

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009070171

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 5-8, 2010; April 12-14, 2010; May 4-6, 2010; May 10, 2010; and May 12-13, 2010, at Los Angeles, California, and on May 18, 2010, by telephone conference call in Van Nuys, California.

Student was represented by Maureen Graves, Attorney at Law, John Nolte, Attorney at Law, and Ann Wexler, Attorney at Law, all of the Law Offices of Maureen Graves. Student's mother (Mother) was present on all hearing days, and Student's father (Father) was present on several hearing days. Mother and Father are sometimes referred to herein as Parents.

Los Angeles Unified School District (District) was represented by Patrick J. Balucan, Attorney at Law, Associate General Counsel for the District. Joyce Kantor, District Due Process Specialist, was present on several hearing days, and Sue Talesnick, District Due Process Specialist, was present on the remaining hearing days.

On June 30, 2009, Student filed his Due Process Complaint (Complaint). Student's First Amended Complaint was filed and the matter was continued on January 27, 2010.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were granted a continuance and were ordered to file and serve closing briefs by no later than 5:00 p.m. on June 14, 2010. District and Student each timely filed their closing briefs on June 14, 2010. On that date, the record was closed and the matter was submitted.

ISSUES

1. Whether the District denied Student a free appropriate public education (FAPE) during the 2008-2009 school year, by reason of any of the following:
 - A. Failing to provide appropriate behavioral services; and
 - B. Failing to conduct a Functional Analysis Assessment (FAA).
2. Whether the District denied Student a FAPE during the 2009 extended school year (ESY) and 2009-2010 school year, by reason of any of the following conduct regarding the June 17, 2009, Individualized Education Program (IEP) meeting:
 - A. Failing to include an appropriate District representative;
 - B. Failing to consider reports obtained by Parents from other professionals or service providers;
 - C. Failing to answer Parents' questions;
 - D. Failing to include appropriate present levels of performance in the IEP document;
 - E. Failing to include at the IEP meeting individuals with specific knowledge of Student; and
 - F. Predetermination that the District would not provide one-to-one home Applied Behavior Analysis (ABA) services, and that ABA services would only focus on behavior reduction.
3. Whether the District denied Student a FAPE during the 2009 ESY and the 2009-2010 school year, by reason of any of the following:

- A. Failing to develop appropriate goals to continue the progress Student had made in his non-public agency (NPA) program;
- B. Failing to develop appropriate speech and language (LAS) goals;
- C. Failing to offer an appropriate educational placement; and
- D. Failing to offer appropriate related services, including LAS services, occupational therapy (OT) services, and behavioral services.¹

REMEDIES REQUESTED

Student's requested remedies include (1) Reimbursement for the private services Parents have obtained since January 22, 2009; (2) Services for 50 weeks per year, include a 40-hour-per-week comprehensive behavioral program to be provided by JBA Institute (JBA), a certified California NPA; (3) LAS services in the amount of four sessions per week for 50 minutes each session; and (4) compensatory education, including compensatory ABA therapy and supervision, LAS therapy, and OT.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a six-year-old boy who has resided in the District at all relevant times. He has been eligible for special education as a child with autism at all relevant times. Student has not attended public school in the District since December 17, 2008, at which time Parents withdrew Student from school. Since on or about February 9,

¹ Student's First Amended Complaint also contained allegations that District had violated Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 (a).) These allegations were dismissed at the prehearing conference, as they are beyond the jurisdiction of OAH.

2009, JBA, a certified California NPA selected by Parents, has provided Student home-based intensive one-to-one ABA services.² The Westside Regional Center (Regional Center) and Parents have been paying for JBA's services. JBA has never had a contract with the District to provide services to the District's students, and District is not paying for JBA's services to Student.

2. Student was diagnosed with autism in early 2007, when he was approximately three and one-half years old. Also in early 2007, District assessed Student for eligibility for special education.

3. On March 12, 2007, District convened an initial IEP meeting to consider the results of the assessments. At that time, Student was attending First Presbyterian Preschool (First Presbyterian), a private pre-school located in Santa Monica, California. First Presbyterian served typical pre-schoolers, and used the Reggio-Emilia teaching approach, which is a strongly child-centered approach to learning.

4. The IEP team determined that Student was eligible for special education under the category of Autism. The team drafted present levels of performance and set goals in the areas of receptive, expressive, and pragmatic speech, school readiness, self-help, safety, social emotional, behavior, and motor OT. The team also prepared a behavior support plan (BSP), to address Student becoming upset with routine changes. The team recommended placement at the Preschool Collaborative Classroom at the Westminster Early Education Center, with specified accommodations and supports, and ESY. Additionally, the team decided that Student required related services, consisting of

² Regional Center provides services to children and adults with disabilities under California's Lanterman Act (Welf. & Inst. Code, § 4500 et seq.). These services are distinct from the special education and related services which eligible students receive under the IDEA (20 U.S.C. § 1400 et seq.) and the California Education Code (§ 56000 et seq.)

OT for 60 minutes per week in a therapy room, NPA LAS for 60 minutes per week, behavior intervention implementation (BII) from an NPA for 10.5 hours per week, and behavior intervention development (BID) from an NPA for 4 hours per month. Parents disagreed with the placement and services recommended by the IEP team.

5. Ultimately, the District and Parents agreed that Student would attend First Presbyterian with the assistance of a District pre-school/kindergarten itinerant teacher (P-KIT), with LAS and OT services. In July 2007, when Student was nearly four years old, Working With Autism (WWA), a certified California NPS that contracted with the District, commenced to provide 17 hours per week of BII and four hours per month of BID services to Student at First Presbyterian, at District expense. Student's BII while he attended First Presbyterian was John-Paul Prakash, and his BID while he attended First Presbyterian was Shirin Sepherband.

6. At approximately the same time as WWA started to provide Student with BII and BID services, WWA began to provide in-home behavioral services to Student at Regional Center expense.³ Mr. Prakash was not only Student's BII at First Presbyterian, but was also one of Student's home therapists.

7. WWA primarily used the ABA technique called Pivotal Response Training (PRT). This method focused on targeting specific behavioral areas that were already in the child's repertoire in the natural environment. At Student's home, WWA sometimes used the ABA method known as Discrete Trial Training (DTT), which required one-to-one, face-to-face, multiple repetitions of the same concept or task. The administration at

³ WWA was to provide 20 hours of services to Student at home, paid for by the Regional Center. At hearing, Parents contended that WWA did not provide the full 20 hours of services per week, but that dispute is beyond the jurisdiction of OAH and is not at issue in this due process matter.

First Presbyterian would not permit DTT to be used there, in the belief that it could affect the implementation of the Reggio Emilia teaching approach.

JUNE 17, 2008, IEP MEETING

8. Student attended First Presbyterian until in or about June 2008, when he was almost five years old. On June 17, 2008, District convened an IEP meeting to review Student's services and discuss placement for the 2008-2009 school year. The IEP team included Mother, Father, Warren Finn (counsel for Student and Parents), a District Administrator, a special education teacher, a general education teacher, an occupational therapist, Margaret Defenderfer (a speech and language specialist), an adaptive physical education (APE) therapist, and representatives of WWA, including Mr. Prakash (Student's BII provider) and Shirin Sephrband (Student's BID provider).

9. The team noted Student's progress on the goals contained in his March 12, 2007, IEP. His speech goals had not been achieved. His expressive and receptive speech therapy goals were partially met. His pragmatic speech therapy goal had not been met. He had either made progress on, or had achieved, with prompts, his motor OT, school readiness, safety, behavioral support, and social emotional goals.

10. The team developed present levels of performance in the area of language. The team noted that Student was speaking. He had many words and could make sentences. He responded to behavioral interventions during testing. He did not consistently use language spontaneously, and his focus wandered. The team noted that oral language development was part of the core curriculum and would be taught by Student's kindergarten teacher. The team noted that Student could also develop language skills through LAS services. The team considered the report submitted by Michele Im, Student's NPA speech therapist. Ms. Im's report stated that Student could follow one-step physical commands at 80 percent accuracy. The report also noted that Student could follow two-step physical commands at 60 percent accuracy, with heavy

support and repetitions. He could spontaneously utter three to five words, which usually included nouns, verbs, and some adjectives. His ability to use functional language to express his wants and needs was emerging in therapy.

11. The District registered nurse reviewed Student's health questionnaire which was completed by Mother and the case carrier. She reported that Student did not take any medications, had no known allergies, was not on any special diet, and was independent in his feeding and toileting.

12. The team developed present levels of performance in the area of social development. The team determined that Student engaged in non-preferred activities in small groups with support, and built on cooperative play with other peers, but engaged in parallel play most of the time. Student had emerging skills in impulse control, and followed the class routine. He attended and coped best when the learning environment was highly structured, with routines. The team noted that Student's needs included maintaining focus over non-preferred skills and engaging in cooperative play with others, engaging in sustained activities, and coping with transitions and over-stimulating situations within the class environment.

13. The team developed present levels of performance in the area of cognitive development. The team agreed that Student demonstrated emerging skills in most school readiness areas involving number recognition 1-10, rote counting 1-20, and letter recognition skills. Student also had emerging skills in investigating cause and effect, in problem solving, and in persisting in difficult tasks. Student's skill level was adversely affected by his non-attentive behaviors, lack of engagement with others and materials during non-preferred activities, and self-willed behavior.

14. The team developed present levels of performance in the area of OT. Student demonstrated adequate skills in the areas of postural stability, range of motion, muscle strength and tone. Student could navigate his school environment with

moderate to maximal cues for transitioning between activities, and attending to and participating in tasks. He was able to imitate simple prewriting lines and participate in cutting tasks with moderate assistance. Student required moderate verbal, visual, and physical prompting to attend to non-preferred tasks, such as fine motor/visual motor tasks, and sometimes he required maximal prompting for task completion. He exhibited difficulty processing proprioceptive and vestibular input.

15. The team noted that Student's needs negatively affected his abilities to attend, to perform quality classroom work, and to access his curriculum. The team found that Student's needs in cognitive development and social development may impact his ability to meet grade-level standards.

16. Included in the IEP was a written report dated June 9, 2008, from Ms. Sepherband, Student's BID. The report described the techniques WWA was using with Student at school, and described Student's present levels of performance and progress based on the data that WWA had taken and recorded. The report noted that Student had met his previous behavioral goal, and could transition from a preferred to a non-preferred activity in four out of five opportunities, given one verbal prompt. The report explained that Student had made significant progress in his ability to attend to circle time, participate in group activities, and engage in appropriate functional play. His level of distractibility and isolated behaviors had decreased, allowing him to be more involved in group activities and classroom routines, with prompts. Student's tantrum behaviors had decreased dramatically in frequency, intensity and duration. The report attributed this improvement to Student's greater ability to verbally communicate with others and to the structure provided by his BII and teachers. The report noted that Student was able to attend to tasks and engage in non-preferred activities when the classroom was divided into smaller groups, such as centers. When auditory environmental stimuli were present, Student became over-stimulated and engaged in task-avoidant and

inappropriate behaviors. He could be redirected by his BII. Ms. Sepehrband reported that areas of concern included Student's comprehension of academic tasks, and Student's ability to self-regulate and engage in peer play.

17. The team suggested a variety of accommodations to meet Student's needs, including simplifying directions and tasks, using behavioral reinforcements, visual schedules, scripting appropriate social skills, modeling appropriate social skills, taking breaks, learning to use words to express needs and wants, close proximity to the teacher, physical guidance and cues, frequent checks for understanding, highly structured routines and activities, and shortened lessons and tasks. The team also suggested supports to assist Student in participating in general education activities, such as small group instruction, individualized teaching, modeling of social skills, and support in language development.

18. The team set goals in the areas of language, gross and fine motor skills, behavior, social skills, reading, language development, and math. The behavior and social skills goals adopted by the team were based upon suggestions by WWA. The team included a behavior support plan (BSP) to address off-task behavior and promote appropriate classroom behavior. The behaviors in the BSP were not the only behaviors to be addressed by Student's BII, BID, and teachers. Rather, this BSP was drafted in accordance with District's policy to address what the team considered as the most relevant behavior or behaviors that were affecting Student's ability to learn.

19. The team specified that Student exhibited autistic-like behaviors, consisting of an inability to use oral language for appropriate social communication, a history of withdrawal or relating to others inappropriately, a resistance to controls, and displaying peculiar motoric behaviors. Student was unable to participate in conversation, had a limited vocabulary, and engaged in echolalia. He made limited eye contact and

was not able to play cooperatively with his peers. He engaged in activities on his own terms. He walked on his tiptoes.

20. The team recommended that Student continue placement at First Presbyterian through ESY 2008, with his current levels of services. The team also agreed that Student would receive his related services of APE one time per week for 30 minutes, LAS services one time per week for 60 minutes, and school-based OT services for 60 minutes per week during the ESY period at the District's Coeur d'Alene Elementary School. Additionally, the team agreed that Student would receive OT clinic services at a District therapy room one time per week for 60 minutes. ESY was offered because the team determined that Student's disability was likely to persist over a prolonged period of time, and he was likely to lose mastered skills during extended breaks.

21. The team offered placement for the 2008-2009 school year in the lower Autism Special Day Class (SDC) at Walgrove Elementary School (Walgrove), with 30 hours of BII services per week and 6 hours of BID services per month, and related services of the same type and at the same frequency as were set forth for the ESY period. The team specified that Student would spend approximately 77 percent of the school day in special education. Student was expected to meet grade-level standards, and Student would participate in the general education curriculum with the accommodations described in the IEP.

22. Parents did not agree with the IEP. Parents rejected placement in the Autism SDC, and requested a collaborative Kindergarten program. Such a program would have included general education and special education students together in the same classroom, with both general education and special education teachers. Parents also disagreed with other aspects of the IEP, such as the level of LAS services, the APE services, and the goals. They filed a due process complaint, but accepted related services pending resolution of the due process complaint.

23. During ESY 2008, District provided related services to Student at Coeur d'Alene Elementary School. Mr. Prakash, Student's BII, had ceased providing home therapy to Student in spring 2008, and he was replaced by several successive therapists over a short period of time in the home setting. He ceased being Student's BII on or about June 19, 2008, and he was replaced with Erin Garnsey. Erin Hafey became Student's BID in or about August 2008, in place of Ms. Sepherband. Ms. Hafey received her B.A. from the University of California, San Diego, in urban studies and public health, and a master's degree in clinical psychology from Notre Dame de Namur University. At the time of the hearing, she was enrolled in coursework at Florida Tech University to become a Board-Certified Behavior Analyst (BCBA). At the time of the hearing, she had had over six years of experience in providing ABA therapy, including DTT and PRT.

24. Student's behaviors at home deteriorated over the summer, and tensions heightened between Parents and WWA over the summer. Parents were dissatisfied with the many changes of therapists over the summer, and the attitudes and practices of the therapists. WWA was dissatisfied that Parents failed to follow through with WWA's therapy program. At hearing, Mother expressed dissatisfaction with WWA's services dating back from 2007, when WWA first commenced working with Student. There was no evidence that Parents had communicated to the District their asserted long-standing dissatisfaction with WWA prior to the hearing. Further, Parents were satisfied with the progress Student had made at First Presbyterian, progress which was achieved with the assistance of a one-to-one BII from WWA.

25. On September 2, 2008, District and Parents, on behalf of Student, entered into a mediated settlement agreement (Agreement), which resolved the Parents' and Student's due process complaint. Parents and Student were represented by their counsel, Mr. Finn, during the mediation. The Agreement modified the June 17, 2008, IEP, in various specified ways. For example, the parties agreed that Student would be placed

in the early education (EE) special day class (SDC) at Walgrove, with appropriate mainstreaming with general education kindergarten peers during recess, lunch, lunch recess, music, and art. In addition, Student would receive instruction in the general education classroom with behavior support for a block of time before recess, after recess, or after lunch. As Student became acclimated, his mainstreaming time would increase, with a goal that Student would spend 50 percent of his day in the general education setting. The Agreement also provided that, in lieu of 60 minutes per week of school-based LAS services as set forth in the IEP dated June 17, 2008, District would reimburse Student for 65 hours of LAS already provided, and to be provided, by Amy Parsons from March 13, 2008, through June 17, 2009. Ms. Parsons was a private LAS therapist who was selected by Parents. The Agreement stated that Ms. Parsons was to use the LAS goals and objectives on Student's June 17, 2008, IEP, or any subsequent IEP. The Agreement also provided that Student would be reimbursed for up to 13 hours of compensatory OT services provided by a private service provider selected by Parents. The Agreement stated that the services and reimbursements provided in the Agreement did not constitute, and should not be construed as constituting, an admission as to what was a FAPE for Student. The Agreement provided that it was the entire agreement and understanding of the parties, that no party relied upon any representation not contained in the Agreement, whether expressed or implied, and that the parties voluntarily agreed to the Agreement's provisions. The Agreement contained a mutual release which provided that the parties released and discharged each other from all claims and liabilities arising from or related to Student's educational program through the date of full execution of the Agreement. The Agreement also provided that Parents' signature on the Agreement constituted their consent to implement Student's June 17, 2008, IEP, except as modified by the Agreement.

STUDENT'S ATTENDANCE AT EE CLASS AT WALGROVE

26. On or about the day after the Agreement was signed, Student began attending Nicole Parham's EE SDC at Walgrove pursuant to the Agreement. Ms. Parham received her B.A. in social welfare from the University of California, Berkeley, in 2001, and her M.A. in special education from California State University, Dominguez Hills, in 2005. She has a clear education specialist credential to teach students with mild to moderate disabilities, and an internship credential for Pupil Services for school psychology. She had taught the EE SDC at Walgrove for four years, and had been employed by the District from 2003 to the end of the 2008-2009 school year. In August 2009, Ms. Parham commenced employment by the Lancaster School District as a school psychology intern, and she held that position as of the time of the hearing.

27. Ms. Parham's class during fall 2008 consisted of approximately eight students and six adults (including Ms. Parham.) The class served students with mild to moderate disabilities, including mental retardation, specific learning disabilities and autism. The class was language-based, and the students had exposure to language arts throughout the day. The class spent approximately one and one-half hours per day on the Open Court curriculum.

28. District provided Student 30 hours of BII services per week, and six hours per month of BID services, as set forth in the June 17, 2008, IEP. These services were provided through WWA. When Student began attending Ms. Parham's class, Ms. Garnsey remained as his BII, and Ms. Hafey remained as his BID. On or about October 15, 2010, Patricia Land (Patty) replaced Ms. Garnsey as Student's BII. Ms. Parham communicated frequently with Student's BIIs regarding behavior strategies, and she communicated with Ms. Hafey either every week or every two weeks.

29. In October 2008, WWA formulated a written Behavior Reduction Plan, for use by Ms. Garnsey at school as well as by Student's at-home therapist. The Behavior

Reduction Plan addressed self-injurious behavior, yelling/screaming, and tantrum behavior. The plan described the behavior, listed the functions of the behavior, and contained strategies for controlling the behavior.

30. Student had difficulty transitioning to Walgrove and to Ms. Parham's class, which offered a more academic environment than Student was accustomed to in pre-school at First Presbyterian. Student did not adjust well to the lecture format which was used in the EE class. Initially, he engaged in many tantrums, and resisted routines and transitions. He cried when he came to school, and when transitioning to APE and art. He hit his head with his open hand occasionally. He often hit or pinched his BII, and, on one occasion at the beginning of the school year, he hit Ms. Parham. He threw himself on the floor. He threw objects, but did not direct them at anybody. He spit food at other children at lunch. He made loud noises, and did not attend to task. Mother was often on campus, and Student's behaviors would deteriorate when Mother was present. District personnel considered Student's behaviors as within the norms for a child with autism. The District never sent Student home, or suspended him or expelled him from school due to his behaviors, or for any other reason. Student's BII managed his behaviors in a variety of ways, including re-direction and sensory breaks.

31. Student's transition to Walgrove was impeded by Student's numerous tardies, which prevented Student from establishing a routine. Ms. Parham marked Student tardy on 25 days from September through December 17, 2008. Student's tardies were due to a variety of factors. Sometimes, because he had difficulty falling asleep, Parents permitted him to sleep later in the mornings. Also, Student's schedule was such that he routinely arrived late to school several days a week. On some occasions, Student was tardy by as many as 25 minutes or more. He routinely arrived late to school on at least one morning per week, because the District delivered his OT clinic services in the morning at another campus, Short Avenue Elementary School, and

he was also receiving compensatory OT services in the morning one time per week through October 2008. On those days that he had OT, he was arriving at school between 9:30 and 10:00. Student's attendance at OT only accounted for approximately 50 to 75 percent of his tardies.

32. As the fall semester proceeded, Student's ability to transition to school and between school activities improved. Patty (Student's BII from WWA) suggested to Father, who transported Student to school, that Student's transition to school might be facilitated if Patty, Father, and Student stayed on the playground for awhile after Student arrived at school. Patty's suggestion indeed helped Student to improve in his ability to enter the classroom and follow the routines. Student was not marked tardy for the time he spent on the playground with Father and Patty while they were trying to transition him to school. Additionally, as the fall semester proceeded, Student's crying and aggressive behaviors diminished. He was eventually able to request breaks. He took breaks regularly, such as when he had difficulty attending to task, and they helped to control his behaviors. Student's BII also scheduled breaks regularly so that they could be used as a reward if Student behaved appropriately. Student improved in his ability to attend to stories during circle time. He performed preferred activities, and was improving in performing non-preferred activities. He still engaged in maladaptive behaviors throughout the fall semester; however, overall, many of them diminished in both frequency and intensity as the semester proceeded.

33. Beginning in October 2008, Patty and Mother communicated about Student's progress and activities through a communication log. The communication log documented that Student's behavior at school varied. On some days, he had no difficulty at all participating in school activities and following directions, and he seemed happy. At times, he was able to greet other children, initiate conversations with them, write his name with assistance, and identify some letters of the alphabet with help. He

counted, he identified colors, and he put a puzzle together with little help. He paid attention during OT, PE, class reading time, and during mainstream music and art. On other days, he would engage in some of the maladaptive behaviors previously described for at least part of the day. Patty wrote in the log that that she managed these behaviors by taking breaks. Patty noted in the log that Student's good days occurred when he was on time and followed a schedule. Patty and Mother communicated very pleasantly in the log. Mother's notes to Patty included many expressions of gratitude for Patty's assistance. Mother also frequently commented in the log as to whether Student was being mainstreamed as often as the IEP or Agreement required. Student was mainstreamed for lunch and recess every day, and, when he was not tardy, for circle time. He was also mainstreamed for music and art.

34. Mother also frequently visited Walgrove and frequently e-mailed and communicated with Joyce Dara, Walgrove's assistant principal, regarding Student. Mother's concerns were primarily that Student was not being mainstreamed as much as Mother thought was appropriate pursuant to the Agreement. Mother believed that Student had done very well at First Presbyterian, where he was mainstreamed with typical peers, and she wanted him to have the benefit of exposure to typical peers at Walgrove. Mother also constantly requested that the school institute a collaborative kindergarten program.

35. Ms. Parsons, Student's private LAS provider, prepared a progress report dated November 20, 2008. The report indicated that it was directed to District and Parents, but there was no evidence that District received the report. Ms. Parsons's report noted that Student had made progress or met the goals Ms. Parsons had developed in March 2008, when she first began to provide therapy to Student. He made progress on a receptive language goal which required him to follow a two-component direction with 80 to 100 percent accuracy across three consecutive treatments. He met a

receptive/expressive language goal which required him to label "happy" versus "sad" pictures of people, with 80 to 100 percent accuracy across three consecutive treatment sessions. He made progress on another receptive/expressive language goal, which required him to answer a set of simple "why" questions with 80 percent accuracy across three consecutive treatment sessions. He made progress on an auditory comprehension skill, which required him to answer simple contextual "Wh" questions with 80 to 100 percent accuracy across three consecutive treatment sessions. He met all of his expressive language goals, including using "I" to refer to himself and using "yes" or "no" to accept or reject. He had also partially met his expressive/social language goals, which consisted of using "my turn," and to take turns. Ms. Parsons' report did not mention that she believed Student suffered from apraxia of speech, a disorder involving Student's inability to control the movements of his tongue and lips to create intelligible sounds.

36. During fall 2008, the tension between WWA and Parents continued, particularly with respect to the in-home services WWA provided through the Regional Center. Student's at-home behaviors had deteriorated. For example, he was frequently engaging in self-injurious and aggressive behaviors at home. He was having difficulties falling asleep and staying asleep. By no later than November 14, 2008, Parents were exploring the possibility of obtaining behavioral services from JBA, and on that date JBA commenced a formal skills assessment of Student.

37. Student's last day at school was December 17, 2008, which was just prior to the school's winter break. Sometime over winter break, Parents notified District that Student would not be returning to school. At hearing, Mother described the event that occurred on December 17, 2008, which influenced Parents' decision not to send Student back to school. Mother testified that she was visiting the campus, and heard Student screaming. Mother was displeased with the ineffective and physical methods that Patty used to control Student's behavior, which included dragging Student by his arm to the

school auditorium. When Mother approached Patty and Student, Patty threw Student's backpack at Mother and told Mother "good luck" and left. Student produced no documentation of this event, and no witnesses other than Mother testified to this event. There was no evidence that this event was reported to the District at any time prior to the June 17, 2009, IEP meeting, and Mother's description of the event at hearing was more dramatic than her description of it at the IEP meeting. Patty had written a note dated December 17, 2008, in the communication log which did not refer to this incident at all. Rather, her note was amiable and forward-looking. It described Student's activities preparing for a school assembly, reminding Mother to provide Student's "outfit" the following day, and to provide dried mango because it was "great reinforcement." Patty left WWA in January 2009.

38. In a report directed to the Regional Center dated January 1, 2009, WWA advised the Regional Center that it would cease providing the in-home services to Student that it had been providing through the Regional Center effective January 31, 2009, because "of the inconsistencies of the parents in following through with the behavioral program." WWA did not, however, intend to stop providing BII and BID services to Student at school.

39. Ms. Hafey prepared a progress report dated January 21, 2009, which was submitted to the District. The report noted that Student was able to independently follow multi-step verbal directions in one out of five opportunities. Student needed three to four prompts to follow multi-step directions, and would often become distracted after the first step and engage in task-avoidant behaviors, such as screaming or walking away. The report also noted that Student currently engaged in appropriate peer play and interaction in structured and unstructured settings in one out of five opportunities. Student had difficulty initiating and sustaining interactions with peers, and would play by himself unless prompted by the BII. Student was not able to engage

in appropriate playground activities. Unless redirected by the behavioral aide, he would walk around the perimeter of the yard or engage in self-stimulatory behaviors. Student would remain seated and attend to a group lesson for at least 10 minutes without engaging in inappropriate behaviors in two out of five opportunities. He required regular prompting from his BII to stay on task during both group instruction, such as circle time, and individual work time. He would engage in verbal self-stimulatory behavior, if not redirected, such as screaming or scripting, during the majority of the day. His level of distractibility and isolated behaviors had increased since the past year, which hindered Student's ability to be involved in group activities and routines. Student's tantrum behaviors, such as crying, screaming, and falling to the floor decreased in frequency, intensity, and duration, since the beginning of the school year, and his ability to transition between activities had increased. Ms. Hafey attributed this to the structure provided him from the teacher and the BII, as well as to his ability to appropriately request a break when he became over-stimulated. His behavior of throwing objects and verbal self-stimulatory behaviors had increased. The report noted that Student had a difficult time mainstreaming, specifically during the studio art class and during circle time in the regular education kindergarten. He required more frequent breaks and constant prompting from the BII to stay on task, attend to the teacher, and complete the activity. Student seemed to benefit from a more structured environment, especially when priming (warning prompts of what would come next) and a visual schedule were used. Areas of concern included his comprehension of academic tasks, his attention during group instruction, his ability to self-regulate, and peer play. Ms. Hafey noted that Parents had pulled Student out of school as of December 19, 2009, and therefore he had missed classroom instruction for five weeks.

JANUARY 22, 2009, AND JANUARY 28, 2009, IEP MEETINGS

40. Father requested an IEP meeting in an e-mail dated December 4, 2008, which he directed to Joyce Dara, the assistant principal at Walgrove. On January 22, 2009, when Student was approximately five and one-half years old, District convened an IEP meeting. The IEP team included Mother, Father, Warren Finn (Parents' and Student's attorney), Ms. Dara, Ms. Parham, Elyse Steffens (District occupational therapist), Kathy McCool (District APE therapist), Ms. Hafey, Suzanna Hernandez (the teacher of the Autism SDC at Walgrove), Alessia de Paola Gottlieb, M.D., a pediatrician who had been caring for Student since he was in pre-school, Janet Yi (the Director of JBA) and Lisa Topp, (a supervisor at JBA.)

41. The District categorized the meeting as an annual IEP, since it was convened to discuss a change in Student's placement. The team noted that Student had not met any of the goals and objectives set forth in his June 17, 2008, IEP.⁴ The team determined that he needed more time on the behavior and language development goals, and on a behavior support goal. The team determined that another behavior support goal was not appropriate, and that the motor OT goals needed revision. With respect to the math, reading, and social skills goals, the team determined that Student either needed more time or remediation. Student had made some progress on the gross motor goal.

42. The team recorded Student's present levels of performance in Motor OT, Language Arts, Mathematics, Pre-Vocational, Self-Help, Motor Abilities—APE, and Behavior. The team noted that Student demonstrated adequate neuromuscular skills to navigate his classroom and playground environments. He had sufficient fine motor skills

⁴ Student's June 17, 2008, IEP did not contain the speech goals to which Ms. Parsons' progress report of November 20, 2008, had referred.

to maintain a variety of grasps. His visual perceptual skills were functional to the degree that he could discriminate between objects with various attributes. He continued to require moderate to maximal verbal/physical cues to attend to non-preferred tasks and for task completion. Student exhibited some sensory processing issues. With respect to clinic OT, the team noted that Student had completed his 12 compensatory OT sessions in October 2008. He had adequate behavioral organization and sensory modulation, and adequate levels of arousal and ability to participate in preferred activities. He presented with improved motor planning to navigate through the clinic OT environment and to participate in activities that mimicked climbing and jumping on a playground with verbal encouragement and minimal verbal prompts. Student presented with sensory processing issues relating to his body awareness and discrimination skills that negatively impacted his ability to participate in classroom activities. His ability to participate and perform in the classroom was also negatively impacted by decreased interest and intrinsic motivation, especially with activities that used fine motor and visual motor skills. He would exhibit negative behaviors to avoid participating in the activity, such as licking, looking away, and flicking items. Student responded well to adult-selected activities when he received verbal encouragement, and there was structure and a clear demand.

43. In language arts, the team noted that Student enjoyed listening to stories read to him both one-on-one and during circle time. He could identify the letters A-E and the letters in his first name with 70 percent accuracy. He could write his first name with hand-over-hand support, and he could trace his last name and the alphabet. He could sing the alphabet song, and with verbal prompts Student could point to requested items on the board, on a paper, or in a book with 70 percent accuracy. He was not able to complete writing assignments without maximum support, and he did not answer direct questions related to stories. In mathematics, the team noted that Student would orally count numbers 1-10 aloud, with verbal prompts. He could sort

objects by color and size and shape. He was unable to write any numbers or shapes independently. He was unable to consistently count, name, or represent numbers 10-30.

44. In the pre-vocational area, the team recorded that Student was able to follow the classroom routine. He enjoyed listening to music and stories. He indicated preferences for activities or objects by verbally expressing his wants and needs with one-word statements when prompted. He noticed his peers and made statements about them. He was unable to attend to non-preferred activities such as writing assignments for more than five minutes. He did not initiate conversations with peers. In the self-help area, Student could make choices by verbally requesting his wants and needs with one-word statements and short phrases. With prompting, he could ask to use the restroom. He could ask for a break. He could attend to his toileting and eat independently. He was unable to complete the steps in his daily routine without one-on-one support.

45. In the area of motor abilities—APE, the team recorded that Student had many areas of strength. He had adequate overhand throwing skills. He could catch a ball tossed underhand, he could kick a rolled or stationery ball with a strong kick, and could maintain balance while kicking. He could walk on a balance beam when he was focused, and he enjoyed propelling himself on a scooter board and throwing a “Whoosh” Frisbee to a partner. Student jumped well and could gallop. His behaviors, however, frequently interfered with his ability to complete tasks. He would hit, pinch, or spit at his BII and become very loud and throw himself on the floor. When he was calm, he appeared to enjoy the activities and participated in a variety of activities with his classmates. Student was frequently in constant motion, and therefore had challenges imitating the warm-up exercises or stationary balance activities. He required constant supervision to attend to task. He could not toss a ball in the air and catch it before it bounced twice.

46. In the area of behavior, Student could remain in his seat for five minutes during whole group activities of high interest and during individual instruction. He could

label emotions of teachers and peers, and seemed concerned when his peers were upset. When prompted, he would apologize to peers. Student had difficulty transitioning to the EE class. During the first few months of the school year, he cried each morning for 10 to 15 minutes upon arriving at school, as well as upon the introduction of other activities (APE, OT, Library, Art, Music, mainstreaming). His ability to transition throughout the school day had improved, such that he no longer cried for prolonged periods. His frequent tardies negatively impacted his ability to meet his IEP goals. He continued to require behavioral support to address lack of sustained attention and poor work production. He displayed maladaptive behaviors such as touching peers, verbal self-stimulation, spitting, hitting, and throwing pencils and crayons. His impairments impacted his ability to communicate, to attend to non-preferred activities at grade level, and to identify unsafe situations.

47. There was no evidence that Parents objected to the accuracy of the present levels of performance as developed by the IEP team. At hearing, Ms. Parham provided additional evidence regarding Student's classroom performance. Student appeared to respond well to his BII. He improved in his ability to attend to non-preferred activities. He made some progress in the Open Court reading curriculum regarding recognizing letters. Ms. Parham did not have difficulty understanding Student's language. She expressed her belief that the EE SDC was not appropriate for Student, because he lacked independent skills. She felt that transitions were more difficult for children when the classroom environment was not appropriate. Ms. Parham was a very credible witness. She is an experienced and credentialed teacher, and she was the witness who had the most experience with Student in the classroom setting. Furthermore, since she has not been a District employee since summer 2009, she was the only witness that did not have any apparent financial, personal, or professional

interest in the case. Her opinions and her observations were therefore given great weight.

48. The team set goals in gross motor APE, pre-vocational/social skills, behavioral support, reading, written expression, mathematics, motor OT (clinic and school-based), and self-help. The APE goal addressed different skills than did the IEP goal in the June 17, 2008, IEP. The school-based OT goal remained the same. Student had made progress on the goal and was on track to meet the annual goal. The reading goal was similar to the goal in the June 17, 2008, IEP, as they both involved identifying upper and lower case letters. Ms. Parham had drafted this goal, related to the California kindergarten standard of recognizing all letters of the alphabet. Ms. Parham also drafted the written expression goal, addressing Student's ability to write his name. In her opinion, as expressed at hearing, he had the ability to learn this. His math goal, which required him to identify numbers, was related to the California kindergarten standard. The other goals were, for the most part, simplified versions of the goals in the June 17, 2008, IEP. Some of the more complicated goals in the June 17, 2008, IEP, were eliminated, such as a language goal requiring Student to give items on demand, a behavioral support goal requiring Student to independently follow multi-step verbal directions, a social skills goal requiring Student to raise his hand to ask or answer questions, and a reading comprehension goal directed at drawing inferences from stories.

49. The team determined that Student's instructional accommodations included a small class setting, high-interest materials, picture schedules, reduced distracters, expanded time, tasks broken into component steps, cues, frequent breaks and repetition, structured play opportunities with peers, and a variety of sensory strategies and accommodations, such as pressure vests, movement breaks, and a slant board. The team determined that Student's needs for small groups, a highly structured

environment, and accommodations could best be provided in the special education setting, and decided he should spend 82 percent of his time in special education. While he was in general education, his supports would include small group instruction, modeling of social skills, support in language development, priming, and picture schedules.

50. The team drafted a BSP to address off-task behaviors. The BSP had one goal, requiring Student to remain in his work area and attend to non-preferred activities.

51. In three separate places on the IEP form, the IEP team stated that Student would have an alternative curriculum and/or would not be expected to meet grade-level standards. Page 6 of the IEP states that the Student's disability impacts his ability to meet District grade-level standards. Page 6 also includes the question, "Is the student expected to meet grade level standards?" The circle next to the question is marked "No." On this part of the form, the IEP states that Student's speech and language impairment and prevalent behavioral characteristics of autism impeded his ability to reach grade-level goals and be involved in the general education curriculum. On page 8 of the IEP, item 9 is entitled "Curriculum," and states that Student will participate in an "Alternate District curriculum provided to prepare him/her to access the district's general education curriculum." The alternative curriculum is identified as SEACO. The SEACO curriculum is not the same as a functional skills curriculum. It is a curriculum that references California state standards, and is implemented so as to meet the individual needs of the child. It is not necessarily a permanent curriculum, but may be used, as it was to be used for Student, to prepare the student to access the general education grade-level curriculum. Accordingly, Student's reading, writing, and math goals in this IEP were drafted with reference to California standards for kindergarten.

52. The IEP designation of the SEACO curriculum was a change from Student's previous IEP of June 17, 2008, which provided that Student would participate in the

general education curriculum, and stated that Student would be expected to meet grade-level standards. There was no evidence that the change to the SEACO curriculum was specifically discussed at either of the January 2009 IEP meetings. There was no evidence that Parents or their attorney ever directed any comments or questions to the District regarding the SEACO curriculum until the hearing.

53. The IEP notes also state that Student's special education teacher reported that Student's disability was negatively impacting his ability to achieve significant academic and social gains in the EE classroom. Student had demonstrated some gains on some isolated days, but he had difficulty transitioning to Walgrove. Student's ability to transition throughout the school day had improved somewhat, but his frequent late arrival had impacted his ability to meet his goals. The team discussed whether Student needed a more structured environment to reduce the sensory input that may have been impeding his learning. The team decided that Student would benefit from a highly structured environment with reduced distracters. The team recommended Student be placed in the Primary Autism SDC (Autism SDC) with 30 hours of BII per week and 6 hours of BID services per month. The IEP notes stated that if Student did not make adequate progress by May 2009, the team would explore NPS options. Student would continue to mainstream with his non-disabled peers in a general education classroom for circle time, studio art, music, and District art at the discretion of his classroom teacher based on his readiness.

54. The team also determined that Student would receive related services if he were attending a District school, consisting of 30 minutes per week of APE, 30 hours per week of BII services, 6 hours per month of BID services, 60 minutes per week of school-based OT, and 60 minutes per week of clinic OT. The team did not provide for LAS services. Those services were provided pursuant to the Agreement, and Student continued to receive them through the 2008-2009 school year. The statement in the IEP

that Student would only receive clinic-based OT if he were attending a District school was incorrect, ignored, or modified, as the evidence demonstrated that Student continue to receive clinic-based OT throughout the remainder of the 2009 school year and ESY period, although he was not attending a District school. The team decided that Student was eligible for ESY.

55. The IEP notes reflect that the team discussed Student's behaviors. The Parents and their lawyer felt that Student needed a more behavioral/therapeutic environment. The team discussed classroom placement, and Parents expressed that the Autism SDC was too advanced for Student. Parents expressed an interest in exploring non-public school placement. The evidence at hearing reflected that Parents wished to change agencies from WWA to JBA. District advised them that District could not change agencies to JBA, since JBA did not have a Master Contract with the District.⁵

56. The team agreed to recess so that Dr. Gottlieb could observe the Autism SDC.⁶ Dr. Gottlieb observed the class in the days following the IEP meeting, and

⁵ It is District policy that District may only use NPAs who have a Master Contract with the District, unless the parties agree otherwise as part of the resolution of a due process complaint, or unless an ALJ orders otherwise in adjudicating a due process complaint. Furthermore, it is District policy that an IEP team cannot specify the NPA that is to render the services agreed upon by the team. The District's NPA Office reviews those IEPs and assigns the NPA from among the NPAs who have a Master Contract with the District.

⁶ Dr. Gottlieb received her B.S. in biology in 1985 cum laude from Columbia University, and her M.D. with honors from Columbia University College of Physicians & Surgeons in 1993. She is certified by the American Board of Psychiatry and Neurology in

communicated to Ms. Dara that the Autism SDC would be appropriate for Student and a better placement than the EE classroom. On January 27, 2009, at approximately 9:00 p.m., Mother wrote an e-mail to Ms. Dara. In the e-mail, Mother inquired whether, if Parents agreed to the Autism SDC placement, the District would permit JBA to provide the BII and BID services instead of WWA.. The team reconvened the next day, on January 28, 2009.⁷ Mother and Parents' attorney were present, but not Father. The IEP notes state that the team reviewed changes to Student's goals and renewed the offer of the Autism SDC and the related services, as proposed at the IEP meeting of January 22, 2009.

57. The District members of the IEP team, as well as Ms. Hafey, believed that Student was capable of coping with the school setting. The IEP team agreed that the EE SDC was not appropriate for Student because Student lacked the independent skills to function in that class. District representatives on the IEP team believed that the Autism SDC would provide support for Student to develop those skills. Ms. Hafey had observed the Autism SDC in fall 2008, and had thought it would be appropriate for Student. Ms. Hafey had formed the opinion that the EE SDC class was not appropriate for Student, as he was the only child in the class who needed individual assistance with classroom routines. She advised Parents of this opinion in fall 2008. Ms. Hafey believed that the Autism SDC provided a more structured environment than the EE SDC, and that, like Student, all children in the Autism SDC were receiving individual direction regarding

Adult Psychiatry and Child and Adolescent Psychiatry. Her private practice specializes in developmental disorders.

⁷ For the sake of simplicity, the single IEP document that resulted from the January 22 and January 28, 2009, IEP meetings will be generally referred to herein as the January 2009, IEP.

classroom routines. Ms. Hafey believed that the children in the Autism SDC were functioning at Student's level, and that the children in the EE SDC were more advanced than Student. The students in the Autism SDC class spent less time transitioning, used a visual schedule, and had more one-to-one work time.

THE AUTISM SDC

58. The Autism SDC into which the January 2009 IEP team proposed placing Student would have been taught by Suzana Hernandez. Ms. Hernandez holds a bachelor's degree in psychology and chicano studies from the University of California, Santa Barbara, and a master's degree in education from the same institution. She has a moderate to severe Level 1 teaching credential. As of January 2009, she was in her second year teaching the Autism SDC at Walgrove. At that time, the class had approximately nine children, with approximately seven adults, including Ms. Hernandez. The SDC was designed for children with moderate to severe disabilities, and included kindergarten, first, and second grades. The classroom was divided into centers, including a reading center, a math center, a one-to-one work area, a computer center, a library center, and a play center. One of the centers was based on TEACCH (Treatment and Education of Autistic and related Communication—handicapped Children.) principles. TEACCH is a method of structured teaching that also involves the physical organization of the classroom and providing visual information, such as the use of visual schedules. Ms. Hernandez also used PRT and DTT techniques. Some children in the class were on a general education curriculum, others were on the SEACO curriculum. The students were taught letters and numbers, and she tried to engage the children in reading throughout the day. Children in the class have learned to read and have made academic progress. Some of them mainstreamed in academic classes for part of the day. Some of them used the Open Court reading program, and some of them used a modified form of Open Court. The students were also taught science and social studies. The class was

highly structured, and Ms. Hernandez used visual schedules to help with transitions. Ms. Hernandez encouraged social interactions between the students. She occasionally used sensory techniques.

59. Carolyn Gelfand, who has been an Autism Specialist in the District since 2007, testified regarding the Autism SDC. Dr. Gelfand received a B.A. in art history with Special Honors from George Washington University in 1988, and an M.A. in special education (Severe Disabilities) from the University of Washington in 1990. At the time of hearing, she was a Ph.D. candidate at the School of Educational Studies (Urban Leadership) at Claremont Graduate University. She holds a Clear California State Level II Education Specialist Instruction credential, for special education, moderate/severe disabilities, and a Clear California Administrative Services Credential. Prior to her position as an Autism Specialist in the District, she was a specialist in the Non-Public Services Department, division of Special Education, from 2002-2007.

60. As part of her job, she has visited the class approximately 15 times in the past two years. The classroom is language-based, and Ms. Hernandez used ABA methodologies, such as DTT, PRT, incidental teaching, and principles of ABA, such as modeling, cueing, shaping (providing reinforcement) and chaining/task analysis (breaking down a routine into individual steps). Ms. Hernandez taught with reference to State curriculum standards. Ms. Gelfand testified that one of the drawbacks of an intensive, at-home, 40-hour-per-week DTT program is that it does not encompass socialization. In her opinion, a child of six or seven, such as Student, should be in school with peers, friends, and other students. She discussed research regarding ABA methodologies and TEACCH, noting that TEACCH was not used as an instructional strategy in the Autism SDC, rather, it provided a context for other approaches. TEACCH principles could inform how the classroom could be arranged, such as by the use of visual schedules. Ms. Gelfand discussed the National Standards Report in general, as

well as its categorization of TEACCH as an “emerging” behavioral method.⁸ She also testified that current research was demonstrating that students with autism did not need particularly intensive or lengthy assistance with transitions, but she did not specify the research to which she referred.

61. At hearing, Dr. Gottlieb elaborated upon her opinion regarding the Autism SDC versus the EE SDC, and other matters as an expert witness for Student. Dr. Gottlieb observed the Autism SDC for approximately an hour. She thought the range of children in the Autism SDC was a positive attribute. Some were very low functioning, and others were actually sitting and doing work. She felt that Student’s behavior in the EE SDC were not in control, and felt his behavior could be better controlled in the autism class with a one-to-one aide. Children were working in smaller groups and there was less group-based instruction in the Autism SDC than in the EE class. In her opinion, the Autism SDC, with a one-to-one aide, would provide more behavioral support for Student than the EE class did. She spoke with the teacher in the Autism SDC regarding the academic program, and was told it ranged from providing pre-academic support to some students and near grade-level work for other children. She did not discuss with the teacher the curriculum Student would have had in the Autism SDC.

62. Parents did not consent to the IEP. There was no evidence that they or their attorney had any additions or corrections to the IEP document. Parents continued to keep Student out of school. Subsequent to the IEP meeting, Mother and District had various communications regarding the possibility of Student returning to school. Mother suggested to District that Student return to the EE class, and Parents would employ teachers from First Presbyterian to provided transition services. Parent also

⁸ The National Standards Report is a report by The National Autism Center. The ALJ took judicial notice that it was published on September 22, 2009.

requested that she be able to provide BII services herself in the EE class. District declined both of these requests. At the District's request, a BII from WWA appeared at Walgrove for a period of time in early 2009, in the event that Parents changed their mind and sent Student back to school.

63. By letter dated February 10, 2009, Ms. Dara notified Parents that Student had been absent for 23 consecutive school days, and that if Student was not present at school by February 17, 2009, he would not longer be enrolled at Walgrove. Student did not return to school in the District. At some point subsequent to the IEP meeting, Parents notified WWA, in writing, that Student would be ending therapy with WWA. District sent Parents a letter dated February 12, 2009, acknowledging Parents' written request to WWA to end therapy, and explaining that District would therefore end BII and BID services as of February 17, 2009. The letter also advised Parents that, should they wish to access the services again, they could contact the District's NPA office. Mother sent Ms. Dara an e-mail dated February 17, 2009, stating that Parents had removed Student from school because the District had not provided him a FAPE, and that Parents reserved the right to seek reimbursement for all necessary educational expenses they would incur.

64. District continued to provide one hour per week clinic OT services to Student, and to reimburse Parents for the LAS services provided by Ms. Parsons.

JBA PROVIDES SERVICES TO STUDENT

65. On January 19, 2009, JBA had generated a Skills Assessment Report. The Skills Assessment Report was not presented to the District at the January 22, and 28, 2009 IEP meetings. Rather, it was presented to the District for the first time at the June 17, 2009, IEP meeting, discussed below.

66. The assessment was performed by Ms. Yi and Ms. Topp. Ms. Yi, the Director of JBA, received her B.A. in psychology, cum laude, from UCLA in 1992, and her

M.A. in applied behavior analysis, summa cum laude, from California State University, Los Angeles, in 2004. She has been a BICM (Behavioral Intervention Case Manager) since 2001, and is a BCBA (Board-Certified Behavior Analyst). She worked in Ivar Lovaas' Institute and Clinic from 1990 to January 2000. Ms. Topp, Student's supervisor at JBA, received her B.A. in psychology from York University in 1998, and her M.S. in counseling and applied behavior analysis in 2009 from California State University, Los Angeles. She has worked at JBA since November 2007, and prior to that time she worked at the Lovaas Institute. Neither Ms. Yi nor Ms. Topp hold any teaching credentials.

67. The assessment was based on interviews with Mother, on four and one-half hours of observations and assessments conducted in Student's home on November 14, 2008, and December 30, 2008, and from an observation of Student at Walgrove for approximately 1.25 hours on November 25, 2008. At that time, Ms. Topp observed Student in the EE SDC for approximately eight minutes, during recess for approximately 17 minutes, and during general inclusion art class for approximately 45 minutes. For approximately 20 of those 45 minutes, Student was outside of the classroom for his sensory break. Mother had reported that behaviors at home and at school were similar.

68. The assessment report covered the areas of Behavior, Play/Socialization, Self-Help, Communication, and Pre-Academics. In the area of Behavior, JBA noted Student's variety of inappropriate behaviors during the home portion of the assessment. He persistently walked by the assessor and touched and flipped her hair. He engaged in high-pitched yelling and vocalizations. He dumped food on the floor and laughed. JBA reported that when Student made a request, he would continuously request the item until it was granted, and could scream and cry for up to an hour. Parents also reported that Student often talked in a loud voice. Student frequently spun objects, and would yell and scream when the object was taken away. Parents reported that Student cried and screamed on his way to Walgrove and during the first 20 to 30 minutes there. At

school, Student whined or engaged in vocalizations He was nonresponsive, such that his BII had to repeatedly instruct him. She also physically prompted him. During the assessment, Student would not respond to instruction, but instead would stare away from the assessor. To address these behaviors, the assessment report proposed a goal in each of the following areas: Waiting; Reduction in Repetitive Requests and Statements; Quiet (remaining quiet while engaged in an activity); Tolerance to Denials of Reinforcement; Reduction in Non-Responding; and Come Here. Some of the goals consisted of statements such as: "[Student's] repetitive requests and statements will reduce by 25 % from baseline"; "[Student's] non-responsiveness will reduce by 50 % from baseline."

69. The Assessment Report stated that Student demonstrated very limited play and social skills. He could put together a 10-piece peg puzzle, but only with constant direction and prompting. During "down time," Student would sit on Mother's lap or wander around the room. Mother reported he could watch a movie with Mother present. He would not stay engaged in any age-appropriate activities, nor play appropriately with toys. As a result, Student would demand constant attention from Parents. At school, during recess, the JBA assessor observed that his play was solitary and required constant physical prompting and facilitation from his aide. Without an aide's active participation, Student preferred to spin the wheel on the climbing structure. JBA proposed one goal in each of the following areas: independent play; turn-taking; leisure skills; social initiation; and conversation questions.

70. With respect to the area of Self-Help, the Assessment Report stated that Student was able to undress himself independently, but he was not able to dress himself. He could initiate toileting during the day, but he slept in a pull-up. He required assistance during the hygiene and re-dressing aspects of toileting. He had limited ability to feed himself and wash himself, and he required hand-over-hand help with tooth

brushing. The Assessment Report proposed one goal in each of the following areas: dressing; toileting; washing hands; eating; and chewing food. The Assessment Report also addressed the area of Language/Communication. The report noted that Student could make requests using approximately three to six words in a sentence, but that he would repeat the request until it was met. His articulation was often unclear when sentences increased in length, when he was excited, and when he spoke very loudly. Student would often engage in repetitive communication, such as asking a question, receiving an answer, and then asking the question again. The JBA assessor had difficulty ascertaining Student's baselines of his language and communication skills because of his non-compliance, repetitive statements, and non-responsiveness. JBA proposed one goal in each of the following areas: actions; adjectives; vocal imitation; function; describe; occupations; prepositions; two-term receptive instructions; volume control; yes/no volitional; and yes/no factual.

71. In the area of Pre-Academics, the assessors noted Mother's report that Student did not like school, and would cry and tantrum when she took him to school. The report reiterated the information it had previously provided regarding the school observation, adding that during circle time, Student needed continuous direction from his one-to-one-aide to attend to his teacher. He engaged in inappropriate noises while the other children were quiet. During art class, Student participated with maximal prompts. The report concluded that Student benefited minimally from the classroom setting. JBA determined that Student's limited ability to respond to requests, tasks, and instruction compromised his full participation in the school setting. JBA's report proposed one goal in each of the following areas: circle time; receptive drawing; receptive and expressive letters; receptive and expressive numbers; and matching. In all, JBA proposed 32 goals for Student. The final portion of the Assessment Report commented on parental training, and proposed six goals for Mother.

72. In addition to the proposed goals, the Assessment Report contained numerous recommendations. The recommendations included the assessors' conclusion that Student found the instructional setting very aversive, such that instruction should proceed carefully to desensitize Student to the instructional environment. The Assessment Report recommended that services start with rapport-building exercises, that real-time data be collected, graphed, and analyzed, and set forth training requirements for supervisory staff and therapists. In particular, the therapists should have at a minimum, 65 hours of on-the-job training with an ABA supervisor or experienced staff member, which amounted to six and one-half hours per day for two weeks. Additionally, the therapist should have additional lecture and background training in ABA, and data collection and analysis. The recommendations included approximately one-half page of reasons why a 40-hour-per-week intensive ABA home program for 50 weeks per year was appropriate. In the report, JBA suggested that, based upon the types of the 32 goals JBA proposed, the program be paid for 50 percent by District and 50 percent by the Regional Center. The Assessment Report did not state any particular time at which Student would return to school, but recommended that Student be accompanied by a one-to-one ABA trained aide when he returned to school, and that the aide also regularly conduct one-to-one-instruction in the home setting.

73. On or about February 9, 2010, JBA began to provide intensive one-to-one ABA services to Student, at the level of 10 to 15 hours per week, 50 weeks per year. The services consisted almost entirely of DTT. JBA has a curriculum manual, but there was no evidence that the manual related to California curriculum standards, and there was no evidence that any specific portions of the manual were used with respect to the services that Student received. Student's therapy was provided by three therapists, and was supervised by Ms. Topp. Neither Ms. Topp nor the therapists are credentialed teachers. Ms. Topp has no training in special education, and there was no evidence that the

therapists had any training in special education. JBA has a credentialed general education teacher on staff, but that individual briefly provided services to Student only when he first started to receive therapy at JBA. Student's therapy has addressed not only his behavioral issues, but also academic issues, such as language. Student's therapists have changed three times since he began receiving JBA services. Student transitioned well through these changes, which were eased by overlapping services between the new therapist and the therapist who was leaving, as well as by the continuing presence of the remaining two therapists.

74. Both Ms. Yi and Ms. Topp testified at hearing. They both described JBA's program, and DTT, and the importance of taking and analyzing data to measure Student's progress. Ms. Yi testified that Student required 40 hours per week of intensive ABA therapy, using DTT, and incidental teaching. Incidental teaching is teaching that arises out of the natural environment. She testified that this was the best therapy for Student, who has many challenging behaviors, and skill deficits in all domains. JBA would need to teach him to converse, and teach him alternate behaviors. Ms. Yi believed that the therapy should occur 50 weeks per year, to prevent regression.

75. Ms. Yi testified that at first the therapy must occur exclusively in the home environment, because that was the most important educational setting. Ms. Yi testified that it was not sufficient that Student behave well at school; he must also behave well at home. She also testified that Mother had reported that Student's behaviors at home and at school were similar. Ms. Yi testified that at some point services could also be provided in the school setting. In school, the one-to-one aide, would teach the Student through DTT, and Student would participate in classroom activities for socialization for approximately an hour.

76. Ms. Yi testified that research demonstrated that intensive ABA produced better results than the eclectic approach, and she referred to a particular peer-reviewed

research article. She testified that intensive ABA treatment can provide beneficial results at any age, but she cited no specific research to support this. She also testified that research recommended a minimum of 25 hours per week of intensive ABA DTT therapy. She stated that a specific peer-reviewed research article had found that anything less than 20 hours was not as effective, and that ten hours per week was the same as no treatment. She also testified that methodologies used in the eclectic approach, such as TEACCH and the Sensory Integrative Package⁹ were not evidence-based. She testified that she has an ethical obligation to recommend what was the most effective approach. She stated that just as chemotherapy is the treatment for cancer, 40 hours per week of intensive ABA DTT therapy was the treatment for autism.

77. She criticized WWA as providing an eclectic approach. She noted, however, that Ms. Hafey was qualified to provide intensive ABA DTT therapy. She criticized the WWA progress report dated January 21, 2009, in that it was not specific enough. She would have preferred that the report detail the functions and the topography of the behavior. She also criticized the WWA behavior plan of October 2008. She believed it did not address why the behavior was occurring, but only attempted to redirect it. She felt that WWA should have performed a functional analysis assessment. However, there was no evidence that Ms. Yi was recommending that Student have a statutory FAA pursuant to the Education Code, as opposed to a more general functional analysis pursuant to ABA principles.

78. She believed it would not be in Student's interests to change agencies as of the date of hearing. JBA spent much time trying to understand Student, and it would

⁹ The Sensory Integrative Package involves establishing an environment that stimulates the child to use his or her senses as a means of addressing overstimulation or understimulation from the environment.

be a waste not to continue with JBA. She did not think it was advisable to have one agency, such as WWA, provide services to Student at school and a different agency, such as JBA, provide services to Student at home.

79. She discussed her school visit in November 2008, when she observed Student in his EE SDC and in art class. She did not see him have any difficulty with transitions. She did not remember that he demonstrated any severe behaviors during the observation. She had never visited the Autism SDC at Walgrove.

80. Ms. Topp's opinions were similar to those of Ms. Yi, regarding the recommendation that Student receive 40 hours per week of intensive ABA therapy, for 50 weeks per year, provided by JBA. She added that he needed the 50-week program, for consistency, and because he was academically delayed, and needed to catch up. She believed that he might need the intensive services for a few years. She believed that JBA should remain Student's provider, as he was making progress with, and was comfortable with, JBA. Furthermore, JBA had a good relationship with Parents, and parental participation was an important aspect of Student's therapy. She was concerned that if there was one agency providing therapy at home, and another agency providing services at school, there could be a problem with providing consistent therapy. However, she thought it could be successful if the agencies used the same strategies, if there was overlap between the different agency's therapists to assist with the transition, and if the supervisors of the agencies worked together.

81. Ms. Topp testified that Student was not capable of being in school full-time when JBA first began providing services to him. His behaviors would have been too disruptive to deal with in class. She wanted to work on behaviors, such as task completion, and self-injurious behaviors, and then transfer to a school setting. She admitted that she had not seen him engage in many self-injurious behaviors. She also admitted that she did not see self-injurious behaviors, or violent behaviors, or

aggressive behaviors at school. She had observed the Autism SDC. She thought the class was worth trying for 1-2 hours with a JBA one-to-one aide, and gradually increasing the time he was there. He was not currently ready for an entire day there.

82. Currently, she testified that he was at a basic level. He could not discriminate who, what, when, why. He was learning functions, such as what one does with a ball, and what one does with a car. He was learning picture matching and word and letter matching. He had learned categories and sorting, such as animals versus food. She intended to teach him occupations.

JUNE 17, 2009, IEP MEETING

83. In March 2009, Student's counsel requested that an IEP meeting be held to consider Student's request that the District provide Student the intensive ABA home program that JBA was providing. District convened an IEP meeting on June 17, 2009. The IEP team included Mother, Ms. Dara, Ms. Parham, Susan Terris (a general education teacher), Susan Mora (a school psychologist), Elyse Steffens, Minuja Kurian (LAS), Ms. McCool (APE), Tim Adams (new counsel for Student), Drew Massey (new counsel for Student), JBA representatives Ms. Yi and Ms. Topp, Paul Mullen (a District autism specialist), Arlene Fortier (Walgrove's Principal), Ms. Liquori (the District's clinic OT), and Ms. Hernandez, the special education teacher in the Autism SDC class.

84. One day prior to the IEP meeting, District received several reports. One of these reports was a "Follow-Up Developmental Consultation" by Dr. Gottlieb, who did not attend the IEP meeting. The report is undated, but it refers to Student's age as 5 years, 9 months, which indicates that it was written in May 2009. It is based upon a school observation of September 25, 2008, an office visit of May 13, 2009, and a home observation of May 16, 2009. The report stated that it was generated at the request of Student's family, who had requested a follow-up school, home observation and office

visit to assess Student's current level of functioning and to discuss the best educational and medical options for Student.

85. Dr. Gottlieb's report described her observation of Student at Walgrove on September 25, 2008, while he was enrolled in the EE SDC. She noted that Student needed moment-by-moment redirection and physical and verbal prompts to stay on task during a small group tabletop activity with the teacher. Without redirection, he would spin toys or sit on the floor next to his desk. At other times, Student was very interested in working on a puzzle and stayed on task for several minutes. Student momentarily moaned when redirected from his preferred activity, but he was able to accept the redirection and attend to the task at hand for a few minutes at a time. Student's aide attempted to use a reward system to encourage Student to attend to task, which was successful for only a couple of minutes. Peers would occasionally acknowledge Student when they passed by him. Student intermittently looked up and smiled at these peers, but the social interaction was not sustained.

86. Dr. Gottlieb reported that Student displayed significant delays in social communication and social engagement, as well as joint attention and general attention to non-preferred tasks. His involvement as a member of the class was significantly underdeveloped, and he primarily learned one-on-one with his BII as a satellite member of the classroom. Student did not appear particularly happy in this setting, as compared to his pre-school setting, which she attributed, in part, to Student's adjustment from the Reggio-based pre-school setting to a kindergarten classroom. Dr. Gottlieb noted that, at the time of the report, Student was no longer attending Walgrove, due to concerns about Student's behavior and those behaviors impeding his progress in the Walgrove kindergarten classroom. She also noted Parents' report that Student's behaviors were impairing his OT. Dr. Gottlieb's report did not mention her observation of the Autism

SDC at Walgrove in January 2009, or her opinion at that time, as stated in the January 2009 IEP, that the Autism SDC was appropriate for Student.

87. Dr. Gottlieb's report described Student's program with JBA. She noted that the JBA program notes included clear objectives for all aspects of development, including play, preacademics, language and communication, and adaptive functions. The plan included contingencies for aggressive and maladaptive behaviors, and scheduled breaks as prescribed based on Student's needs.

88. Dr. Gottlieb reported on her observation of Student at home with his behaviorist on May 16, 2009. She described the methods and strategies the behaviorist used. She noted that, with the work of the behaviorist and the sophisticated behavioral strategies used, Student was able to work productively for the one hour observation time, with frequent breaks. She considered this "a step forward." He used one-to-two word utterances to have his needs met. He displayed intermittent social engagement and communication, and his play was functional. He appeared happy and comfortable in this setting, and was smiling frequently. Dr. Gottlieb also felt that Student's self-regulatory skills were emerging, which supported his success in an afternoon play group, as he was better able to engage with and play along side his peers. The report does not state that Dr. Gottlieb observed Student at the play group, rather, this observation appears to be based on the report of Student's companion, Anna, who took him to a pre-school afternoon program for socialization. Anna told Dr. Gottlieb that she could only handle Student in a small group of a maximum of five children for a period of 20 minutes.

89. Dr. Gottlieb reported concerns with Student's sensory modulation delays, and recommended Student receive two 50-minute sessions per week of direct OT. She also reported that his speech and language remained significantly delayed in areas of receptive communication, expressive communication, and pragmatic language. The

report did not refer to any speech apraxia or dyspraxia. She recommended Student receive three 50-minute sessions of speech therapy per week with his current provider. Based upon her school and home observations, and her observations of Student in her office, as well as multiple accounts of self-injurious behaviors, she reported that Student could only tolerate short period of focused attention without engaging in these maladaptive behaviors. She was concerned that a kindergarten class would be longer than Student could tolerate at that time. She recommended that Student continue aggressive behavioral intervention to address his educational needs and to address maladaptive behaviors. Dr. Gottlieb specifically recommended that Student receive 40 hours per week of a year-around intensive ABA program. She recommended that Student continue to work with JBA, as he was working well and productively with JBA. She hoped that Student's behaviors and ability to attend and focus to task would improve enough that he would be ready for a school-based program in a small, structured classroom with the support of his current behavioral interventionists. She recommended that Student start school and gradually increase his school attendance to full-time. She reported that Student was being provided with the optimal type of behavioral intervention, as he had been making significant gains in all developmental and behavioral areas.

90. The day before the IEP meeting, the District also received a report from Amy Parsons, Student's speech therapist. The report stated that Student had received LAS therapy from Ms. Parsons two times per week from March 24, 2008, and one time per week from January 9, 2009, through the present. The report stated that in March 2008, when Student began therapy, he was unable to follow a two-step related command, identify emotions, and was only 30 percent accurate in identifying verbs in pictures. He used only 1-2 words to communicate, was significantly dysfluent, could not control his volume, only referred to himself in the third person, and did not use any

form of yes/no. His speech was fast and slurred, and only 50 percent intelligible with an unknown context. Socially, he did not respond to his name, he had very poor joint attention, and did not have any turn-taking skills.

91. Ms. Parsons reported that Student had made gains in all of these areas since he began therapy. As the IEP team summarized, Student was currently working on three-step directions, identifying and labeling simple pronouns and prepositions, answering simple who, what, where questions, using yes/no to affirm/deny, using five-plus-word sentences to communicate, using appropriate volume and speed, increasingly using language to communicate his feelings, and improving simple diadochokinetic (oral motor and precision) skills.

92. The report recommended that Student's LAS therapy be increased to four times per week for 50-minute sessions, so as to provide increased repetition, consistency, and follow-through. The report concluded that Student had significant needs in the areas of receptive, expressive, and social language, and would greatly benefit from an increase in services. Ms. Parsons's report did not mention any apraxia of speech. Ms. Parsons' assessment report dated May 18, 2008, was the only report that Ms. Parsons generated prior to this IEP meeting that mentioned the possibility that Student had apraxia, and there was no evidence that District ever received that assessment report.

93. The day before the IEP meeting, the team also received the JBA Progress Report (Progress Report), dated June 9, 2009, the stated purpose of which was to compare Student's progress towards some of the goals set forth in JBA's January 2009 Skills Assessment Report. In the area of Behaviors, the report noted that Student was responding to the instruction "come here" with 70 percent accuracy. The report noted that Student was unable to respond to that instruction at the time of the intake assessment in January 2009. The report stated that Student's behaviors had increased

since the time he started therapy, as instructional demands on Student have increased. These behaviors included hitting self and others, biting, throwing, and pinching. The report noted that Student received intermittent reinforcement for these maladaptive behaviors outside of therapy sessions. In the areas of Play and Socialization, JBA reported that Student did not demonstrate any independent play skills at intake. At the time of the Progress Report, he was still having very much difficulty learning to play independently, but he was learning play skills. He was learning to complete jigsaw puzzles, and how to play games on the computer. The Progress Report noted that at the intake assessment, Student did not have any turn taking skills. At the time of the Progress Report, he was learning to take turns. He was also learning to play bowling and tennis on Wii. JBA reported that, during these activities, Student would throw, lick, or spin the game materials. He would also cry, whine, and pinch or hit aides when he did not want to play, or to gain attention.

94. JBA reported that during the intake assessment, Student would watch TV and movies, but would bang on the TV screen. As of the time of the progress report, Student could watch three minutes of TV without banging on the screen. During the intake assessment, JBA reported that Student would gain attention by pinching or hitting others, and hitting himself, as well as repeating statements. At the time of the Progress Report, Student still pinched, but he was given phrases to use instead of pinching and hitting, and the therapists have blocked pinching and hitting when possible.

95. JBA reported that during the intake assessment, Student did not consistently answer conversational questions. At the time of the Progress Report, JBA reported that Student was learning to make similar statements in response to other's statements. He could state his name and Mother's name, and he was learning Father's name. He could respond 60 percent of the time, on average. In the area of Self-Help,

JBA reported that Student could not dress himself, and he was having daily toileting accidents. The Progress Report noted that Student still was not compliant with getting dressed, and that JBA had successfully instituted a bathroom routine that was minimizing toileting accidents.

96. The Progress Report discussed Student's language/communication. JBA noted that Student demonstrated knowledge of receptive action labels. At the time of the Progress Report, he was learning expressive actions, and had learned pointing, talking on the phone, and cooking. JBA noted that Student did not know adjectives at the time of the intake assessment. At the time of the Progress Report, JBA had placed this skill on hold, due to continued difficulties with inappropriate behaviors and non-compliance. With respect to imitating sentences, JBA reported that, at the time of the intake assessment, Student was able to imitate three-word sentences. The Progress Report stated that Student was learning four-word sentences. The report noted that, at the time of the intake assessment, Student knew receptive functions. At the time of the Progress Report, JBA noted that Student was learning expressive functions. JBA reported that, at the time of the intake assessment, Student did not know prepositions. As of the time of the progress report, Student had learned two prepositions, but he was not maintaining one of them, and he was often non-compliant with the program for learning prepositions.

97. In the area of pre-academics, JBA reported that Student was not able to match or to sort at the time of intake. At the time of the Progress Report, Student could match objects and pictures. He had learned to sort animals, and was learning to sort food. The report concluded with a description of Mother's participation, and noted that Student's severe behaviors with aides, and the training of new aides, had interfered with Mother's participation. Mother continued to report to JBA continuous difficulties in managing Student's behaviors at home outside of the therapy sessions.

98. The Progress Report did not clearly correlate the goals it described with the 32 goals that were listed in the Skills Assessment Report. The Progress Report contained data regarding Student's behaviors, but it did not specify the goals to which it referred, and it did not contain any data or information as to how Student's performance on each of the goals was recorded or measured.

99. The team denoted the IEP meeting as an Annual Review, since Student's Annual Review was due. The team noted that none of Student's goals had been met, as Student had not attended school since December 2008. The team presented present levels of performance in the areas of motor ability—APE, motor OT, language arts, mathematics, pre-vocational, self-help, and behavior, which were the same areas of need covered by the January 2009, IEP. The team noted that Student had not attended school since December 2008, and that the information in the present levels of performance was based on information prior to exit. Since Student had continued to receive clinic OT, however, the OT present levels of performance reflected his present levels in clinic OT. He had improved in participating and performing tasks for up to 12 minutes when he was interested in the activity. He was able to follow a multi-step activity when incorporating behavioral strategies and positive feedback. His motor planning had improved.

100. Both of Student's District occupational therapists, Margaret Liquori and Elyse Steffens, testified at hearing and confirmed Student's present levels of performance, the appropriateness of the goals as set forth in this IEP and the January 2009 IEP, Student's progress on the goals, and the appropriateness of the level of OT services. Ms. Steffens, who has a B.S. and a master's degree in OT from the University of Southern California, was Student's school-based occupational therapist. She is a licensed OT in California, and she is registered with the National Board of Occupational Therapists. She saw him in the classroom and on the playground, and believed he had

the physical skills to navigate those environments. She had no concerns about his safety, and did not observe that he bumped into things inordinately. Ms. Liqouri, Student's clinic-based occupational therapist, has a B.S. in biology from Penn State University, and a master's degree in OT. She is licensed in California and is registered with the National Board of Occupational Therapists. She also testified that Student could negotiate his environment, and there were no safety issues.

101. The team summarized Ms. Parsons' report dated June 14, 2009, in the IEP, under the present levels of performance section for speech and language. Ms. Parsons was not present at the meeting. She was not invited to the meeting by District, and there was no evidence that Student had requested that District invite her to the meeting. The team noted that Student had received LAS therapy for 1-2 hours per week, for 60 minutes per session. Student was working on three-step commands, identifying and labeling simple pronouns and prepositions, answering simple "who," "what," and "where" questions, using appropriate volume and speed, increasingly using language to communicate emotions and frustration, and improving simple diadochokinetic skills to increase intelligibility. The team noted that, pursuant to the Agreement, the District was reimbursing Student for LAS services by Ms. Parsons, through June 19, 2009. The team also noted that Student was eligible for school-based LAS services at 60 minutes per week, and that present levels of performance and goals would be established upon Student's enrollment at a District school. Mother and her counsel did not comment on Ms. Parsons' report, or raise any questions regarding the report.

102. The IEP included a new goal in gross motor—APE, and a new goal in motor OT—clinic. The IEP included essentially the same goal in motor OT, and the same goal in the areas of pre-vocational/social skills, self-help, reading, written expression, and mathematics. The IEP also included a BSP to address Student's off-task behavior, which contained the same goal as did the BSP included in the January 2009 IEP.

103. The team noted that Student was not expected to meet grade-level standards, and stated that his speech and language impairment and the behavioral characteristics of autism that Student demonstrated impeded Student's ability to reach grade level goals and to be involved in the general education curriculum. The team recommended that Student be provided much the same instructional supports and accommodations as in the January 2009 IEP. The team recommended that the curriculum be modified to reflect Student's learning style and match his functional levels of performance. The team determined that Student would spend 82 percent of his time per week in special education, and agreed that Student was eligible for ESY. The team offered Student placement in the Autism SDC at Walgrove. The team noted that District would provide the SEACO curriculum to prepare Student to access the District's general education curriculum. Neither Mother nor her attorneys asked any questions or made any comment regarding the SEACO curriculum.

104. The IEP team recommended school-based LAS services for 60 minutes per week. The notes reiterated that present levels of performance and goals would be established upon enrollment in an LAUSD school, as Student had not attended school since December 17, 2008. The team also recommended APE services, one time per week, for 30 minutes, and that those services would be provided at ESY as well, if Student attended ESY. The team recommended school-based OT services for 60 minutes per week in a small group in a classroom setting to address Student's fine motor and visual motor delays. The team noted that Student had been receiving clinic-based OT per his June 17, 2008, IEP, and continued to be eligible for clinic-based OT services to address his sensory processing delays for 60 minutes per week. The team recommended an OT assessment, and stated that an OT assessment plan would be generated if Student attended a District school.

105. The IEP team determined that Student should receive BII at 32 hours per week, and BID at six hours per month, provided by an agency that had a contract with the District. Since Student had not been at school, the team determined that an IEP would be held to establish new behavior goals, if necessary, when Student returned to a District school.

106. The IEP notes reflected that the District had reviewed JBA's Skills Assessment Report dated January 19, 2009, and had taken it into consideration. The notes summarized the report. The team notes reflect that both Ms Yi and Ms. Topp reviewed their work with Student at the IEP meeting, and summarized their goals, their methods of working with Student, and their report. JBA recommended that Student needed an intensive program for 40 hours per week, part of which should be at school, with JBA one-to-one support. The IEP team noted that the team recommended a school-based education program was the most appropriate setting in the least restrictive environment for Student. The notes elaborated that the least restrictive environment for Student was an integrated campus where Student had access and opportunities to engage, interact, and learn from his typical peers. The team determined that Student needed a highly structured environment with social skills instruction, which the Autism SDC could provide. The team also recommended that Student be integrated in the general education classroom during art, music, PE, and other activities per Student's readiness. Team meetings would occur periodically to plan and review Student's integration progress.

107. The IEP notes stated that school staff did not report maladaptive behaviors to the degree, severity, and frequency which were reported by outside assessment and behavior providers. Student made progress while he was attending school in his ability to transition, in the morning and between activities, in participating in non-preferred activities, and in his acquisition of academic skills. After Student returned to school in

the Autism SDC, the IEP team offered to conduct a comprehensive re-evaluation at Walgrove to determine whether NPS placement would be appropriate.

108. The IEP notes also mentioned the reports that the District had received. The notes reiterated the previous summary of Ms. Parsons' LAS report, adding that Ms. Parsons had recommended services at the level of four 50-minute sessions per week. The team noted that on June 16, 2009, the day before the IEP meeting, Student's attorney had faxed to the District a report from medical doctor Dr. Gordon, a follow-up report by Dr. Gottlieb, and a report of present levels from JBA. The report of present levels from JBA had been discussed by the IEP team, but Dr. Gordon's and Dr. Gottlieb's reports were not discussed at the meeting. The notes stated that Dr. Gordon's letter was dated June 11, 2009, and shared his opinion that Student's behavior had regressed at a five-year check-up and asserted that his behavior improved on a visit on April 29, 2009. He also reported that blood tests showed Student was "extremely sensitive" to mold and dust, and recommended continued individualized, direct, and intensive instruction. Additionally, the IEP notes referred to Dr. Gottlieb's follow-up report, and that its recommendations included speech and language services three times per week for 50 minutes, aggressive behavioral intervention, and the need to extinguish maladaptive behaviors and develop attention and focus to task sufficient to consider a school-based program.

109. The meeting was tape-recorded, and Mother prepared a transcript of the recording. The 55-page transcript did not identify all of the speakers at the meeting, and did not properly identify some of the speakers. Portions of the transcript are unintelligible. The transcript reflects, however, that the team discussed Student's behaviors in depth. The District members of the IEP team, including Ms. Parham, expressed that Student's behaviors at school were not as severe or extreme as Parents and JBA were experiencing at home. Ms. Parham reported that Student's ability to

transition to the classroom and between activities improved between September and December. His ability to sit in the circle at circle time had increased since September. Ms. Parham added that Student did not engage in any self-injurious behaviors in the classroom, and he was not assaultive toward his peers. Ms. Parham reported that Student had hit her once but she believed it was unintentional.

110. Ms. Yi and Ms. Topp spoke at length regarding the services JBA provided to Student, their goals, and his progress. The transcript of the IEP meeting does not reflect that either Ms. Yi or Ms. Topp criticized any of the goals formulated by the IEP team. Mother, her two attorneys, Ms. Yi, and Ms. Topp did not suggest that the team formulate goals that related to the goals formulated by JBA.

111. The transcript reflects that Mother and her attorneys asked in excess of 50 substantive questions, all of which were responded to by the District members of the team. Ms. Yi and Ms. Topp collectively asked in excess of 10 substantive questions, which were also responded to by the team. Neither Mother, her two attorneys, Ms. Yi, nor Ms. Topp asked any questions about the SEACO curriculum. Mother or Student's counsel responded with a comment or question after nearly every District witness spoke. The team discussed JBA's proposal that Student receive 40 hours per week of intensive ABA DTT services, for an undetermined length of time. Ms. Yi and Ms. Topp explained that part of the ABA therapy could occur at school, with the ABA therapist providing Student the one-to-one DTT services on site. The one-to-one aide at school would provide both behavioral services and academic instruction using DTT. The transcript reflects that the District members of the team asked questions and considered the proposal. The parties discussed JBA's status as an NPA without a Master Contract with the District. The transcript reflects that, by the end of the meeting, the District and the Student understood each other's positions. At the conclusion of the meeting, Ms. Dara offered to answer any further questions that Mother or counsel might have. There was

no evidence that Parents or counsel asked any such questions after the IEP. Neither Parents nor their counsel submitted any additions or corrections to the IEP document.

112. Parents refused to sign the IEP. District continued to reimburse LAS services pursuant to the Agreement through June 19, 2009, and OT services until on or about the end of July 2009, which was the end of the ESY period.

Expert Testimony Pertaining to the June 17, 2009 IEP's Offer of FAPE and to the Expert Reports

113. At hearing, Dr. Gottlieb elaborated upon the Follow-Up Developmental Consultation report of May 2009, mentioned in the June 17 2008, IEP. She also testified about a report she prepared dated October 16, 2009, while this matter was pending. Dr. Gottlieb acknowledged that she knew at the time she wrote her May 2009 report that Parents wanted the JBA home program to continue. She reiterated her opinions, as expressed in the report that JBA was providing the optimal type of behavioral intervention, and she recommended that Student should receive such services from JBA for 40 hours per week. Since Student was successful in his JBA program, she did not recommend changing providers. She expected that Student would ultimately return to school. She believed that, when Student returned to school, there should be consistency and direct communication between his home therapists and school one-to-one aide, and that this would be easier to accomplish if the one-to-one aide was from JBA.

114. Dr. Gottlieb testified that she had initially examined Student in November 2006, when he was three years and three months old, and had diagnosed him as developmentally disabled. Dr. Gottlieb noted that Student had a history of behavior regression which occurred when he changed pre-schools, when he went from First Presbyterian to Walgrove, when he went from Walgrove to home, and then when he began receiving therapy from JBA. She noted that rather severe maladaptive behaviors occur when Student was stressed.

115. Dr. Gottlieb expressed her concern that Student had dyspraxia of speech, which was a neuromotor condition, also known as apraxia, which affects Student's ability to produce speech. She testified that she typically referred patients with a dyspraxia to a specialist, to evaluate the integrity of physical structures. She did not recall whether she had referred Student to such a specialist.

116. Dr. Gottlieb testified that Student had continued to improve under JBA's program. She last observed him on April 2, 2010. His compliance and responsiveness had improved and JBA has been able to extinguish Student's more aggressive behaviors. His academic abilities advanced, and his overall abilities to attend and to focus improved while he has been in JBA's program. In her opinion, Student should continue to be provided with the JBA home program, because he has done extraordinarily well in it, and with JBA, and she feared that change would negatively impact his progress. She feared he would regress behaviorally if his service provider was changed to a different agency. Such regression could affect his ability to develop new skills and his maintenance of the skills he has acquired. In her experience, Student could continue to progress in an ABA program, and that there was no age limit for any child regardless of the end point for ABA effectiveness that appeared in some of the research. Optimistically, she would consider transitioning Student back to school, slowly, over a period of several months, in fall 2010. She recommended an assessment and an IEP meeting to consider his educational program.

117. Dr. Gottlieb testified that she had no training in ABA, but was familiar with established treatments for autism based upon conferences she has attended, and her recommendations are informed by the National Standards Report. She was testifying from a medical and clinical perspective. She did not know if Student would have made the same improvement if he had been in the Autism SDC at Walgrove. She was very concerned about his behaviors. He had a one-to-one aide in the EE class, and his

behaviors persisted. She acknowledged that his behaviors at home and at school could have been different.

118. Ms. Parsons testified at hearing regarding the therapy she provided Student. Ms. Parsons received her B.A. in communication disorders, and her M.S. in speech and language pathology from San Francisco State University. She is a certified speech and language pathologist in California, and she has her Certificate of Clinical Competence from the American Speech-Language-Hearing Association (ASHA) . She is not a California-certified NPA. She became Student's private speech therapist in March 2008. She tried to provide Student services two times per week for 30 to 50 minutes each time, but the actual amount of time varied, due to her scheduling issues or Student's scheduling issues. She thought that was sufficient time for therapy. She testified that at first Student did not have much functional communication. He would not respond yes or no, and only his Parents could understand him. Student's phonology patterns impeded his intelligibility. He put a stop at the end of a word, or would substitute another consonant at end of the word. His statements seemed to be out of context. His articulation was a concern, but she was more concerned with Student acquiring sufficient language so he could have his basic needs met. She was concerned that he had apraxia. She did not begin providing therapy for Student's apraxia until late June, or early July 2009, because, in her opinion, apraxia therapy was not a priority, and she did not think therapy would be effective before then.

119. She characterized his language delay, articulation, motor speech, and phonological impairment as moderate to severe, given his age. He would lose skills, and then have to regain them. She believed he requires goals for receptive language, expressive language, and "all areas of need." He was moderately to severely impaired in expressive and receptive language, and articulation. Speech therapy priorities for

Student included the ability to communicate his likes, dislikes, and needs, and his speech must be more understandable.

120. She remembered Student's maladaptive behaviors increasing in fall 2008. He was yelling a lot, pinching, and crying. WWA gave her a very specific behavior plan for those behaviors, and it worked so that she could perform therapy. His behaviors also deteriorated when he was taken out of Walgrove. After JBA began to provide services, he calmed down. Since JBA started to provide services, Student has been easier to redirect. The whole house seemed calmer, and parents seemed calmer. Student still had behaviors, however. She was not sure Student was ready to work on articulation because of his behaviors, and Student did not like articulation therapy.

121. She has never attended an IEP meeting for Student. She prepared progress reports and treatment plans to Parents to take to IEP meetings. District has not invited her to IEP meetings, or talked to her about Student, except that she talked to Ms. Parham, Student's Walgrove EE SDC teacher one time. Ms. Parsons advised Ms. Parham what Student was working on in speech therapy, and what he could do. She gave Ms. Parham some suggestions regarding Student's communication in class.

122. At the time of her report of June 14, 2009, she was providing therapy two times per week, at 30 to 50 minutes per session. Her recommendation to the IEP team in her report of June 14, 2009, was an "overshoot." She had intended to recommend three times per week for 50 minutes per session. However, Parents, anticipating that District would not agree to the amount of time she asked for anyway, requested that she recommended therapy at a level of four times per week, for 50 minutes per session. Ms. Parsons felt Student could benefit from that level of therapy also. At that time, he could handle more therapy. However, she recommended that, if he had therapy four times a week, some of those sessions should be with a different therapist. In her opinion, he could make progress with fewer hours, and he has done so.

123. Ideally, she recommended three 45-minute sessions, or four 30-minute sessions. Student required more repetition, especially for treatment for his apraxia, and shorter, more frequent sessions, were more beneficial. She advocated Student returning to school, for the social interaction, and so that his speech could develop in a social and academic setting. She believed he should gradually transition into the school placement, to avoid a resurgence of former problem behaviors, or the emergence of different problem behaviors. Ms. Parsons testified that Student required individualized therapy to master his goals, with repetition and carryover into a classroom, while the therapist worked on new goals. She felt he needed a smaller classroom with more structure than his EE SDC and with a higher adult/child ratio. She thought he required sensory aids in class, and visual supports.

124. Dr. Gordon testified at hearing on behalf of Student. Dr. Gordon received his B.S. from the University of Wisconsin at Madison in 1970, and his M.D. from the Medical College of Wisconsin, Milwaukee, in 1975. He was a pediatric intern at the University of Southern California, Los Angeles County Medical Center, and his pediatric residency at Childrens Hospital of Los Angeles. He became Board-Certified as a Fellow of the American Academy of Pediatrics in 1983. Dr. Gordon has been Student's pediatrician since the day Student was born. He did not testify regarding the substance of his letter at hearing. He did not testify that Student had any health conditions that required Student to be educated at home. He observed Student during his six-year-old check-up in August or September 2009 and was very pleased that Student's behaviors had improved so well as compared to all of his previous check-ups. Dr. Gordon and Student interacted verbally and physically, and it was a very pleasant visit. Dr. Gordon did not recall how long the visit had lasted, but it was at least 30 minutes long.

125. Dr. Gordon testified that Parents had consulted him regarding their decision to keep Student out of school and provide him one-to-one ABA services. Dr.

Gordon was aware that behavioral analysis and behavioral intervention, such as ABA and Floortime were highly regarded in the autism field. Parents reported to him that school was not working well for Student, so he followed their lead and supported their decision to give him one-to-one therapy at home until he could better function in the classroom. Parents had not gone into detail regarding Student's JBA program, but they have reported to him that they thought he was doing better. All information that Dr. Gordon had regarding Student's functioning came from Parents, primarily Mother, and from Student's periodic medical visits. He considered Mother a reliable reporter. At hearing, Dr. Gordon recommended, based upon his experience and knowledge, and on the Student's office visit and Mother's reports, that Student continue to receive at-home services from JBA. He testified he would rather not change a program that was working. Dr. Gordon believed that there was a crucial window between the ages of two years to eight years for children with autism, and he testified that he wanted to maximize Student's exposure to behavior modification for the next year and a half. He also wanted to minimize Student's stress. He testified that Student had injury to the lining of his intestine which was consistent with colitis, and he believed that Student' was aggravated by stress. Dr. Gordon believed that Student's autism caused him stress, particularly his difficulties with communication and socialization. Dr. Gordon testified that all changes in Student's program should be slow, as anything else would be stressful for Student.

126. He noted that Mother had reported to him that Student was having sleep problems at the five-year-old check-up in August 2008. Dr. Gordon expressed his opinion that lack of sleep affects children's ability to learn, and affects parents as well. He did not recall whether he recommended any sleep strategies to Parents, and he did not refer Student to a sleep specialist. He would recommend that Student be permitted to sleep late in the mornings, if he had had difficulty sleeping the night before. He recommended flexible school hours for Student with respect to his sleeping problems,

while noting that in the long term, it was important to have Student in school at the same time every day. At some point, however, if sleep difficulties became more extreme, he would recommend therapy. He did not know how much school Student had missed in fall 2008 due to gastrointestinal or sleep issues

127. Dr. Gordon testified that if a classroom setting would work for Student, he would support that. He would defer to the recommendations of parents and therapists as to when Student should return to school. He felt that the more stability Student had, the better, so he felt it would be better for Student to be at school with the therapists from his home program. He recognized that it might be difficult for Student to return to school, particularly in the area of socialization. He believed that the transition to school might be easier if Student were learning academic tasks at home that he would be called upon to do at school. He recommended play dates to address the socialization issues.

128. At hearing, Ms. Yi of JBA criticized the goals in the June 17, 2009, IEP, as being vague regarding the types of prompts to be used and how many prompts. She criticized the vagueness of the specific enough regarding what types of prompts and how many prompts. She criticized the goals for including prompts, since their use indicated that Student would not master the task. She criticized the vagueness of the phrase "acknowledge his peers" in the Pre-Vocational/Social Skills goal. She criticized the Reading and Math goals for not specifying whether they referred to receptive or expressive language. She criticized the behavior goal regarding attending to task, because it did not include teaching a replacement behavior. She and Ms. Topp both criticized the ESY offer for several reasons. The offer contained no specific information regarding the type of ESY class Student would be placed in. There was no transitioning into the class. After ESY, he would have a month with no services, and then no transitioning back to school. She objected that the IEPs did not specify that the

behavioral services should be provided by an ABA-trained aide, because ABA was the only effective documented evidence-based treatment for Autism.

129. As did Ms. Yi, Ms. Topp of JBA criticized the vagueness of the goals. She also testified that the BSP was not written in accordance with ABA standards, as the terms were vague, the functions of the behavior were not described, and there was no data to support it. However, she believed that JBA could work on the BSP goal that Student stay on task and attend to non-preferred activities. She also believed that JBA could work on the pre-vocational/social skills goal regarding Student acknowledging his peers. She was working on a goal similar to Student's Reading goal of identifying letters, but she felt that the written expression goal requiring Student to write his name was too advanced. She could work on the math goal of identifying numbers, even though JBA was not yet working on numbers.

STUDENT'S SERVICES POST-JUNE 2009 IEP

130. Student continued to receive in-home services from JBA for a varying amount of hours, through the time of hearing. Regional Center paid for 10 hours per week of JBA services, pursuant to California's Lanterman Act, and Parents paid for a few additional hours per week, until August 1, 2009. Then, Regional Center paid for 20 hours per week of JBA services, and Parents paid for five to 10 additional hours. Parents also paid for Student to receive LAS services from Ms. Parsons. Ms. Parsons prepared several progress reports which post-dated the filing of the due process hearing complaint, and, in view of the results of this Decision, they need not be summarized in this Decision.

131. In November 2009, Student began to receive OT services from a private provider, Shelby Surfas, OTD, OTR/L. Dr. Surfas is a Supervisor of Clinical Practice and occupational therapist at Therapy West, Inc./pLAY Studio (Therapy West). She received her B.A. in psychology from Lake Forest College. She received her M.A. in OT and her clinical doctorate in OT from the University of Southern California. Dr. Surfas received

her SIPT Certification in approximately 2008, which qualified her to administer and interpret the Sensory Integration and Praxis tests. Parents arranged for and have paid for Dr. Surfas' services. Through the time of hearing, she has provided OT to Student one time per week, for one hour per session. Dr. Surfas had not met Student prior to August 13, 2009, when she assessed him for OT services. At that time, she recommended that he receive clinic-based OT services one to two times per week, at 60 minutes per session. She testified that she had initially recommended that Student have a behavioral aide present during OT services, but that she realized that she could handle Student's behaviors, and so no such aide was needed. Her services were directed to fine motor coordination and control, gross motor skills, including coordination and balance. She used intensive proprioceptive feedback to calm him. She disagreed with portions of the present levels of performance in the Motor OT set forth in the June 17, 2009, IEP. The present level of performance mentioned that Student had adequate neuromuscular skills to navigate the classroom and playground environments. She had never seen him in the classroom, but she had observed he had difficulties with the equipment at her facility, and difficulties with grip strength, climbing, climbing into a swing, climbing over walls, motor planning, and being able to slide properly on the slide. She had observed him having issues with motor planning at home, such as bumping into things and dropping items. She was concerned with his visual perception, and had recommended he be evaluated by a developmental optometrist, because he could not consistently perform on a visual perception test. Dr. Surfas agreed that Student could sometimes perform multi-step activities, as mentioned in the present levels of performance. She noted that the tasks described in the APE present level of performance relate to and correlate to the therapy she provided. She commented on the motor OT goal in the June 17, 2009 IEP regarding copying of simple shapes, noting that his quality and pressure were poor. He needed an adaptive writing tool, because he did not have an

appropriate grasp. She testified he was successful about 50-75 percent of the time, with moderate prompts on the other Motor OT goal in the June 17, 2009, IEP. That goal required that Student use appropriate force and pressure when using classroom tools such as crayons and markers with minimal verbal prompts on 75 percent of trials. She did not consider him ready to work on writing letters, as called for in the Written Expression goal in the June 17, 2009, IEP. She recommended that he receive home-based OT two times per week for 45 minutes per session, with a behavioral therapist or a parent present for part of that time. Dr. Surfes did not criticize the OT services offered in Student's June 17, 2008, IEP, which provided that, if Student returned to school, he would be eligible to receive school-based OT for 60 minutes per week, and clinic-based OT services for 60 minutes per week.

132. Parents retained Mitchel D. Perlman, Ph.D., a clinical psychologist, to perform a neuropsychological assessment of Student. Dr. Perlman received his B.A. in psychology summa cum laude in 1980 from the University of Texas at Dallas. He received his Ph.D. in clinical psychology in 1986, from the California School of Professional Psychology, in San Diego, California. He has been in private practice since 1984. There was no evidence that he had ever provided therapy to Student. The assessment occurred in November 2009, while this due process matter was pending.

133. Dr. Perlman wrote a report of his assessment of Student. Dr. Perlman noted that Parents did not believe that previous assessments had sufficiently determined Student's needs, and thus were not convinced that the recommendations from those assessments were appropriate. Dr. Perlman did not specify the assessments which Parents were questioning. His report states that he administered the following instruments to Student: the Kaufman Assessment Battery for Children, Second Edition (KABC-II); Developmental Neuropsychological Assessment, Second Edition (NEPSY-II); the Peabody Picture Vocabulary Test, Fourth Edition (PPVT-4); the Kaufman Test of

Educational Achievement, Second Edition (KTEA-II) (selected subtests); and the Adaptive Behavior Assessment System, Second Edition (ABAS-II).

134. Dr. Perlman's report included information provided to him by Parents, and stated that he primarily concentrated on previous assessments he found pertinent to his evaluation. He converted all scaled scores and standard scores into percentiles, and constructed a table in which he defined categories ranging from severely deficient to very superior based upon defined ranges of standard scores and percentiles.

135. Dr. Perlman's report contained a brief review of Student's early development, and summaries of reports and assessments from the 2006-2007 school year, including summaries of all of Student's IEPs. Dr. Perlman quoted from and italicized portions of previous reports of Parents' experts that coincided with Parents' position in this matter. The report erroneously described the LAS services Student received, stating that, in January 2009, the District agreed to provide compensatory LAS services to Student until January 2010.

136. Dr. Perlman reported that he observed Student on two separate occasions. In June 2009, he observed Student for approximately one and one-half hours at his proposed school program at Walgrove, and then spent about two hours with Student at his ABA home clinic. Dr. Perlman acknowledged at hearing that this was error, as Student had not attended Walgrove since December 17, 2008. Further, Dr. Perlman testified that he did not observe the Autism SDC for one and one-half hours, as his report indicated. Rather, he visited the EE SDC for approximately one-half hour and the Autism SDC for approximately one hour. Dr. Perlman's testimony also contradicted his report as to the date on which he visited the Autism SDC. Dr. Perlman testified that he visited the Autism SDC in November 2009, but his report stated he visited it in June 2009. Brief references to the length of Dr. Perlman's classroom observation were made at the June 17, 2009, IEP. Both his testimony and his report support that Dr. Perlman

visited Walgrove only one time. Consequently, Dr. Perlman's testimony that he visited Walgrove's Autism SDC in November 2009 is an error.

137. Dr. Perlman also reported that he observed Student in November 2009 at his ABA home program. He reported that he spent four hours assessing Student.

138. Dr. Perlman reported on his observation in June 2009 at Walgrove. He noted that there were nine children, one teacher, and two aides in Student's "previous school placement," referring to the EE class. He also observed the proposed Autism SDC. The day he observed, there were seven children, one teacher, and two aides. Unlike the EE classroom, Dr. Perlman reported that this class was not geared toward academics. He reported that the entire one and one-half hours that he observed consisted of the children singing songs, rotating to sensory and play areas, and participating in snack time. Most of the children in the class were higher functioning than Student, in that most of them were verbal, and capable of social interactions. He did not consider it a language-rich classroom, as he observed virtually no effort made to facilitate language between any of the children. He noticed that the teacher and aides missed obvious opportunities for language and/or social facilitation. He asked the teacher and learned that social interactions were also not facilitated during recess. This was his only substantive interaction with the teacher. Dr. Perlman's observations at Walgrove were not presented at the June 17, 2009 IEP meeting, although they occurred prior to the meeting. He was not present at the IEP meeting, and there was no evidence that Student had invited him to the meeting.

139. Dr. Perlman's report described his observations of Student's home ABA program. He attended the JBA Clinic Meeting in June 2009, and learned that Student did not behave identically with each therapist. JBA reported to him that Student's maladaptive behaviors had been well-ingrained over the last couple of years, both at home and at school, so JBA required more time to correct these behaviors. After the

Clinic Meeting, Dr. Perlman observed Student working with one of his therapists. Student did not settle down during the entire hour of the observation, but he was able to work through some of the slated drills. Dr. Perlman reported that Student's speech was not very intelligible, unless the context was clearly known.

140. Dr. Perlman observed Student's ABA home program again for approximately an hour in November 2009, approximately five months after his prior observation. Student completed approximately twelve drills, which was many more than during Dr. Perlman's visit the previous June. Dr. Perlman was impressed that Student was quite compliant during the entire hour even though Student clearly preferred to be doing something else. The report noted that Student was quite verbal, but his intelligibility remained poor.

141. Dr. Perlman described the results of the standardized tests he administered to Student. He stated that Student's ability to attend to the tests was only marginal, even with the support of his therapists. Also, Student was unable to understand or fully appreciate the tasks. With respect to the KABC-II, Student could understand only five of the nine processing tasks. Therefore, a single IQ score could not be calculated. Student obtained a standard score of 4 on the Word Order subtest (2nd percentile); a standard score of 4 on the Number Recall subtest (5th percentile), a standard score of 6 on the Hand Movement subtest (9th percentile), a standard score of 4 on the Atlantis subtest (2nd percentile), and a standard score of 3 on the Triangles subtest (1st percentile). Dr. Perlman's report categorized Student's performance on these subtests as falling within the severely deficient range on one subset, in the well below average range on two subtests, and in the below average range on another. Dr. Perlman's analysis thus categorized only four of the five subtests. Based upon this incomplete analysis, Dr. Perlman estimated Student's current intellectual functioning to

be well below average, which the report stated was above the range normally associated with Mental Retardation.

142. After discussing Student's scores on the KABC-II subtests, Dr. Perlman listed Student's standard and percentile scores on each subtest administered, without specifying the assessment of which the subtest was part. This list also included Student's standard score of 63 (1st percentile) on the PPVT-4. Dr. Perlman's report did not explain the significance of this score, and it appears nowhere else in his report. Indeed, he mentioned the PPVT-4 only one other time in the report, with respect to the receptive language portion of his assessment. The score of 68 that Dr. Perlman reported for the PPVT-4 regarding receptive language is different than the PPVT-4 score of 63 that Dr. Perlman reported in his listing of subtests.

143. The report then grouped the various subtests of the assessments into various domains. Student performed as follows in these domains:

Simultaneous Processing: Severely Deficient Range;

Sequential Processing: Well Below Average to Below Average Range;

Visual-Spatial Processing: Severely Deficient to Well Below Average Range;

Fine Sensory-Motor Processing: Severely Deficient Range;

Executive Functioning: Severely Deficient Range in Abstract Reasoning;

Learning: Well Below Average Range; and

Language: Severely Deficient Range.

144. Dr. Perlman's report noted that he could not assess Student in the area of Visual-Scanning/Discrimination, because Student could not sufficiently attend to those tasks. Dr. Perlman could not assess Student's auditory attention, as Student was unable to understand the tasks in that area. He did not assess planning because it could not be reliably assessed at Student's age.

145. Dr. Perlman attempted to address aspects of Student's academic achievement. He administered the Letter and Word Recognition subtests from the KTEA-II. Student obtained a standard score of 80 (9th percentile) on that subtest, which was below average. Dr. Perlman did not administer any writing tasks, as Student could not copy letters, and he did not administer any math tasks, as Student was unable to identify any numbers.

146. To assess Student's adaptive functioning, Mother completed the ABAS-II. Dr. Perlman reported that Student's ratings on the ABAS-II overall placed him in the severely deficient range. More particularly, Student achieved a standard score of 57 (less than 1st percentile) in the Conceptual area; a standard score of 70 (2nd percentile) in the Social area; a standard score of 60 (less than 1st percentile) in the Practical Area, and a Composite Score of 60 (less than first percentile).

147. Dr. Perlman's report contained numerous recommendations. Dr. Perlman primarily recommended that Student continue in his home ABA program, with hours increased to between 30 to 40 hours per week. He did not recommend changing Student's ABA provider, as that would result in lost treatment time, and there was no guarantee that another agency could match JBA's success. Dr. Perlman also recommended Student continue OT for his fine motor skills, and he recommended a variety of programs and software to remediate Student's inattention, and to increase Student's learning. He also recommended that RDI (Relationship Development Intervention) be considered as another parent-training program. The report included an

Appendix, in the form of a chart based on Parents report and JBA information, comparing Student's skills and behaviors as of January 2009, when JBA first began treating Student, and November 2009. The chart is repetitive, generally does not cite the sources for the information received, contains speculative and anecdotal comments, including comments from third persons, provides no context for the information listed, and contains no dates regarding when Student engaged, or ceased engaging, in any of the behaviors listed. The chart contains no graphs or data from Student's ABA therapy. The chart also did not take into account other reports of Student's abilities, and incorrectly attributes Student's progress only to JBA's interventions. For example, the chart stated that as of January 2009, Student did not have any turn-taking skills, which was contradicted by Ms. Parsons' progress report dated November 20, 2008. The chart stated that Student could not follow two-step instructions. Ms. Parsons' report dated June 14, 2009, stated that Student was working on three-step commands. The chart stated that neither WWA nor District was able to teach Student letters in two years, and that Student could not sort. At hearing, Dr. Perlman reiterated that, prior to being taught by JBA, Student "could not recognize a single letter." However, his January 2009 IEP states that Student could identify the letters A-E, and the letters in his first name with 70 percent accuracy, and he could sort objects by color, size, and shape. Further, Student only attended a District school for approximately three months, not two years.

148. Dr. Perlman testified at hearing as an expert witness on behalf of Student. He testified that Mother was correct in removing Student from school and arranging for JBA to provide an ABA home-based program, and that Mother's conduct in doing so had been approved by Dr. Gordon, Dr. Gottlieb, and others. He considered WWA to have been a failed attempt at ABA. In Dr. Perlman's opinion, Student's behaviors were very severe and were precluding him from benefiting in the classroom. Therefore, Parents had three options: (1) Change the program and focus on controlling Student's

maladaptive behaviors; (2) Perform an FAA; or (3) Place Student in a therapeutic placement. In his opinion, the District's proposal to place Student in the Autism SDC with the SEACO curriculum was not appropriate, as Student's out-of-control behaviors had to be addressed. After the behaviors were addressed, Dr. Perlman would approve of Student returning to school in a program suited to his needs. That program would not include the Autism SDC, which he considered to be a non-academic classroom, with no opportunities for social reciprocity or communication, or the SEACO curriculum, which he considered a functional curriculum. Dr. Perlman described a functional curriculum as a non-diploma track, curriculum which taught independent life skills and from which students do not advance academically. He thought a change to a functional curriculum was a serious matter, and not appropriate for Student at the present time, as Student's cognitive skills were difficult to measure and were still developing. The Autism classrooms he had seen and liked included exposure to the California curriculum, had children working on academic skills, and had a program that was individualized for each child.

149. Dr. Perlman recognized that a home ABA program did not provide the socialization opportunities that a public school classroom would, but he believed that play dates could be arranged to include other children. He recommended that behaviors be controlled before play dates were arranged. He believed that it was common and could be constructive to place a child in a more restrictive environment so that he could have the opportunity to participate in a less-restrictive environment in the future.

150. Dr. Perlman testified that when he saw Student in November 2009, Student's behaviors were much improved since his visit in June 2009. He had attempted to assess Student in June 2009, and could not do it due to Student's behaviors. He noted that it takes approximately three-to-six months of intensive ABA intervention to obtain control over behaviors. He testified that research supported ABA intervention at a

minimum of 25 hours per week. Dr. Perlman believed that it was important that Student be caught up academically as soon as possible, and therefore his ABA intervention should be increased to 30-40 hours per week. He recommended that Student continue with JBA ABA at-home intervention until at least December 2010, because research demonstrated those two years of intensive intervention was needed. Then, he would recommend a reevaluation, and formulation of a transition plan. He was in favor of a short transition program, starting with Student's home one-to-one aide accompanying him to school for one-half day, and continuing until Student was in school all day with his one-to-one aide. He did not recommend that Student change agencies for the school-based one-to-one aide. There was no research-based reason to change, and he was concerned that a change to another agency would risk failure or regression. In his opinion, Student, at his age, did not have time to experiment with another agency.

151. Dr. Perlman did not know how many hours of services JBA was providing Student per week. Dr. Perlman did not know whether JBA was providing Student a curriculum which was based upon California standards. He did not know the details of Student's goals in his JBA program. He admitted that he could not be certain that Student would not have made progress in the District's Autism SDC, and admitted that Student's home program was the most restrictive environment. He did not recall whether Student had play dates or was out in the community. He declined to compare a school classroom with at-home play dates. He did not know the efficacy of an intensive ABA program in children of Student's age, and did not know of any research to support it.

152. Dr. Perlman also testified that ASHA recommended LAS therapy for apraxia five times per week, but that sessions could be as short as 15 minutes. He acknowledged that Student might need additional LAS services if he had speech

difficulties besides apraxia. Dr. Perlman did not assess for apraxia, and he has no credentials as a speech therapist.

153. As noted, Dr. Perlman's report and testimony contained several factual errors. His report and testimony confused the dates and lengths of his school observations. His report erroneously stated he had observed Student at Walgrove. His report misstated the terms of the Agreement by which Student received LAS services. His analysis of his assessments contained errors in accounting for the test scores, and he failed to explain Student's scores on the PPVT-4. These errors combined with other factors to diminish Dr. Perlman's credibility.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

ISSUE 1A: BEHAVIOR SERVICES IN THE 2008-2009 SCHOOL YEAR

2. Student contends that WWA failed to appropriately address Student's behaviors during fall 2008. District contends that WWA was providing appropriate services to Student, and their interventions reduced Student's maladaptive behaviors.¹⁰

3. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with

¹⁰ Student raises numerous issues in his closing brief that were not alleged in his First Amended Complaint. The only issues that will be addressed in this Decision are the specific issues that were alleged in the First Amended Complaint. (Ed. Code, § 56502.)

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.) A FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).)¹¹

4. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).) In California "related services" are referred to as designated instruction and services (DIS). (Ed. Code, § 56031, subd. (b)(1).)

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 106 [102 S. Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide

¹¹ All citations to the Code of Federal Regulations are to the 2006 edition.

special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200; *J.G., et al. v. Douglas County School District* (9th Cir. 2008) 552 F3d 786 at p. 793.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley, supra*, at p. 201.)

6. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and, when appropriate, benchmarks or short-term objectives, that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 USC § 1414(d)(1)(A); 34 C.F.R. § 300.320.)

7. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).) In the case of a child whose behavior impedes the child's own learning or other children's learning, the IEP team shall consider positive behavioral interventions and supports, and other strategies, to address the behavior. In the case of a child whose behavior impedes the child's own learning or other children's learning, the IEP team shall consider positive behavioral

interventions and supports, and other strategies, to address the behavior. (20 U.S.C. 1414(d)(3)(B)(i); Ed. Code, §56341.1, subd.(b)(I).)

8. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (Id. at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (Ibid.)

9. To determine whether a school district's program offered a student a FAPE under the substantive component of the analysis (as opposed to the procedural component), the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. However, to meet the level of educational benefit contemplated by Rowley and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al.* (9th Cir. 1996) 267 F.3d 877, 890.) Furthermore, educational benefit in a particular program is measured by the degree to which Student is making progress on the goals set forth in the IEP. (*County of San Diego v. Cal. Sp. Ed. Hrg. Off.* (9th Cir. 1996) 93 F.3d 1458, 1467.) (*County of San Diego*).

10. The evidence demonstrated that the behavioral services provided by WWA were appropriate and permitted Student to access his education. As is shown in Finding of Fact 24, Student's behavior had deteriorated prior to his attending Walgrove. Student

had a history of having difficult transitions, and his transition to the academic environment of Walgrove's EE SDC from an accommodating and familiar pre-school environment was difficult. The transition was made more difficult by his numerous tardies, up to approximately half of which were not due to his morning OT. Despite these factors, the evidence demonstrated that the intensity and frequency of many of Student's maladaptive behaviors at school diminished during fall 2008, and that accomplishment is due to a great extent to his one-to-one WWA aides. Except for Mother, all witnesses at hearing who observed Student in his school environment noted that the Student's one-to-one aide was able to assist Student in managing his behaviors. None of those witnesses criticized Student's one-to-one aide's ability to work with Student during their observations. Indeed, Patty, one of Student's one-to-one WWA aides, successfully crafted a solution to Student's reluctance to enter school in the morning. The WWA aides so successfully helped Student learn to manage his behaviors that he was never sent home from school, or suspended, or expelled due to his behaviors. Rather, he was able to remain in school, access his curriculum, and benefit from his education to the extent possible. (Findings of Fact 24 through 57, 80, 81, 84, 85, 86, 107, 109, and 120.)

11. Furthermore, as is demonstrated in Finding of Fact 33, Mother often praised Patty in the communication log between Patty and Mother. This is significant, because the communication log is a contemporaneous, spontaneous, and voluntary document of events. Mother chose to include her praise for Patty in the log; she did not have to do so. Patty's tenure as Student's aide was marred for Mother by the incident to which Mother testified, when Patty did not appear to her to be managing Student's behaviors well on December 17, 2008. However, there was no evidence that the District or WWA had any prior notice that Patty had acted inappropriately either on December 17, 2008, or at any other time when she was Student's one-to-one aide at school.

12. Ms. Yi and Ms. Topp criticized the program WWA provided to Student. Ms. Yi criticized WWA for using an eclectic approach instead of DTT. Both Ms. Yi and Ms. Topp criticized WWA's data collection, and expressed that WWA did not sufficiently address the functions of Student's behavior. These criticisms of WWA's fidelity to ABA principles and methods may bear upon the efficacy of the home-based portion of the WWA program, which was provided by the Regional Center. They are not persuasive with respect to the behavioral services that Student received at school. The evidence demonstrated that the strategies and methods of Student's one-to-one WWA behavior aides were helping Student to manage his behaviors in the classroom, and that many of his maladaptive behaviors were diminishing in intensity and frequency as the fall semester proceeded.

13. Based upon Findings of Fact 1, 2, and 24 through 120, and Legal Conclusions 1 through 12, District did not deny Student a FAPE by providing Student behavioral services through WWA.

Issue 1B: No FAA during the 2008-2009 School Year

14. Student contends that Student's severe aggressive, assaultive, and self-injurious behaviors warranted that the District conduct an FAA. District contends that his behaviors did not require an FAA or a behavior intervention plan (BIP) based upon an FAA.

15. Special education includes supportive services as may be required to assist a child to benefit from special education. In the case of a child whose behavior impedes the child's own learning or other children's learning, the IEP team shall consider positive behavioral interventions and supports, and other strategies, to address the behavior. California law provides that a functional analysis assessment (FAA) and the behavior intervention plan (BIP) which is derived from the FAA occur after the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective,

or after a parent has requested an assessment pursuant to Education Code section 56320 et seq. (Cal.Code Regs., tit. 5, § 3052, subd. (b).) The IDEA does not require that the FAA be in writing. The BIP is a written document, based upon the FAA, which is developed when the student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP. (Cal.Code Regs., tit. 5, § 3001, subd. (f); Cal.Code Regs., tit. 5, § 3052, subd. (a)(3).) A serious behavior problem that justifies the development of a BIP refers to behaviors that are self-injurious, assaultive, or the cause of serious property damage, and includes behaviors that are pervasive and maladaptive, for which instructional or behavioral approaches specified in the student's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Such interventions are designed to eliminate maladaptive behaviors that inhibit the student's ability to access the student's education, and to encourage positive behavior so that the student may be educated in the least restrictive environment. (Ed. Code, §56520, subd. (a).) The failure to perform an FAA when an FAA is warranted may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.*, (9th Cir. 2006) 464 F.3d 1025 at 1032.)

16. A procedural violation only constitutes a denial of FAPE if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

17. Student did not demonstrate that District was required to perform an FAA. An FAA must be performed when the Student exhibits behaviors that are self-injurious, assaultive, or the cause of serious property damage, and when interventions in Student's IEP have been tried and been ineffective in controlling the problem behavior.

18. The settlement agreement did not provide for an FAA, and, at no time during the 2008-2009 school year did Parents or their counsel request an FAA. Further,

an FAA was not warranted during the fall 2008 semester. Student's negative behaviors during the fall 2008 semester did not rise to the level of the serious behavior problems contemplated by the statute so as to justify an FAA. The behaviors, which consisted of hitting, biting, pinching, spitting, and Student's banging of his open hand against his head, were within the realm of behaviors that District personnel expected a child with autism would exhibit. His behaviors did not threaten other children. The hitting, biting, and pinching were largely directed toward his one-to-one aide, who sustained no actual harm from them, and Student did not harm himself, either. None of Student's witnesses who observed him in the classroom observed Student engaging in any aggressive or self-injurious behaviors. None of Student's witnesses who observed him in the classroom recommended that District perform an FAA. Ms. Yi criticized WWA for not performing an FAA with respect to Student, however, she was referring to the FAA that ABA behavioral providers perform as part of their treatment. Her testimony did not demonstrate that she was familiar with the requirements of the California Education Code. (Findings of Fact 1, 2, 25 through 57, 77, 79, 81, 84, 85, and 99 through 112.)

19. Furthermore, Ms. Parham and Student's one-to-one aide were able to help Student control his behaviors within the school environment, using the instructional and behavioral approaches in the IEP. Student was not sent home from school, or suspended due to the behaviors. Rather, although Student continued to exhibit them, many of the behaviors were diminishing in intensity and frequency as the semester progressed. (Findings of Fact 26 through 34, 107 and 109.)

20. Based upon Findings of Fact 1, 2, and 25 through 112, and Legal Conclusions 1 and 14 through 19, District did not deny Student a FAPE by not performing an FAA.

Issues 2A-F: Procedural Issues Pertaining to June 17, 2009, IEP Meeting

21. Student contends that the District procedurally violated the IDEA during the June 17, 2009 IEP meeting for a variety of reasons: (1) Failing to include an appropriate District representative; (2) Failing to consider reports obtained by Parents from other professionals or service providers; (3) Failing to answer Parents' questions; (4) Failing to include appropriate present levels of performance in the IEP document; (5) Failing to include in the IEP meeting individuals with specific knowledge of Student; and (6) Predetermination that home ABA services would not be provided, and that ABA services could only focus on behavior reduction.

22. Procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. As is discussed below, Student failed to meet his burden of proof as to each of the alleged procedural violations.

Issue 2A: Failure to Include an Appropriate District Representative

23. Student contends that the IEP meeting of June 17, 2009, failed to include an appropriate District representative because there was nobody at the meeting with authority to designate the NPA to provide behavioral services to Student.¹² District

¹² In his closing brief, Student attempts to expand this issue to include the failure of the general education teacher to participate in the June 17, 2009, IEP meeting, and also contends that the January 2009 IEP meeting, failed to include a general education teacher. As was mentioned above, these are among the issues raised in the closing brief that are not addressed in this Decision, as they were not alleged in the First Amended Complaint. (Ed. Code § 56502.)

contends that there were sufficient personnel at the meeting such that District could determine the resources available to educate a student with autism.

24. The IDEA regulations specify that an IEP team must include: the parents; a regular education teacher if the child is, or may be, participating in the regular education environment; one special education teacher of the child; a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency; and an individual who can interpret evaluation results. At the discretion of the parent or of the school district, the team may include other individuals who have knowledge or special expertise regarding the child, including related services personnel, and, when appropriate, the child. (34 C.F.R. 300.321.) Additionally, as was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

25. The IEP team was properly constituted. Among others, the team consisted of Walgrove's principal and assistant principal, a District psychologist, and a District autism specialist. These individuals were qualified to supervise the provision of Student's special education instruction, were knowledgeable about the general education curriculum, and were knowledgeable about the availability of the resources of the public agency. The IDEA and the Education Code do not require that any personnel at the IEP team meeting have the authority to enter into contracts for services on behalf of the District, or require the IEP to specify the personnel who will provide services to Student, or accommodate Parents' request to change service providers. (*Lessard v. Wilton Lyndeborough Coop. Sch. Dist.* (1st Cir. 2008), 518 F. 3d 18, 30, in which the court stated

that school districts have legal rights with respect to special education, just as parents do. Parents who demand more than the IDEA requires frustrate the operation of the collaborative IEP process, and put the school district in an untenable position. Pursuant to Findings of Fact 1, 2 and 83, and Legal Conclusions 1 and 23 through 25, District did not deny Student a FAPE on this ground.

Issue 2B: Failure to Consider Reports Obtained by Parents from Other Professionals or Service Providers

26. Student contends that the District did not consider the letter from Dr. Gordon, and the report from Ms. Parsons, both of which the District received one day before the IEP meeting.¹³ District contends that the law only requires the District to consider the reports, not to accept the recommendations in the reports.

27. If a parent obtains an independent educational evaluation (IEE) at public expense, or shares with the school district an evaluation obtained at private expense, the results of the evaluation must be considered by the agency, if it meets agency criteria, in any decision made with respect to the provision of a FAPE. (34 C.F.R. § 300.502(c)(1); Ed. Code §§ 56329, subd. (c).) The duty to consider the evaluation does not obligate the school district to accept the evaluation or its recommendations, or discuss the report at the IEP meeting. (*G.D. v. Westmoreland School District* (1st Cir. 1991) 930 F.2d. 942, 947.) In *Evans v. District No. 17* (8th Cir. 1988) 841 F.2d 824, 830, the court determined that the school district had “considered” the report when the school district’s Director of Special Education had read the report and wrote the parents about it. Additionally, as

¹³ In his closing brief, Student attempts to expand this issue to include the failure of the District to consider the Follow-Up Report of Dr. Gottlieb. This issue was not raised in Student’s First Amended Complaint, and therefore will not be addressed in this Decision. (Ed. Code, § 56502.)

was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

28. It is not clear that the Progress Report of Amy Parsons constitutes the IEE that is contemplated by these portions of the Federal Regulations and the Education Code. Nevertheless, the evidence was undisputed that the District considered the report at the IEP meeting. It was summarized at the meeting, and the summary was included in the IEP. (Findings of Fact 90, 91, 92, 101, and 108.) This is all that the law requires. The IEP team need not accept the findings and recommendations in the Progress Report.

29. With respect to Dr. Gordon's letter, it was read by Ms. Dara and summarized in the IEP document. It was not discussed by the IEP team. It is not clear that the letter falls into the definition of an IEE, as there was no evidence that the letter constituted an "evaluation" of Student, and there was no evidence regarding why Dr. Gordon wrote the letter. Assuming, however, that the letter constitutes an IEE report, Ms. Dara's review of it and its inclusion in the IEP document satisfies the requirement that the IEP team of "consider" it.

30. Moreover, any failure to consider Dr. Gordon's letter did not deprive Student of a FAPE. Neither Dr. Gordon, nor Dr. Gottlieb, another of Student's treating pediatricians, testified at hearing that Student's health issues, such as his colitis, or allergies, required him to have one-to-one at-home instruction by JBA. Nor did any other witness so testify. Further, neither Dr. Gordon nor any other witness at hearing authenticated the letter, and Dr. Gordon did not testify regarding the contents of his letter. Indeed, at the IEP meeting, JBA was willing to provide instruction to Student at school, and Mother and Student's counsel were advocating that JBA be permitted to do so. The position taken by JBA, Mother, and Student's counsel at the IEP meeting

contradicted that Student had particular health needs that required he receive one-to-one intervention from JBA at home. Further, Dr. Gordon testified that he would defer to JBA and Parents as to when Student should return to school, thereby calling into question the implication that Student's health required one-to-one ABA intervention from JBA at home. To the extent that the letter commented upon Student's improved behavior during his last medical visit, and thus was a testimonial to JBA's success, that information was cumulative of the other information presented at the IEP meeting. Under these circumstances, any failure of the District to consider Dr. Gordon's report did not impede Student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision making process; or cause a deprivation of educational benefits. (Findings of Fact 1, 2, 83 through 112, and 124 through 127.)

31. District did not deny Student a FAPE with respect to the manner in which it handled the reports of Ms. Parsons and Dr. Gordon. (Findings of Fact 83 through 127; Legal Conclusions 1 and 26 through 30.)

Issue 2C: Failure to Answer Parents' Questions

32. Student contends that the District failed to answer Parents' questions at the IEP meeting, and terminated the meeting before all of Parents' questions could be answered. District contends that Parents questions were answered and Parents meaningfully participated in the development of the IEP.

33. School districts shall ensure that the parents of a child with a disability are members of the IEP team that decides the educational placement of the child. (20 U.S.C. § 1414 (e).) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP.

(*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.*, *supra*, 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) Additionally, as was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

34. Mother attended the June 17, 2009, IEP meeting with two attorneys, and Ms. Yi and Ms. Topp, the representatives of JBA, Mother's preferred ABA service provider. Both Mother and her counsel were given the opportunity to speak at the meeting and to ask questions. Mother and her attorney asked in excess of 50 substantive questions, all of which were sincerely responded to by the District members of the team. Ms. Yi and Ms. Topp collectively asked in excess of 10 substantive questions, which were also sincerely responded to by the District members of the team. Mother or Student's counsel responded with a comment or question after nearly every District witness spoke. There was no evidence at hearing of any particular question that was not answered at the IEP meeting. Additionally, Ms. Dara, who was conducting the meeting, offered to answer after the meeting any additional questions that occurred to Mother or counsel. There was no evidence that Mother or counsel contacted Ms. Dara to ask any additional questions. Mother was informed of the issues, attended the meeting, expressed her disagreement, and requested a different placement and services than the IEP team offered. (Findings of Fact 83 through 111.)

35. Under these circumstances, and based upon Findings of Fact 1, 2, and 83 through 111, and Legal Conclusions 1 and 32 through 34, Mother meaningfully participated in the formulation of the IEP, and Student was not deprived of an educational opportunity because the District's answers to Parents' questions were not as thorough as Parents' might have preferred. District did not deny Student a FAPE on this ground.

Issue 2D: Failure to Include Appropriate Present Levels of Performance in the IEP Document

36. Student contends that the present levels of performance in the June 17, 2009, IEP, were not accurate. District contends that the levels of performance were as accurate as possible, in view of the Student's failure to attend a District school since December 2008.

37. The IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum, and, when appropriate, short-term objectives, that are based upon the child's present levels of academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320, Ed. Code, § 56345, subd. (a)(1).) Additionally, as was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

38. The IEP contained several current present levels of performance. The OT clinic present levels were revised based upon the OT clinic services which District was still providing Student at the time of the IEP. The IEP included a summary of Ms.

Parsons's report in the present levels of performance in Speech and Language. In the remaining areas of need, the IEP document stated that the present levels of performance were based upon Student's January 2009 IEP, as Parents had removed Student from school in the District as of December 17, 2009. District had had no personal contact with the Student since then. Further, at the time of the January 2009 IEP, Student did not object to the accuracy of the present levels of performance. (Findings of Fact 40 through 57, and 83 through 111.) Student cites no authority that District must accept JBA's Skills Assessment Report or Progress Report in formulating Student's present levels of performance. Indeed, the Skills Assessment Report was completed prior to the January 2009 IEP meeting, and thus it would hardly be a more reliable source for Student's present levels of performance than would the January 2009 IEP. JBA's Skills Assessment Report did not correlate to several of Student's areas of need, such as APE, OT, and Math. (Findings of Fact 65 through 72.)

39. The failure of the District to update certain of the present levels of performance to reflect Student's status five months after the previous IEP meeting did not impede Student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits. (Findings of Fact 1, 2, 40 through 63, 65 through 72, and 83 through 111; Legal Conclusions 1, and 36 through 38.)

Issue 2E: Failure to Include at the IEP Meeting Individuals with Specific Knowledge of Student

40. Student contends that the District denied him a FAPE because it did not invite Ms. Parsons, Student's private LAS therapist, to the IEP meeting.¹⁴ District

¹⁴ In his closing brief, Student attempts to expand this issue by contending that other individuals, such as those with knowledge of Student's behaviors when he was

contends that all individuals who were required to be present at the IEP meeting were present, many of whom had specific knowledge of Student. District further contends that additional individuals with knowledge of Student were there, such as JBA.

41. The IDEA regulations specify that an IEP team must include: the parents; a regular education teacher if the child is, or may be, participating in the regular education environment; one special education teacher of the child; a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency; and an individual who can interpret evaluation results. At the discretion of the parent or of the school district, the team may include other individuals who have knowledge or special expertise regarding the child, including related services personnel, and, when appropriate, the child. (34 C.F.R. 300.321.) Additionally, as was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

42. Findings of Fact 83 through 111 reveal that the IEP team included all individuals who were statutorily required to be present: administrators, a general education teacher, a special education teacher, and individuals who could interpret assessment results, such as a District psychologist and OT and LAS specialists. Indeed, the District LAS specialist was present even though there were no LAS assessment

mainstreamed at Walgrove, and representatives of WWA, should have been invited to the June 17, 2009, IEP meeting. These matters were not raised in the First Amended Complaint, and consequently will not be addressed in this Decision. (Ed. Code, § 56502.)

results presented at the meeting. District had no contract with Ms. Parsons, and Ms. Parsons was not a California certified NPA. Her services were not provided to implement Student's IEP, rather, they derived from a settlement with Parents. She was not paid for her services by the District, rather, the District, pursuant to the Agreement, reimbursed Parents for her services. There was no evidence that Student requested that Ms. Parsons be invited to the meeting. Under these circumstances, the law did not require that the District invite Ms. Parsons to the meeting. Had Student wished Ms. Parsons to be present at the meeting, Student could have invited her. The absence of Ms. Parsons did not impede Student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process; or cause a deprivation of educational benefits. The IEP team had reviewed Ms. Parsons' report, and included a summary of it in the IEP. Mother and her counsel did not comment on the report, or mention that they had any questions regarding the report. Based upon Findings of Fact 1, 2, 25, and 83 through 111, and Legal Conclusions 1 and 40 through 42, the IEP team was properly constituted, and Student was not denied a FAPE on this ground.

Issue 2F: Predetermination that Home ABA Services Would Not Be Provided, and that ABA Services Could Only Focus on Behavior

43. Student contends that the District predetermined that no in-home ABA services would be provided, and that ABA services could only focus on behavior reduction, and not academic areas. District contends that District appropriately considered Parents' request, and has the right to determine that academic instruction in the classroom be delivered by a classroom teacher.

44. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F. 2d 840.) To fulfill the goal of parental participation in the IEP

process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools, supra*, 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ., supra*, 993 F.2d 1031, 1036 [parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District, supra*, 337 F.3d 1115, 1131.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA did not provide for an "education . . . designed according to the parent's desires."].) Additionally, as was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

45. *Rowley, supra*, (458 U.S. at p. 209), established that as long as a school district provides an appropriate education, methodology is left to the school district's discretion. The *Rowley* standard recognizes that courts are ill-equipped to second guess reasonable choices that school districts have made among appropriate instructional programs.

46. Student has not met his burden of showing that the IEP team predetermined its offer regarding the services Parent requested. There was no evidence that the District members of the IEP team met or communicated before the June 17,

2009, IEP, meeting to discuss Student's educational program, and agreed before the meeting what Student's program would be. There was no evidence that the District members of the IEP team then came into the meeting demanding that Mother ratify the District's pre-determined plan on a "take it or leave it" basis. Rather, the evidence demonstrated that the two JBA representatives at the meeting were permitted to describe in detail the services they were providing, express their opinion as to why the services should continue, answer questions from the other members of the IEP team, and explain how their services could be offered in the classroom. The team considered and discussed JBA's presentation, and whether and how JBA's services could be offered in the classroom. Mother attended the IEP meeting, was advised of Student's problems, asked questions, made comments, and expressed her disagreement with the conclusion of the IEP team. (Findings of Fact 83 through 111.)

47. The District may require that BII services be limited to behavioral services, and that BIIs not provide academic instruction in the classroom. The IDEA allows the District to choose how academic instruction is provided in the classroom. That the District reasonably exercises its right to do so through credentialed teachers and other means of its choosing is not the same as predetermination. Nothing in the IDEA or the Education Code, including the doctrine of predetermination, requires the District to permit parents or JBA to select the personnel who will provide academic instruction to Student in the classroom.

48. Under these circumstances, and based upon Findings of Fact 1, 2, and 83 through 111, and Legal Conclusions 1, and 43 through 47, District did not predetermine Student's behavioral services.

ISSUES 3A AND 3B: ABA GOALS AND SPEECH AND LANGUAGE GOALS IN THE JUNE 17, 2009, IEP

49. Student contends that the District failed to develop appropriate goals to continue the progress student had made in his in-home ABA program.¹⁵ District contends that the IEP goals were appropriate.

50. The IEP must include a statement of measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and a description of how the child's progress toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§300.346, 300.347.) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. Furthermore, the contents of an IEP are evaluated pursuant to the "snapshot rule," or in light of information that was available to the IEP team at the time it was developed. The IEP is a "snapshot" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams, supra*, 195 F.3d 1141, 1149.)

51. As was stated in Legal Conclusion 16, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impede the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits.

¹⁵ In his closing brief, Student attempts to expand this issue to include other matters beyond whether appropriate IEP goals were developed to continue Student's progress in his JBA program. In his brief, Student contends that the IEP goals were inappropriate and insufficient for a host of reasons. These matters were not raised in the First Amended Complaint, and consequently will not be addressed in this Decision. (Ed. Code, § 56502.)

52. Student did not meet his burden of proving that he was denied a FAPE by reason of the failure of the District to incorporate JBA's goals into the IEP, or otherwise develop goals to reflect Student's progress in his JBA program. The IEP team determined goals in areas of Student's unique needs, based upon Student's present levels of performance, which were, in turn, based upon the District's information about Student's performance when he last attended school in the District, or, in the case of clinic OT, based upon the occupational therapist's current knowledge of the Student's performance. Therefore, the goals of the June 17, 2009, IEP were nearly identical to the goals in the January 2009, IEP. At the June 17, 2009, IEP meeting, the IEP team considered JBA's Progress Report regarding Student's progress on the goals JBA had developed. (Findings of Fact 40 through 57, and 83 through 111.)

53. The District had an obligation to develop goals to implement the FAPE offer, which included school attendance. Student did not demonstrate that the District had any duty to continue the goals of Parents' unilateral placement. Student did not demonstrate that it would have been appropriate for the District to adopt or continue JBA's goals, which were developed based, in part, upon an eight-minute observation of Student in his EE SDC. For example, JBA's Skills Assessment Report, which was provided to the District in connection with the June 17, 2009, IEP meeting, contained a total of 32 goals. None of those goals particularly correlated to Student's IEP goals, which were designed to address Student's unique needs at school, and there was no evidence that those goals were aligned in any way with California state standards. Some of the goals were drafted in such a vague fashion that they were not particularly meaningful, such as "[Student's] repetitive requests and statements will reduce by 25% from baseline," and "[Student's] non-responsiveness will reduce by 50% from baseline." Student also contends that the IEP should have contained goals for parental participation such as

those in the JBA Skills Assessment Report. Yet, the JBA Progress Report states that, for a variety of reasons, none of those parental goals had been implemented.

54. Furthermore, Student did not demonstrate that the JBA goals on which Student was working were presented to the IEP team in any usable form. The JBA Progress Report, which was presented to the District the day before the June 17, 2009, IEP, mentioned that JBA was not pursuing many of the 32 goals proposed in the Skills Assessment Report. Yet, JBA's Progress Report did not specify which of the 32 goals JBA was still working on with Student, how those goals correlated to Student's areas of need as identified by the District pursuant to the IDEA, or clearly described how Student's progress on those goals was measured or was to be measured. The Progress Report broadly references Student's progress on approximately four tasks in terms of percentages, but there are no quantifications or graphs regarding Student's progress on the majority of the tasks referred to in the Progress Report. (Findings of Fact 93 through 98.) This is noteworthy because, at hearing, Ms. Yi and Ms. Topp criticized the IEP goals as being vague, and both testified regarding the importance to ABA methodology of taking and analyzing data so as to measure progress. Yet, JBA's Progress Report lacks the clarity and data that Ms. Yi and Ms. Topp deemed so significant. (Finding of Fact 74.) During the IEP meeting, Ms. Yi and Ms. Topp described some of the JBA goals Student was working on and described some of his progress. However, the information regarding the goals was not presented in a sufficiently systematic fashion that the team could reasonably be expected to incorporate JBA's information into the IEP goals. In short, Student did not provide information to the IEP team, in any reasonable form, such that the team could draft goals that would support Student's progress under JBA's program and yet be consistent with the IDEA. Nor did anyone at the IEP meeting request that the team do so. Further, Student did not demonstrate at hearing how the IEP team could have drafted such goals. Significantly, rather than demonstrate that the

IEP goals were inappropriate for Student, Ms. Topp testified that she would be able to work with Student on the IEP's Pre-Vocational/Social Skills goal, the Reading goal, and the Math goal. (Findings of Fact 83 through 111, and 129.)

55. Under these circumstances, and based upon Findings of Fact 1, 2, 74, 83 through 111, and 129, and Legal Conclusions 1, and 49 through 54, the District did not deny Student a FAPE on this ground. The IEP goals were appropriate. That District did not adopt JBA's goals did not impede Student's right to a FAPE, or significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits.

56. Student also contends that the District did not develop appropriate LAS goals, even though the District had information from Ms. Parsons, Student's LAS therapist. District contends that the District offered to develop LAS goals when the Student returned to school in the District, as District had not attended school in the District since December 2008.

57. The law to be applied is the same law as was set forth in Legal Conclusions 50 through 51, above. Student did not meet his burden of proving that he was denied a FAPE with respect to the failure of the District to develop LAS goals in the June 17, 2009, IEP. The IEP stated that, pursuant to the parties' Agreement, District has reimbursed Parents for LAS therapy through June 19, 2009, and that LAS goals would be established upon Student's enrollment in a District school, as Student had not been enrolled in a District school since December 17, 2008. The IEP offered to provide Student with school-based LAS services for 60 minutes per week, if he attended a District school. (Findings of Fact 83 through 111.)

58. District was required to develop LAS goals for Student, and the evidence demonstrated that the District was willing to do so speedily upon Student's enrollment in the District. However, since Student was not enrolled in the District, and did not enroll

in the District, the District's failure to develop LAS goals did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process; or cause a deprivation of educational benefits. Under these circumstances, and based upon Findings of Fact 1, 2, and 83 through 111, and Legal Conclusions 1, 49 through 51, 56, and 57. District did not deny Student a FAPE.

ISSUE 3C: FAILING TO OFFER AN APPROPRIATE EDUCATIONAL PLACEMENT

59. Student contends that the District's offer of the Autism SDC at Walgrove with a SEACO curriculum was inappropriate, as he requires a 30-40 hour per week intensive ABA program that primarily uses DTT, as provided by JBA. Student contends that such a program is the only peer-reviewed program that is effective for teaching Student's with autism. Student further contends that District's offer did not include a transition plan for Student's attendance at ESY and then for Student to return to school. District contends that it has offered an appropriate placement.

60. As was stated in Legal Conclusion 5, the *Rowley* court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200; *J.G., et al. v. Douglas County School District* (9th Cir. 2008) 552 F3d 786 at p. 793.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley, supra*, at p. 201.) As was stated in Legal Conclusion 8, an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149.)

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

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

63. Title 34 Code of Federal Regulations, part 300.320(a)(4) provides that IEPs shall include a statement of the special education and related services and supplementary aids and services to be provided to the student, based on peer-reviewed research to the extent practicable. The United States Department of Education (ED) clarified that the service based upon the greatest body of research is not the service necessarily required for a child to receive a FAPE, or that a school district's failure to provide services based on peer-reviewed research necessarily results in a denial of a

FAPE. Further, the ED has explained that services need only be based upon peer-reviewed research to the extent possible, given the availability of peer-reviewed research. The ED explained that Section 300.320(a)(4) incorporates the language in section 614(d)(1)(A)(i)(IV) of the IDEA, and the IDEA does not refer to “evidenced-based practices” or “emerging best practices,” which are generally terms of art that may or may not be based on peer-reviewed research. The ED also specifically declined to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refused to provide documentation of research-based methods, believing such requirements were unnecessary and would be overly burdensome. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46665 (August 14, 2006).)

64. *Rowley* established that, as long as a school district provides an appropriate education, the choice regarding the methodology to be used to implement the IEP is left up to the district’s discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Subsequent case law has applied this holding to disputes regarding choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm., supra*, 361 F.3d at p. 84.)

65. School authorities may be ordered to reimburse parents for their expenditures on private special education for a child if the school authorities did not offer the child a FAPE and if the unilateral private placement chosen by the parents is appropriate under the IDEA. (*School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996 at 2002.]

66. Student did not meet his burden of demonstrating that District's proposed placement in the Autism SDC at Walgrove denied him a FAPE. First, most of the witnesses who testified on behalf of Student on this issue did not have an understanding of what a FAPE consisted of, or that the inquiry must focus on the program offered by the District, not the program preferred by the Student. For example, Dr. Gottlieb, Ms. Yi, and Ms. Topp all testified that JBA's program was the optimal program for Student, and therefore that is the program he should receive. (Findings of Fact 113 through 117, 124 through 127, and 74 through 82.) Regardless of the truth of their assertions, the law is clear that the District need not offer the best program for Student. Dr. Gordon's testimony was not persuasive, either. Dr. Gordon was aware of the range of treatments for autism, but he was not aware of the details of either Student's JBA program or the program offered by the District. His information regarding Student's educational status and progress was derived only from Mother's reports to him and from his observations of Student during medical office visits. He was inclined to follow Parents' lead, and he knew they wanted Student to continue to receive services from JBA, and that they wanted those services for 40 hours per week. Additionally, Dr. Gordon did not want to change a program that was working for Student. Therefore, Dr. Gordon recommended that Student continue to receive intensive ABA services from JBA. (Findings of Fact 125, 126, and 127.) However, none of these considerations are relevant to the issue of whether the District's offer was a FAPE for Student. Therefore, the testimony of Dr. Gottlieb, Dr. Gordon, Ms. Yi, and Ms. Topp did not support the contention that the June 17, 2009, offer of placement in the Autism SDC at Walgrove with 32 hours per week of BII was a denial of a FAPE.

67. Dr. Perlman, another of Student's experts, specifically criticized the District's placement offer. He observed the Autism SDC for an hour in June 2009, and he did not find it suitable for Student. From what he observed, it was non-academically

oriented, non-language-based, the program did not foster communication between the students, and the adults in the classroom continually missed teaching opportunities that naturally arose in the classroom. In addition to his criticism of the Autism SDC itself, he criticized the District for offering the Autism SDC without addressing Student's out-of-control behaviors, and for proposing to teach Student a functional curriculum, as Student should be given an opportunity to succeed with a standards-based curriculum. Based upon his assessment of Student, including his observations of Student in JBA's program, his knowledge of JBA's program, and his knowledge of the research supporting a minimum 25-hour per week ABA program, he asserted that Parents appropriately placed Student in JBA's program. He believed that Student should continue in JBA's intensive ABA program for 40 hours per week until at least December 2010, as research supported two years of intensive intervention, and that Student participate in the program for 30- 40 hours per week, so that Student could catch up academically. He also did not recommend that Student change service providers, as Student could not afford to lose therapy time if a different provider did not work well with Student. (Findings of Fact 148 through 150.) Dr. Perlman's opinions, however, are not persuasive.

68. First, he was the only expert, on either side of this case, to testify that the Autism SDC was an inappropriate classroom for Student. He had never observed Student at Walgrove, and his familiarity with Student at the time of his observation was limited. (Findings of Fact 136.) In comparison, Dr. Gottlieb, Student's expert who had known and treated Student since he was approximately three years old, and had observed Student in his EE SDC at Walgrove, had also observed the Autism SDC. Knowing that it was the placement that the District had tentatively offered Student, she

had advised Ms. Dara that it was an appropriate classroom for Student.¹⁶ At hearing, Ms. Topp, who also knew Student well, and who had observed Student in his EE class, testified that she considered the Autism SDC an appropriate classroom placement for Student (with JBA services) should he return to Walgrove. (Findings of Fact 56, 81, and 85.)

69. Secondly, Dr. Perlman's opinion as to the District's program was based upon two unproven assumptions. He assumed that Student's school behaviors were severe and out of control. Student's home behaviors may have been severe and out of control, but Student did not prove that his school behaviors were severe and out of control. As was discussed above, Student's one-to-one BII helped Student manage his behaviors at school as the fall semester proceeded, and his behaviors were gradually improving. Dr. Perlman also assumed that the SEACO curriculum which the District proposed for Student was simply a functional curriculum. The SEACO curriculum was a more basic curriculum than the general curriculum, but, as Student's IEP stated, it was intended to be used to assist Student in accessing the general education curriculum. The SEACO curriculum was aligned with state standards, as were the academic goals in Student's IEP, and Ms. Parham had testified that Student was capable of reaching his academic goals. As reflected in the IEP, the IEP team expected Student to advance academically, and to participate to the extent possible in the general education

¹⁶ Subsequently, after Student commenced receiving in-home services from JBA, Dr. Gottlieb learned that Parents desired that Student remain in JBA's program and observed that Student had made progress in the program. She then formed the opinion that Student should remain in JBA's program, as it provided the optimum education for him.

curriculum. There was no evidence that any member of the IEP team anticipated that Student would not obtain a diploma. (Findings of Fact 51 and 103.)

70. Indeed, comparing the level of JBA's program, which Dr. Perlman and others of Student's experts support, with a modified curriculum such as SEACO, indicates not only that Student requires a modified academic curriculum, but also that his proposed program in the Autism SDC was more sophisticated than was JBA's program. The goals that Student was working on in the JBA program at the time of the IEP, such as learning to sort animals and food, and learning to label actions, are relatively basic skills, which suggests that a general education curriculum in a public school would not be appropriate for Student. In contrast, the goals in Student's IEP contained more challenging, and more academically appropriate tasks than those in the JBA program. Ms. Topp testified at hearing that, even at the time of the hearing, JBA was not yet working with Student on his IEP goals of writing his name or identifying numbers. (Finding of Fact 129.)

71. Third, Dr. Perlman's report demonstrated a lack of objectivity. It emphasized portions of prior reports that favored Student's position. It contained an Appendix that purported to compare Student's status when he started with JBA, and his progress as of the date of the report. It is not unusual for assessors to compile and summarize information from parents. However, the report presents the Appendix as truthful and authoritative, when it contained hearsay and editorial comments as well as incorrect information. For example, the Appendix incorrectly states that Student could not identify any letters, or sort, at the time he started with JBA, although District had had two years to teach him letters. The Appendix also contradicted the information in Ms. Parsons's progress reports. (Finding of Fact 147.) Dr. Perlman's own records review should have detected and accounted for at least some of these matters.

72. The body of Dr. Perlman's report also contained errors. There were errors in the facts of the case, and he inaccurately reported or analyzed some of Student's assessment scores. (Findings of Fact 141 and 142.) These errors do not inspire confidence in Dr. Perlman's report. Based upon all of these factors, Dr. Perlman's opinions and testimony were not persuasive.

73. Dr. Perlman not only made incorrect assumptions regarding Student's education at Walgrove, but he also was unfamiliar with Student's curriculum at JBA. Dr. Perlman did not know details of the goals JBA was working on with Student, he did not know whether the curriculum JBA provided Student met California standards, and he did not know how many hours of service JBA was providing Student per week. He also admitted that he did not know of any research to support an intensive ABA program in children of Student's age. (Finding of Fact 151.) Thus, he was advocating a specific program about which he had limited information, and which, to his knowledge, was not supported by research pertaining to children such as Student.

74. Student also failed to meet his burden of proving that he was denied a FAPE because the District's proposed placement was not based upon peer-reviewed research. Student heavily relies on The National Autism Center's National Standards Report, which determined that an intensive one-to-one ABA programs using DTT, such as that provided by JBA, is an evidence-based effective treatment for autism, and that the methods used in the Autism SDC, such as TEACCH and sensory techniques have not been proven effective and therefore are not evidence-based.

75. There are several problems with this contention. First, the National Standards Report was published in September 22, 2009, three months after the June 17, 2009, IEP. (Finding of Fact 60.) Under the "snapshot rule," the IEP is evaluated in light of the information available to the IEP team at the time the IEP was developed. Applying the "snapshot rule," the National Standards Report is out of the picture, as it was not

published at the time of the IEP. Student attempts to avoid the “snapshot rule” by contending that drafts of the National Standards Report were available prior to its publication. No specific drafts of the report were identified at hearing. No such drafts were offered into evidence at hearing. Student presented no specific evidence of the existence or contents of any particular draft. Further, drafts are drafts, and any reasonable person who reads a draft understands that it may change (especially if it is undergoing peer review). Whatever a draft report might have said, it would be unreasonable to hold an IEP team to knowledge of the contents of a final report based upon the contents of a draft report which was not identified or offered into evidence at hearing. The ED specifically decried any interpretation of the IDEA that would require IEP teams to engage in a focused discussion of research-based methods.

76. Secondly, the term “evidence-based” does not equate to “peer-reviewed research.” Indeed, the ED specifically declined to equate the terms. The evidence demonstrated that the primary methods and practices used in the Autism SDC, such as PRT and TEACCH, were supported by peer-reviewed research. Student contends that Ms. Hernandez and the District occupational therapists used the Sensory Integration Package which the National Standards Report classifies as an unestablished treatment. However, there was no evidence that the District used a Sensory Integration Package. Rather, the District used a few sensory techniques, as did Dr. Surfas, Student’s private occupational therapist. Furthermore, as was discussed above, Student’s reliance on the National Standards report is misplaced. Student did not establish that the District’s use of sensory techniques was unsupported by peer-reviewed research so as to constitute a violation of the IDEA.

77. Third, 34 Code of Federal Regulations, part 300.320(a)(4) provides that special education and services need only be based upon peer-reviewed research to the extent practicable. The ED has specified that a District’s failure to provide services based

on peer-reviewed research does not necessarily result in a denial of a FAPE. This is consistent with the principle that methodology is left to the District's discretion. Rather, the inquiry remains whether the Student's IEP provided him with appropriate special education and related services designed to meet his unique needs, in the least restrictive environment, and was reasonably calculated to provide him with some educational benefit. The IDEA does not require that Student's program be the program preferred by parents, or the program that provides him with the greatest educational benefit. Moreover, as long as the Student's program is appropriate, methodology is left to the District's discretion. Therefore, that Student contends that research demonstrates that the program JBA provides is the most effective program is not determinative as to whether the District's program offered Student a FAPE. This is especially so when, as here, the program that Student contends is the most effective program is also an in-home program, or that would take place in a classroom where Student would be separated from the other children and focused almost exclusively on a one-to-one therapist. It is noteworthy that the restricted environment JBA recommended creating for Student in the Autism SDC was similar to the environment that Dr. Gottlieb observed when Student was in his EE SDC program. Significantly, Dr. Gottlieb criticized Student's mainstreaming in his EE SDC program because Student's one-to-one aide was required to provide him with almost constant attention, such that he was not actually a part of the class. (Finding of Fact 86.)

78. Student also contends that the District's offer did not constitute a FAPE because it did not provide for a transition plan for ESY or for school in the fall after ESY.¹⁷ Student has had difficulty with transitions in the past, and he had difficulty

¹⁷ In his closing brief, Student attempts to expand the issues to include whether the IEP team had described the offer of ESY in sufficient detail. This issue was not

transitioning to the EE class. Part of Student's difficulty in transitioning to the EE class can be attributed to Student's frequent tardiness, and to the fact that the EE class was not an appropriate placement for Student. (Findings of Fact 30, 31, and 40 through 57.) The IEP team had no reason to believe that those factors would continue to play a role under the terms of the June 17, 2009, IEP. The IEP team also knew that Parents had precipitously removed Student from school, and that, after nearly two months of no school, he commenced intensive ABA therapy with JBA, and its new therapists. After all of these changes, JBA, Parents, and their experts contended that Student had made progress. Under these circumstances, and applying the "snapshot" rule, the IEP team had no reason to believe at the time of the IEP meeting that Student had any unique needs with respect to transitioning, and that he could not successfully transition to ESY or school with the support of the BII offered in the IEP.

79. In formulating the June 17, 2009, IEP, the team recognized that Student's experience in the EE class was unsuccessful. The team was required to provide Student with a program in the LRE, and therefore it offered the Autism SDC at Walgrove, which included mainstreaming with his non-disabled peers. The evidence demonstrated that JBA's program did not comply with the requirement that District offer a placement in the LRE. Even Dr. Perlman admitted that JBA's in-home program was a program in the most restrictive environment. The Autism SDC provided a small, structured, language-based environment, which emphasized small-group and individualized instruction. It incorporated ABA principles. The weight of the evidence demonstrated that, with a one-to-one BII and the other services provided in the IEP, the June 17, 2009 IEP offered an appropriate educational placement for Student.

included in the First Amended Complaint, and will not be addressed in this Decision. (Ed. Code, § 56502.)

80. Based upon Findings of Fact 1 through 153, and Legal Conclusions 1, and 59 through 79, the IEP of June 17, 2009, was reasonably calculated to provide Student with some educational benefit, and it provided Student with a FAPE. Student did not meet his burden of proving otherwise.

Issue 3D: Failing to Offer Appropriate Related Services in the Areas of OT, LAS, and Behavior

81. Student contends that the June 17, 2009, IEP, was not an offer of a FAPE because it failed to offer appropriate services with respect to OT and LAS. Student also contends that the offer of behavior services was not an offer of a FAPE, for the reasons stated above in Issues 1A and 3C, as well as because the IEP did not specify that the BII and BID services were to be ABA services. District contends that it has offered Student appropriate related services to meet his unique educational needs.

82. As was stated in Legal Conclusions 3 through 9, to determine whether a school district's program offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, and an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. Related services include services as may be required to assist a child to benefit from special education. If a child's behavior impedes the child's own learning or that of other children, the IEP team shall consider positive behavior interventions, strategies, and supports to address the behavior. If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.

83. Student did not meet his burden of proving that District denied Student a FAPE with respect to the IEP offer of OT services. The June 17, 2009, IEP offered one hour of school-based OT and one hour of clinic OT, as well as an OT evaluation should Student enroll in a school in the District. (Finding of Fact 104.) The recommendations for OT services are consistent with the recommendations of Ms. Surfas, Student's current occupational therapist, who recommended two hours per week of OT services. During her testimony, Ms. Surfas, the only expert witness of Student in the area of OT, questioned the accuracy of the present levels of performance in the IEP, and she questioned whether Student would be able to accomplish one of the Motor OT goals and the writing goal. She did not criticize the type or number of hours of OT services offered by the District. Student's District OT providers confirmed at hearing that the present levels of performance and the goals they developed based on those present levels were appropriate for Student in the school setting. Student made progress on the goals. Student contends that his OT goals do not address safety issues, but there was no evidence that Student had any safety issues in the school setting that warranted a goal. Based upon Findings of Fact 1, 2, 40 through 57, 83 through 111, and 131, and Legal Conclusions 1, and 82 through 83, the OT services offered by District were appropriate, and District's offer constituted a FAPE.

84. Student did not meet his burden of proving that the District's offer of LAS services denied him a FAPE. The June 17, 2009, IEP offered Student one hour per week of LAS services. This is the same level of services for which District reimbursed Student during the 2008-2009 school year, pursuant to the Agreement, and was at the lower level of the approximate one hour to two hours per week of services provided by Ms. Parsons. Ms. Parsons' reports stated that Student had made progress with her services. In her report of June 14, 2009, Ms. Parsons had recommended LAS services at the level of four times per week, for 50 minutes each session. At hearing, she admitted that this

recommendation had been inflated. She testified that her original recommendation was three times per week for 50 minutes per session, which diminished her credibility as to any recommendation. Dr. Gottlieb's recommendation was three times per week for 50 minutes each session. Dr. Perlman's recommendation was five times per week, for as little as 15 minutes per session, for apraxia, and additional time if student had other LAS needs. Neither Dr. Gottlieb nor Dr. Perlman had any LAS credentials to support their recommendations as to the level of services Student should receive. (Findings of Fact 56, 132, and 152.) Furthermore, there was no evidence that Dr. Gottlieb's or Ms. Parsons's recommendations took into account that, if Student attended the Autism SDC at Walgrove, he would be in a language-based classroom, and it was possible that he could progress with fewer hours of service. Dr. Perlman's recommendation did not take that fact into account, as, in his opinion, the classroom was not language-based. Ms. Parsons also based her recommendation on her diagnosis that Student had apraxia, as did Dr. Gottlieb and Dr. Perlman. However, there was no evidence that the District knew that any professional believed Student had apraxia. Neither Ms. Parsons' report of June 14, 2009, nor Dr. Gottlieb's report of May 2009, which were both presented to the June 17, 2010, IEP team, mention apraxia or dyspraxia. Dr. Parsons's progress report of November 20, 2008, which was directed to the District, did not mention apraxia. Dr. Perlman's report mentioned apraxia, but that was not generated until after Student filed his due process complaint. (Findings of Fact 89, 92, 122, and 152.)

85. Student's experts did not agree on an appropriate level of LAS services for Student. Dr. Perlman and Dr. Gottlieb were not qualified to make their recommendations. The credibility and judgment of Ms. Parsons, his private LAS therapist, was seriously diminished by her willingness to inflate her request for Student's LAS hours at Parents' request. Further, there was no evidence that the District knew at the time of the IEP that Student had apraxia. Under these circumstances, and based

upon the “snapshot rule,” the District’s offer of LAS services at the frequency of one hour of services per week constituted a FAPE. (Findings of Fact 1, 2, and 89 through 152; Legal Conclusions 1, 81, 82, 84, and 85.)

86. Student did not meet his burden of proving that the District’s offer of behavioral services denied him a FAPE. The June 17, 2009, IEP offered Student a one-to-one BII for 32 hours per week, and BID services for six hours per month, with a BSP that addressed Student’s off-task behavior. These services are similar to the services that Student received in fall 2008, and from which he had benefitted. Moreover, they were to be delivered in the Autism SDC, which was an environment specially designed to address Student’s behaviors. Further, Ms. Topp, of JBA, acknowledged at hearing that the BSP goal was appropriate, and she could work with Student on it. Based upon the “snapshot” rule, the behavioral services were reasonably calculated to provide some educational benefit to Student. For the reasons discussed above with respect to Issues 1A and 3C, the behavioral services offered to Student in the June 17, 2009, IEP constituted a FAPE.

87. Student contends that the IEP was defective because it did not specify that the BII would provide ABA services. There is no requirement that an IEP specify the methodology that a District will use, unless Student demonstrates that he requires a particular methodology. At the time of the IEP meeting, District had only approximately three months of experience with Student and a BII, and Student had not attended school for approximately six months. District knew that Student had made progress with a variety of teaching and behavioral approaches, including the Reggio system that had been used in his pre-school. At the time of the IEP meeting, JBA had been using an intensive ABA program for only four months, and, although he had made some progress with that approach, he still had behavioral issues at that time. Student had never been in the Autism SDC, and District could not know what impact that would have on Student’s

behaviors. (Findings of Fact 3, and 25 through 111.) Based upon what the District knew, it was not objectively unreasonable for the District to refuse to commit itself and Student to a particular methodology by specifying that Student's BII and BID services be ABA services. Under these circumstances, and based upon Findings of Fact 1 through 153, and Legal Conclusions 1 and 81, 82, 86, and 87, District's offer of behavioral services constituted an offer of a FAPE.

ORDER

The relief sought by Student in his First Amended Complaint is denied.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

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

Dated: July 15, 2010

_____/s/_____
ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings