ms. Lewis, District offered to increase the period of specialized academic instruction from five hours per week to 20 hours per week in order to address Student's behavioral issues, as well as Student's reading, math, and writing issues. Student argues that despite District's assertion that the 20 hours per week were to address Student's academic and behavioral issues, the District did not clearly delineate in the IEP how it would carry out the 20 hours per week, thereby violating the mandate under *Union* requiring that the IEP be specific. However, *Union* did not provide that school districts must provide an hour-by-hour account of how it will implement a period designated for specialized instruction, nor did Student cite any statute that sets forth such a requirement. *Union* merely emphasized the importance of providing parents with a formal, specific, written offer, as required by the IDEA, for the purpose of

eliminating subsequent factual disputes concerning what placements and services a district has offered. Here, the IEP team had previously identified Student's areas of need as reading, math, writing, behavior, and executive functioning. In that regard, the District developed an IEP to remediate Student's academic deficits in reading, math, and writing by offering 20 hours a week of specialized academic instruction in a special education setting, specifically, in the Learning Center, where Student was to receive one-on-one and small group instruction. Such an offer provided parents with sufficient information concerning the placement, and, as such, was adequately specific. Student failed to show a procedural violation.

33. Further, Student failed to demonstrate that the IEP offer was substantively inappropriate. The IEP team previously developed goals in the areas of reading fluency, phonics, writing, math, and executive functioning to help remediate Student's academic needs. However, the team did not develop goals addressing Student's behavioral needs at the April 14, 2009 IEP meeting. As such, Student argues that District denied him a FAPE because Student's behavioral needs were not met. However, the evidence established that, despite the absence of formal behavioral goals, District properly addressed Student's behavioral issues. Specifically, the IEP provided that Ms. Turnboo would develop a Behavior Support Plan (BSP). Also, the IEP provided for two and one-half hours per month of consultation from Ms. Turnboo with staff and Parents for the first month in order to establish the BSP; thereafter, one hour per month. In addition, at the April 14, 2009 IEP meeting, the team decided that, within two weeks of the IEP meeting, Ms. Turnboo and Ms. Marquez would develop behavioral goals to address Student's elopement and noncompliance issues. Finally, according to the credible testimony of Ms. Lewis, the 20 hours per week of one-on-one and small group instruction would not only address Student's reading, math, and writing issues, but would also address Student's behavioral issues, based on the recommendations

discussed by Ms. Turnboo at the IEP meeting, as well as on Ms. Turnboo's anticipated BSP. Given these factors, District's offer would provide educational benefit for Student because the behavioral issues that impacted his ability to access the curriculum would be addressed in a setting where Student would be more likely to succeed.

34. Finally, Student has failed to demonstrate that the District's offer of placement was not in the LRE. Overall, a determination of whether a district has placed a pupil in the least restrictive environment involves the analysis of four factors: (1) the educational benefits to the child of placement full time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. Regarding the first element, the evidence clearly established that Student had not been successful academically or behaviorally in the general education setting. Student had been below standard in most academic areas, according to Student's progress reports, report cards, and the credible testimony of Ms. Ghilarducci and Mr. Lewandowski. In addition, Student's noncompliant behavior and elopement issues had interfered with Student's ability to fully access the curriculum in a general education setting, according to the testimony of Ms. Ghilarducci. Consequently, Student's receipt of educational benefits in a full time regular class had been limited. In regard to the second element, Student could receive a non-academic benefit of interacting with his peers, giving Student more opportunity to practice his socialization skills. However, the third element, specifically the effect Student's full time presence would have on the teacher and children in the regular class, poses several problems. Specifically, the discipline record of Student demonstrated that Student had engaged in a fair amount of misbehavior in the form of hitting and striking out at others, teachers and classmates alike. Also, Ms. Ghilarducci, Mr. Lewandowski, and Mr. Cadden credibly testified that Student required a significant amount of attention to address his elopement and

noncompliant behaviors, thereby taking attention away from the other students. Finally, in regard to the element concerning the costs to mainstream Student, neither party introduced any evidence demonstrating the costs associated with educating Student in a general education setting versus a special education setting. The analysis of the above factors indicates, therefore, that Student's full time participation in a regular class would not constitute an appropriate placement. The evidence supports District's contention that a special education setting would be a more appropriate placement for Student, especially given Ms. Turnboo's report and credible testimony emphasizing how important it was for Student to have one-on-one and small group instruction, given Student's high rate of noncompliant and elopement behaviors during large group instruction. Moreover, Ms. Turnboo discussed a number of recommendations to address Student's behavioral issues, which, according to the credible testimony of Ms. Lewis, would be implemented during the course of 20 hours of specialized academic instruction per week. Overall, given the above factors, District's offer of FAPE in the April 14, 2009 IEP was objectively reasonable, as it was designed to confer some educational benefit upon Student by providing Student with more opportunity to access the curriculum. As such, District provided Student with a FAPE in the April 14, 2009 IEP. (Factual Findings 78-83; Legal Conclusions 23-29.)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATED: September 28, 2009

/s/

CARLA L. GARRETT

Administrative Law Judge

Office of Administrative Hearing