

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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| In the Consolidated Matters of:    | OAH CASE NO. 2009121104 |
| PARENTS ON BEHALF OF STUDENT,      |                         |
| v.                                 |                         |
| NEW HAVEN UNIFIED SCHOOL DISTRICT. |                         |
| NEW HAVEN UNIFIED SCHOOL DISTRICT, | OAH CASE NO. 2009101063 |
| v.                                 |                         |
| PARENTS ON BEHALF OF STUDENT.      |                         |

DECISION

Administrative Law Judge (ALJ) Bob N. Varma, Office of Administrative Hearings, heard this matter in Union City, California, on May 24 through 27, 2010, and in Oakland, California on June 3, 2010.

Jean Murrell Adams, Attorney at Law, appeared on behalf of Student. She was assisted by Ana Gonzales. Mother was present throughout the hearing. Father was present on May 24 and June 3, 2010. Student was not present at the hearing. A Spanish interpreter was provided throughout the hearing.

Laurie E. Reynolds, Attorney at Law, appeared on behalf of the New Haven Unified School District (District). Carol Williams, Director of Special Services, was present throughout the hearing on behalf of District.<sup>1</sup>

On October 19, 2009, Student filed a request for due process hearing. On December 17, 2009, District filed a request for due process hearing. On December 31, 2009, the matters were consolidated. On February 8, 2010, Student filed an amended request for due process hearing. The parties were granted continuances on December 31, 2009, and March 22, 2010. At the close of the hearing, the matter was continued to June 11, 2010, so the parties could file written closing briefs. On June 14, 2010, the parties were given an extension to file their closing briefs by June 15, 2010. The record was closed and the matter was submitted for decision on June 15, 2010.<sup>2</sup> The parties stipulated that the written decision in this matter would be due by July 14, 2010. Their stipulation was accepted.

## ISSUES<sup>3</sup>

Student raised the following issues for determination:

1. Did District deny Student a free appropriate public education (FAPE) by failing to assess or appropriately assess Student's academic, speech and language, occupational therapy (OT), adaptive physical education (APE), behavior and mental

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<sup>1</sup> Ms. Williams is also referred in the administrative record as Carol Rohde. She is referred to as Ms. Williams in this decision.

<sup>2</sup> To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as S53. District's brief has been marked as D55.

<sup>3</sup> The ALJ has reworded the issues for clarity.

health needs during the 2007-2008, 2008-2009 and 2009-2010 school years (SYs), from October 19, 2007, to March 22, 2010?

2. Did District deny Student a FAPE in the District's offers contained in Student's annual individualized education programs (IEPs) dated May 25, 2007; April 29, 2008; April 7, 2009, and the addendums to said IEPs, because the offered educational program and annual goals failed to meet his unique needs from October 19, 2007, to March 22, 2010, in the areas of academics, speech and language, gross and fine motor, behavior and mental health needs?

3. Did District's failure to timely translate IEP documents from English to Spanish during the 2007-2008, 2008-2009 and 2009-2010 SYs, from October 19, 2007, to March 22, 2010, deny Parents the opportunity to meaningfully participate in the decision-making process, resulting in a denial of FAPE?

District raised the following issue for determination:

4. Did District offer Student a FAPE pursuant to the April 7, 2009 IEP?

## PROPOSED REMEDIES

Student seeks reimbursement for the independent educational evaluation (IEE) by Dr. Carina Grandison and placement at the nonpublic school Children's Learning Center (CLC) or a similar nonpublic school.<sup>4</sup>

District seeks a determination that the April 7, 2009 IEP offers Student a FAPE and that District is no longer obligated to provide a one-to-one instructional assistant (IA).

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<sup>4</sup> Student's proposed remedies are those identified by Student on the first day of hearing. Student changed his proposed remedies from those identified at the May 17, 2010 prehearing conference.

## CONTENTIONS OF THE PARTIES

Student contends that District failed to properly assess all areas of suspected disability during the 2007-2008, 2008-2009 and 2009-2010 SYs. Student also contends that he was denied a substantive FAPE for the 2007-2008, 2008-2009 and 2009-2010 SYs because the IEPs during that time period failed to address all of Student's needs. The focus of the contention is upon his behavioral, academic, communication, fine motor and gross motor needs. Finally, Student contends that Parents were denied meaningful participation in the decision-making process regarding Student's educational program for the 2007-2008, 2008-2009 and 2009-2010 SYs. The focus of this contention is solely upon District's failure to timely translate IEP documents for Parents from English to Spanish. Student obtained an IEE and seeks reimbursement and placement at CLC.

District contends that it properly assessed Student at all times. It further contends that Student does not require an APE or any other assessment. District contends that Student received a FAPE during the 2007-2008, 2008-2009 and 2009-2010 SYs and that its IEPs addressed all of Student's areas of need. Furthermore, District contends that its IEP of April 7, 2009, offers Student a FAPE. Therefore, District requests that it be allowed to eliminate Student's one-to-one IA support.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is an 11-year-old boy, born in 1999. He is eligible for special education services under the category of autism. Student suffers from Legg-Calvé Perthes syndrome (Perthes), a degenerative disease of the hip joint. Due to Perthes, Student has one leg that is shorter than the other and sometimes experiences pain in that leg.

2. Student has also been diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD), mixed expressive-receptive language disorder, Pervasive Development Disorder, Not Otherwise Specified and Mild Mental Retardation. While the issue of whether Student has mental retardation was brought out in hearing, both parties agree that Student has average intelligence.

## ASSESSMENTS OF STUDENT

### Comparing Student's IEE with the District's Assessments

3. Student contends that the District failed to assess or inappropriately assessed his academic, speech and language, and mental health needs for all school years at issue, and relies in great part on an IEE done by Dr. Grandison. He seeks reimbursement for the IEE.

4. Dr. Grandison is a developmental neuropsychologist. She has an extensive resume and is qualified as an expert in the field of neuropsychology. During April and May 2010, over the course of several days, Dr. Grandison assessed Student, including observing him at school on May 13, 2010. Dr. Grandison did a thorough review of Student's records, including his IEPs and prior assessments from both District and private assessors. She tested Student in the areas of cognitive functioning, attention and executive functioning, language, visual-spatial information and visual processing, academic functioning and autism. She did not assess Student to see if he qualified for OT or for APE. Dr. Grandison is not a behaviorist and she did not conduct a functional analysis of Student's behaviors.

5. Dr. Grandison utilized the Comprehensive Test of Non-verbal Intelligence (CTONI) due to Student's disability of autism and delayed language skills. Her findings were that Student had average intelligence, which confirmed the finding of District's April 25, 2008 psychoeducational assessment by Catherine Ortiz. Dr. Grandison

determined that Student displayed attention problems and has ADHD. The April 2008 testing by Ms. Ortiz showed Student to have scores for hyperactivity and attention problems in the clinically significant and at-risk ranges on the Behavior Assessment Systems for Children, Second Edition (BASC-II). Student's ADHD diagnosis was further confirmed by the May 2008 ADHD assessment at Children's Hospital and Research Center in Oakland (Children's Hospital).

6. Dr. Grandison relied upon the speech and language assessment conducted by Liz Lang, speech therapist at Children's Hospital, in March 2010, as part of her assessment. Dr. Grandison found Student to display difficulty in using language to solve problems, draw inferences, understand causes and appreciate the sequencing of events. This is consistent with Ms. Ortiz's findings on the BASC-II that Student's adaptive skills, which include social skills and functional communication, were rated by his teacher in April 2008 as either clinically significant or at-risk and by Mother as clinically significant. Furthermore, Dr. Grandison's findings are similar to those in District's speech therapist Kathy Mabie's speech and language assessment report of April 24, 2008. Ms. Mabie also found Student to display delays in pragmatic language, language processing and resulting delays in social language and social skills. Based on the CTONI, Dr. Grandison opined that Student processes visual information better than language-based information and that he learns and remembers visually presented information well. Dr. Grandison's CTONI scores and findings are similar to or higher than those of Ms. Ortiz. Therefore, her test results from the CTONI did not identify any previously unknown area of deficit.

7. In academics, Dr. Grandison found Student to show relative strength in math, but displayed difficulties in language-based problems. This is consistent with District's findings in math reasoning, as reported by Donna Smith-Harrison, District's resource specialist, pursuant to her academic assessment of Student on April 24, 2008.

Dr. Grandison found Student to be one-to-two grade levels behind in reading, with significant delays in pseudo-word decoding. Again, this is consistent with the findings of Ms. Smith-Harrison. In writing, Dr. Grandison found Student to be one-to-two years behind, which is similar to the findings of Ms. Smith-Harrison. Finally, Dr. Grandison confirmed the diagnosis of autism, which District also confirmed and does not dispute.

8. Student contends that he has mental health needs that required a referral to the local mental health agency. He asserts that District failed to identify his mental health needs. However, Student presented no evidence to support this contention. The evidence established that to the extent that Dr. Grandison's assessment identified emotional needs, these were also identified by Ms. Ortiz's assessment. The evidence established that these are Student's behavioral needs due to his autism and not separate mental health needs.

9. At hearing, Dr. Grandison testified that Student has Dyslexia. However, she did not administer either a screening or test for Dyslexia. District's testing, by Ms. Ortiz, found that Student has learning disabilities. District does not dispute Student's delays in reading and writing. Because Dr. Grandison did not conduct any screening or testing for Dyslexia and her findings are consistent with those of District, her opinion on this diagnosis was given little weight.

10. Dr. Grandison observed Student on May 13, 2010, at school for approximately 40 minutes. Of the observation, 30 minutes was while Student was doing a math activity, which is a relative area of strength, and 10 minutes while transitioning into a whole-class activity. Dr. Grandison did not see Student on the playground or interacting with other students during non-instructional time. Dr. Grandison did not speak to Student's teachers, IA or speech therapist. Her access to these individuals was not hindered by District. Her description of Student's behavioral problems is similar to that described by Ms. Lang and Dr. Christina Goncalves, Student's private therapist from

Children's Hospital, in their reports and as reported by District when Student is not on Adderall. Because Dr. Grandison's testing and observation of Student did not reveal deficits that were not otherwise discernable from Student's records, her assessment was given little weight. Accordingly, District did not fail to appropriately assess Student in the areas of academics, language and mental health.

#### OT and APE Assessments<sup>5</sup>

11. Student contends that District failed to conduct an appropriate assessment of his OT needs and failed to assess his APE needs completely. District conducted an OT assessment in March 2008 because Parents expressed concerns with Student's handwriting. Maria DeWitt, occupational therapist for District, conducted Student's assessment and presented a report to the March 17, 2008 IEP team. Ms. DeWitt's assessment found Student's fine motor skills to be in the low-average range. Ms. DeWitt acknowledged that Student displayed difficulty with his handwriting, movement and had sensory issues with touch. However, the primary source of the difficulty was Student's behavioral difficulties. Ms. DeWitt observed Student on the playground and had Student engage in continuous physical activity for 20 minutes. She did not find any deficits in his gross motor movements or notice any indications of pain. Ms. DeWitt stated that she was aware that Handwriting Without Tears was being used with Student due to Student's difficulty with handwriting. She recommended consultation services, with which, as discussed in Factual Finding 46, Parent disagreed. She stated she did not

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<sup>5</sup> During the hearing and in his closing brief, Student contends that an assistive technology (AT) assessment should have been done. However, the failure to conduct an AT assessment was not presented as an issue in this case and has not been addressed in this decision.



recommend keyboarding in March 2008 because she thought Parents wanted to continue to work on handwriting. Ms. DeWitt was a credible witness.

12. Student contends that he has deficits in fine motor skills that impact his ability to engage in self-care tasks such as bathing, using utensils, tying shoes, using zippers and buttons, and handwriting. The evidence did not establish that Student displayed difficulties in self-care skills in the school setting. Student did not present a witness or documentary evidence to support that Student had difficulties with buttons and zippers, tying his shoes or using utensils in the school setting.

13. On June 4, 2008, Parents obtained an IEE for occupational therapy at Children's Hospital. The report found Student presented with delayed visual motor skills, difficulty with fine motor skills, decreased self-care skills and coping skills. Children's Hospital recommended 12 weeks of OT services at one time per week of unspecified duration. The short term goals targeted Student's ability to use utensils and manipulate fasteners, and his writing skills.

14. To the extent that Student had OT needs for handwriting, the combination of the 12-week program at Children's Hospital and the use of Handwriting Without Tears appropriately addressed Student's needs. The evidence established that Student's handwriting improved significantly during the 2008-2009 and 2009-2010 SYs. District did not fail to appropriately assess Student's OT needs.

15. Student contends that he is entitled to APE because he experiences pain in his leg due to his Perthes. He contends that District is aware of Student's difficulties in physical activities and has failed to conduct an APE assessment. Father testified that, at home and during sports activities, Student tires easily. Student requires transportation to and from school due to his Perthes.

16. The evidence established that Student is quite active at school. He is an avid four-square player and engages in physical activity consistently during lunch and

recess. There is no evidence to support a finding that Student is in pain or unable to access his desired physical activities. Jorge Maldonado, Jr., Student's physical education teacher, testified on behalf of District. Mr. Maldonado stated that Student is able to participate in the physical education class fully. While he may not be able to move at the speed of the fastest student, he is not limited from participating in any of the activities. While Student has pain medication available at school, there was no evidence to show how often he requires it or how often the supply has been refilled by Parents. Finally, the June 4, 2008 OT assessment at Children's Hospital noted that Parents did not feel Student was in pain. Because Student is able to fully participate in physical education, District did not need to conduct an APE assessment, and its failure to do so did not deny Student a FAPE.

#### Behavior Assessment

17. Student contends that District failed to properly assess his behavioral needs during the 2007-2008, 2008-2009 and 2009-2010 SYs, from October 19, 2007, to March 22, 2010. As discussed in Factual Findings 40, 42 and 43, during the 2007-2008 SY Student displayed behavior problems that resulted in his being suspended and pulled from school by his parents. This resulted in his being moved from Searles Elementary School (Searles) to Alvarado Elementary School (Alvarado). As discussed below, at the time of the January 29, 2008 IEP team meeting to review Student's new placement at Alvarado, Student continued to display behavior problems. These included assaultive, disruptive, non-compliant and disrespectful behaviors. Parents requested a behavior assessment.

18. When a student displays a serious behavior problem, a functional analysis assessment (FAA) is required in order to assess the student's behavior needs. A serious behavior problem is defined as behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and

maladaptive for which instructional or behavioral approaches specified in a student's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (ab).) A FAA includes: 1) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity; 2) systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; 3) systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior; 4) ecological analysis of the settings in which the behavior occurs most frequently by looking to factors such as the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities; 5) review of records for health and medical factors that may influence behaviors such as medication levels, sleep cycles, health, and diet; and 6) review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)<sup>6</sup>

19. Jeanine Wilkinson has been the behavior specialist for District for four years. Ms. Wilkinson holds a bachelor of arts in human services, a master of arts in behavior analysis and a master of arts in psychology. She is working towards attaining her board-certified behavior analyst certification. All of Ms. Wilkinson's degrees were from on-line colleges.

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<sup>6</sup> This is also known as a Hughes Bill assessment.

20. Ms. Wilkinson testified that she conducted a functional behavior assessment (FBA) of Student and issued a report on March 15, 2008. At this time, Student was placed at Alvarado. The FBA revealed that Student engaged in non-compliant, aggressive, argumentative and disruptive behaviors. These included using a loud voice that disrupted other students, arguing with the staff, shouting out to the teacher, refusing to work, banging on the desk and behaving disrespectfully towards peers. Student's behaviors as displayed in March 2008 were consistent with the behaviors he had displayed at Searles and had displayed at Alvarado at the time of the January 29, 2008 IEP team meeting. Ms. Wilkinson determined that the functions for Student's behaviors were task avoidance, expressing frustration and attempting to gain power and control.

21. Ms. Wilkinson testified that the March 2008 assessment was a FBA and not a FAA or Hughes Bill assessment. Ms. Wilkinson stated that she did not feel a FAA was warranted because Student had displayed only one or two aggressive behaviors and this was lower than is legally required for a FAA. Ms. Wilkinson's testimony regarding the type of assessment she conducted was not credible.

22. First, the law does not have a minimum number of assaultive behaviors that are required prior to a FAA being conducted. Second, Ms. Wilkinson's March 15, 2008 report expressly states, "A behavior plan was requested if warranted under the provisions of the Hughes Bill. A functional analysis assessment was conducted to determine the function of behavioral excesses which may meet the definition of a 'serious behavior problem' as laid forth in the California educational code [5 C.C.R. Sec. 3001 (aa)]. For a behavior to be considered a 'serious behavior problem' it must meet one of the criteria 1) is self-injurious or assaultive, 2) causes serious property damage, or 3) is severe, pervasive and maladaptive for which other instructional/behavioral approaches specified in the student's IEP are found to be ineffective [5 C.C.R. Sec.

3052(a)(1).].”<sup>7</sup> Third, the evidence established that Student’s behaviors met the definition of a serious behavior problem. Student displayed assaultive and aggressive behaviors at the time of the January 29, 2008 IEP team meeting. The evidence established that Student continued to display assaultive behaviors through May and June 2008, in the sexually inappropriate touching conduct towards female peers.

23. Fourth, the evidence also established that prior approaches to modify Student’s behaviors as contained in the IEP, such as the May 25, 2007 behavior intervention plan (BIP), had been ineffective. Contrary to Ms. Wilkinson’s testimony, the evidence established that Student’s behaviors met the definition of a serious behavior problem and she conducted an assessment pursuant to the terms of the Hughes Bill. Accordingly, the FBA is analyzed herein under the requirements of the Hughes Bill.

24. Ms. Wilkinson reviewed past reports and assessments; however, she did not review any records to identify health or medical factors. She conducted weekly observations across settings and collected data. Ms. Wilkinson interviewed Student’s classroom teacher, IA, Parents and home therapist. She collected data on behaviors of shouting out, work refusal, refusal to follow directions, disruption of the class and disrespect towards others. The FBA provided data on the number of occurrences of certain behaviors and the settings in which they occurred. However, it failed to identify the time period over which the data was collected; therefore, it fails to identify the frequency with which the targeted behavior was occurring. The FBA failed to provide the duration and intensity of each targeted behavior. The FBA failed to identify the antecedent to each observed behavior. The report provides examples of some of the behaviors in each setting; however, it does not provide a baseline of the targeted

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<sup>7</sup> Legal citations and grammatical formatting is as set forth in the original document.

behaviors or an analysis of the antecedents and consequences that maintained the behavior. The FBA report fails to describe the rate of alternative behaviors and their antecedents and consequences. According to the testimony of Christine Moriuchi, Student's teacher, and supported by documentary evidence, Student was displaying inappropriate behaviors towards female students. The FBA failed to target this behavior as part of its analysis. Finally, Ms. Wilkinson failed to review the effectiveness of Student's prior BIP. Accordingly, District did not appropriately assess Student's behavioral needs.

25. Ms. Wilkinson's testimony regarding her assessment, supervision and consultation services for Student, and the discussion of those services with Parents, was not credible. Ms. Wilkinson's attempt to classify her FBA as exempt from the requirements of a Hughes Bill FAA was contradicted by her own report. At the start of the 2008-2009 SY, District eliminated the one hour per week of direct behavior support consultation services to Student from Ms. Wilkinson. She claimed to have discussed in detail the reduction of her services with Parents during the June 12, 2008 IEP team meeting. However, there is no record of such a discussion and Mother's testimony that she was not informed of the change was persuasive. Furthermore, at the time of the April-June 2008 IEP meetings, Ms. Wilkinson knew of key behavior areas for Student such as his inappropriate interactions with female students and his lack of impulse control. Yet, she failed to address these issues in her FBA and BIP. Ms. Wilkinson testified that for the 2008-2009 SY she provided general support service to Student's class and because he was placed in the special day class (SDC) her services were not required to be documented in the IEP. Her testimony was directly contradicted by Marcelle Tsuei, the SDC teacher, who testified that Ms. Wilkinson came to the SDC once a week specifically for Student. District provided no legal authority for the principle that because Student was in the SDC, his behavior support services did not need to be

documented in the IEP. Accordingly, Ms. Wilkinson did not present as a credible witness.<sup>8</sup>

## PROVISION OF FAPE DURING THE 2007-2008, 2008-2009 AND 2009-2010 SYs

### THE 2007-2008 SY

#### The May 25, 2007 IEP

26. On May 25, 2007, Student's annual IEP was developed. The May 25, 2007 IEP offered Student placement in a general education third grade classroom for the 2007-2008 SY, pull-out speech therapy for 30 minutes per session, 60 sessions per SY.<sup>9</sup> The present levels of performance (PLOPs) stated that Student had strong math skills and was at grade level for math. He was reading at Developmental Reading Assessment (DRA) level 14 independently, which was a first grade level. Student could write simple and repetitive sentences. District identified Student as having unique needs that required special education in the areas of academics, language and behavior. The May 25, 2007 IEP offered Student annual goals in the areas of communication, reading, reading comprehension, writing, social skills and behavior. Student displayed inappropriate behaviors, for which a BIP was developed at the May 25, 2007 IEP team meeting.

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<sup>8</sup> On the weekend preceding her testimony, Ms. Wilkinson injured herself. She was taking heavy pain medication which could impact her ability to testify. It was established that Ms. Wilkinson was not on medication during her testimony and the clarity and accuracy of her testimony was not affected by the injury or the medications. Her injury was considered in the credibility finding.

<sup>9</sup> This is equivalent to approximately two sessions per week.

27. Carrie Igondjo participated in the May 25, 2007 IEP as the case carrier. She has been a program specialist with District for three years. Ms. Igondjo is a speech therapist and has been an inclusion specialist for seven years. She has training in working with children with autism from Dr. James Partington of Behavior Analyst Incorporated (BAI), a nonpublic agency. She has also received training in social skills development through Michelle Garcia-Winner, a nonpublic agency. Ms. Igondjo speaks Spanish and has acted as an interpreter at IEP team meetings.

28. Ms. Igondjo was Student's teacher for first grade and was his case carrier and inclusion specialist for second grade. She stated that first grade DRA levels begin at level 6 and that levels 14 through 16 are equivalent to the end of first grade reading standards. Levels 17 through 20 are equivalent to the beginning through end of second grade reading standards.

29. Ms. Igondjo stated that during the two years that she was Student's teacher and inclusion specialist, he participated in regular physical education. She discussed Student's Perthes with the APE teacher and Parents. It was determined that Student could participate in regular physical education with breaks. Therefore, neither an APE assessment nor APE services were offered.

30. Parents did not consent to the May 25, 2007 IEP at the time it was developed. However, on November 27, 2007, Parents consented to the annual goals contained in the May 25, 2007 IEP. The May 25, 2007 IEP has been considered in this decision from October 19, 2007, onwards, as that is two years from the date of Student's filing of the complaint in this case.

The November 27, 2007 IEP Addendum to the May 25, 2007 IEP

40. Student began the 2007-2008 SY at Searles in a regular education third grade classroom. On November 1, 2007, Parents removed Student from school. District had informed Parents in October 2007 that Student was hitting other children. On



November 1, 2007, Parents were informed that Student had hit and bit school staff. Additionally, Parents had been told that Student was displaying disruptive behavior and was being pulled out of the classroom more frequently as the year was progressing. On November 12, 2007, Mother sent a letter to Ms. Williams, in Spanish, that detailed these behavior problems by Student and resulting discipline by the staff.

41. On November 27, 2007, the parties met to discuss Student's behavior problems and develop an addendum to the May 25, 2007 IEP. District offered to move Student to a new school site as a "fresh start" and provide a one-to-one aide, 15 hours of training for the aide and two hours per week of behavior consultation. The team agreed to the development of a new BIP. Parents consented to the placement and Student was moved to Alvarado.

#### The January 29, 2008 Addendum to the May 25, 2007 IEP

42. On January 29, 2008, an IEP team meeting was held to review Student's placement at Alvarado. Student was in Christine Moriuchi's general education third grade class at Alvarado. He continued to display aggressive, disruptive, non-compliant and disrespectful behaviors in his new placement at Alvarado. Student engaged in physically aggressive behavior such as striking the teacher and the principal, and was suspended for these behaviors. Parents told the January 29, 2008 IEP team that suspensions acted as a reinforcement for Student. The behaviorist at the IEP team meeting noted that Student was asking to be sent home and taunting staff with statements such as "call my mom."

43. Ms. Moriuchi reported to the IEP team that Student struggled with transitions, wanted to do his own activity, did not follow directions, used a high voice that distracted the other students, had "constant" outbursts throughout the day and intervened verbally when the teacher tried to discipline other students. At hearing, Ms. Moriuchi was persuasive that Student did not have friends.

44. The evidence established that there were portions of Student's May 25, 2007 BIP which were not being implemented. District agreed to develop another BIP to address Student's behaviors that could lead to aggressive behaviors. The BIP from May 25, 2007, was therefore updated, with further modification to follow after a behavior assessment. Parent provided consent for District to conduct a FBA and as discussed in Factual Finding 20, Ms. Wilkinson assessed Student in March 2008.

45. The January 29, 2008 IEP maintained Student's services for behavioral support from the behavior specialist at two hours per week. Student continued to be offered a one-to-one IA for the school day, except during recess and the IA's lunch break. Speech therapy remained at two sessions per week, 30 minutes each, but now specified that one session would be individual therapy and one session would be group therapy. Parents consented to the January 29, 2008 IEP addendum.

The March 17, 2008 Addendum to the May 25, 2007 IEP

46. On March 17, 2008, an IEP team meeting was held to review the results of District's OT assessment, the FBA report and to develop a BIP. District contended that Student was functioning within the normal developmental range for fine motor skills. Parents disagreed and contended that Student had difficulties writing and coloring that required OT services. Ms. Moriuchi stated at the IEP team meeting that Student required help with handwriting. District offered to provide OT consultation to the teacher regarding Handwriting Without Tears. Parents did not agree with either the OT assessment's results or District's offer.<sup>10</sup>

47. Ms. Wilkinson participated in the IEP and presented her FBA report, dated March 15, 2008. Based upon this report the team developed a new BIP for Student.

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<sup>10</sup> Whether the OT assessment was appropriate is discussed above in Factual Findings 11 through 14.

California has defined “behavioral intervention” as the systematic implementation of procedures that result in lasting positive changes in behavior through skill acquisition and the reduction of problematic behavior. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) “Behavioral interventions” are designed to provide the individual with greater access to a variety of community settings, social contacts and public events and to ensure placement in the least restrictive environment. (*Ibid.*) The contents of a BIP must comply with specific requirements. (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).) Student has not challenged whether the March 17, 2008 BIP complies with these requirements. Accordingly, whether the BIP meets the legal requirements has not been considered in this decision.

48. However, Student has challenged whether the March 17, 2008 BIP met Student’s behavioral needs and whether District’s IEP offers addressed Student’s unique needs in the area of behavior. Here, the new BIP is substantively identical to the BIP developed on May 25, 2007, and updated on January 29, 2008. Accordingly, it provides Student with a BIP that had previously failed to meet his behavioral needs. Additionally, the March 17, 2008 BIP and the March 17, 2008 IEP addendum fail to provide measurable behavior goals. Because behaviors were an identified area of need, a FBA had been conducted and a new BIP had been developed, Student was entitled to measurable behavior goals.<sup>11</sup> Accordingly, the March 17, 2008 IEP addendum failed to offer Student a FAPE in the area of behavior.

49. The March 17, 2008 IEP addendum reduced Student’s behavior consultation support to one hour per week. Parents requested a copy of the IEP in Spanish. Parents consented to the IEP.

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<sup>11</sup> The behavior goals from the May 25, 2007 IEP were not discussed or carried forward in the March 17, 2008 IEP.

#### The April 15, 2008 Addendum to the May 25, 2007 IEP

50. On April 15, 2008, Kathy Mabie, District speech therapist, held an IEP addendum team meeting with Mother by telephone. Ms. Mabie testified that the purpose of the meeting was to change Student's Standardized Testing and Reporting (STAR) Program test from the standard version to the California Modified Assessment (CMA) version of the STAR test. Ms. Mabie stated that she wanted Student to take the CMA because it would be easier for him. Ms. Moriuchi stated that Student needed to take the CMA instead of the regular STAR testing because of his difficulties with attention, his lack of cooperation and his lower academic ability. Parents consented to the IEP.

51. Student contends that his being eligible for the CMA established that he had regressed academically during the 2007-2008 SY. While the evidence established that Student became eligible for the CMA and the results of the CMA were one factor considered in determining Student's academic progress for the 2007-2008 SY, the evidence did not establish that qualifying for the CMA meant Student had regressed academically. Accordingly, Student did not establish that qualifying him for CMA was a denial of FAPE in academics.

#### The April 29, 2008 IEP

52. On April 29, 2008, and June 12, 2008, the parties met to develop Student's annual IEP.<sup>12</sup> Prior to the April 29, 2008 IEP team meeting, Student underwent an early triennial assessment, as his triennial was not due until May 2009. District conducted a psychological assessment, a speech and language assessment and standardized academic testing. Based on the assessments, District identified Student as having unique needs that required special education in the areas of academics, language and behavior.

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<sup>12</sup> It is referred to herein as the April 29, 2008 IEP.

53. Student's behaviors and the March 17, 2008 BIP were discussed by the April 29, 2008 IEP team. The team also reviewed Student's annual goals for the 2007-2008 SY. However, the IEP fails to document whether Student met the goals. The evidence established that the only written report of progress on the 2007-2008 SY goals is in Spanish, but is incomplete. The goal updates in Spanish address only the communication goals from the May 25, 2007 IEP and there is no written record of Student's progress on 14 of his 2007-2008 SY goals, in the areas of reading, writing, social skills and behavior.

54. The PLOPs report that Student was in the average range in math for computation and reasoning. However, Ms. Moriuchi reported that at the conclusion of third grade, he was functioning at a second grade level. According to the PLOPs, Student could write a paragraph, but required constant redirection. Finally, Student was reading between DRA levels 12 to 14, which the PLOPs defined as the middle of first grade level. He could retell the stories he read in sequence, with some prompting.

55. The April 29, 2008 IEP provided Student with goals in the areas of communication, social language, reading, writing and math.<sup>13</sup> District made minor changes to Student's March 17, 2008 BIP. However, District did not develop measurable goals in the area of behavior as part of the April 29, 2008 IEP, despite Student's behavior

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<sup>13</sup> District's March 2008 psychological assessment identified that Student had needs in the area of attention due to his impulsivity and hyperactivity. District did not develop measurable goals in this area of need. Student challenged District's assessment in the area of attention needs, however, Student did not raise an issue regarding whether District properly addressed attention as an area of need in the IEP. Accordingly, the issue of whether Student required measurable goals in the area of attention in order to receive a FAPE has not been considered.

being an identified area of need. The updated March 17, 2008 BIP did not have measurable behavior goals. Accordingly, District failed to offer Student a FAPE in the area of behavior.

56. For the 2008-2009 SY, District offered placement in a SDC at Student's home school of Hillview Crest Elementary School (Hillview), with one-to-one IA support. District offered continuation of the speech therapy in the amount of two sessions per week, 30 minutes per session, with one session in a group and one session of individual therapy.

57. In May 2008, Student was diagnosed with ADHD by Dr. Buhrmann, a private assessor at the Children's Hospital. The diagnosis was not provided to District until October 2008. District did not contest the diagnosis. In May 2008, Parent placed Student on medication for ADHD. Student also began taking medication for allergies.

#### Student's Progress in the 2007-2008 SY

58. Student contends that he was denied a FAPE in the areas of academics, language and behavior.<sup>14</sup> A written progress update on Student's academic goals for the 2007-2008 SY does not exist. However, based upon the PLOPs in the IEPs for the 2007-2008 SY and District's academic testing in April 2008, the evidence established that Student did not make meaningful progress in reading and writing.

59. The May 25, 2007 PLOPs established that Student was reading at DRA level 14 independently and was able to answer "simple comprehension questions regarding the text." The January 29, 2008 PLOPs showed that Student's reading level

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<sup>14</sup> Based upon Factual Findings 8, 14 and 16, District properly assessed Student's areas of need and Student did not have areas of need in OT, APE or mental health. Accordingly, the decision need not consider the issue of whether Student was denied a FAPE in the areas of OT, APE and mental health.

had dropped to DRA level eight “with comprehension.” DRA level eight is equivalent to the early first grade reading standards. Donna Smith-Harrison, District’s resource specialist, conducted Student’s academic testing in April 2008. At that time, Student was reading at DRA level 10 “with comprehension.” The April 29, 2008 PLOPs indicate that Student was reading at DRA level 12, which was amended on the goal sheets to DRA levels 12-to-14. In the area of writing, Student could write simple, repetitive sentences at the time of the May 25, 2007 IEP. According to the January 29, 2008 IEP, he was still writing simple sentences. According to the April 29, 2008 IEP, Student could write a paragraph, but required constant redirection. However, this was contradicted by Ms. Moriuchi’s statement to the IEP team that Student’s writing was still at the same level as before. At hearing Ms. Moriuchi testified that Student did not make progress in reading or writing during the 2007-2008 SY. Her testimony was persuasive. Accordingly, Student did not receive a meaningful educational benefit in the areas of reading and writing during the 2007-2008 SY and was denied a FAPE.

60. The evidence established that Student continued to display assaultive, disruptive, non-compliant and disrespectful behaviors throughout the 2007-2008 SY. District failed to conduct an appropriate assessment of Student’s behavioral needs. District failed to offer measurable behavior goals when it developed a new BIP in March 2008 and amended it in April 2008. In May and June 2008, Student still displayed sexually inappropriate behaviors towards female peers. Ms. Moriuchi testified that Student did not have friends and she did not believe he had made progress behaviorally. Her testimony was persuasive. Accordingly, Student did not receive meaningful educational benefit in the area of behavior during the 2007-2008 SY and he was denied a FAPE.

61. Student’s progress on his speech and language goals was reported on throughout the 2007-2008 SY. Ms. Mabie was his speech therapist once he moved to

Alvarado. Her progress report on the goals is in Spanish. The burden was on Student to show that he did not make progress in speech and language. Student did not challenge Ms. Mabie's progress updates on Student's goals and presented no evidence to show that he did not make progress in speech and language during the 2007-2008 SY.

#### Failure to Provide Translated IEPs in the 2007-2008 SY

62. Student contends that Parents were denied meaningful participation in the decision-making process for the 2007-2008 SY because District did not timely provide Parents with copies of IEP documents in Spanish. Ms. Igondjo stated that once a parent requests translation, all future IEPs are translated. Ms. Williams described the process for how District receives notice that an IEP needs to be translated. She stated that after the IEP is developed and all copies have been handed out, the original English version is sent to the District office with a cover sheet which notes that a translation needs to be done.

63. Ms. Igondjo and Ms. Williams could not recall if documents were or were not translated into Spanish during the 2007-2008 SY. District submitted partial annual goals from the May 25, 2007 IEP that had been translated into Spanish. However, a Spanish version of the IEP was not submitted. Ms. Igondjo testified that she assumed the May 25, 2007 IEP had been translated, but could not be sure. No evidence was presented to show that the November 27, 2007; January 29, 2008; March 17, 2008; and April 15, 2009 addendum IEPs, and the April 29, 2008 annual IEP were timely translated for Parents.

64. Mother testified that Parents did not receive copies of documents in Spanish until October 2009. Her testimony was not contradicted by the evidence. She further testified that during an IEP on October 20, 2008, she learned that Student's behavior consultation services had been removed pursuant to the April 29, 2008 IEP. Because Mother did not have copies of IEPs in Spanish, she testified, she was unable to



monitor Student's educational program. Mother's testimony was persuasive. Parents were deprived of timely information in their native language and thereby, deprived of meaningful participation in the IEP process.

## THE 2008-2009 SY

### The October 20, 2008 Addendum to the April 29, 2008 IEP

65. Student began the 2008-2009 SY in Marcelle Tsuei's SDC class at Hillview. On October 20, 2008, the IEP team met at Parents' request to review Student's BIP. Student continued to display disrespectful and disruptive behaviors. Student became upset if he did not win a prize at the end of the school day, escalating his behaviors to yelling, throwing things, crying and sitting under the desk. Student screamed in protest and sat at his desk before transitioning to activity in the math center, if his group was not working on computers. He also blurted out his displeasure with non-preferred activities. Finally, Student's behaviors escalated at the end of the day if he saw Mother waiting for him. These behaviors were consistent with behaviors Student had displayed in the 2007-2008 SY and Student's BIP was extended through January 2009, with a review to follow at that point. Student's one-to-one IA support remained in place. District did not develop measurable behavior goals for Student.

66. Dissatisfied with District's March 2008 OT assessment, on June 4, 2008, Parents obtained an IEE occupational therapy evaluation from the Children's Hospital. The parties reviewed the assessment results in the October 20, 2008 IEP meeting. As set forth in Factual Findings 11 through 14, District had conducted an appropriate OT assessment of Student in March 2008. The Children's Hospital report recommended District utilize the Handwriting Without Tears program. The evidence established that District utilized the program with Student, including using the specially lined paper as

specifically recommended in the addendum to the Children's Hospital report. Mother consented to the IEP addendum.

#### The February 5, 2009 Addendum to the April 29, 2008 IEP

67. Student contends that part of the substantive failure of District's March 17, 2008 BIP, as amended during the April 29, 2008 IEP team meeting, in providing him a FAPE was that the BIP was implemented by untrained substitute IAs. On February 5, 2009, the IEP team met again at Parents' request to address Parents' concerns with Student's IA. Mother was concerned that Student's IA was not working with him. District stated that a substitute IA had been with Student and had recently been replaced with a permanent IA.

68. Student began the 2008-2009 SY with Ms. Ainsworth as his permanent IA; however, Student moved out of District geographical boundaries for one week in the Fall of 2008. Upon his return, his permanent IA had been reassigned and Student was assigned a substitute IA, Louisa Rushing. Ms. Rushing established that she was Student's IA for approximately two months during the 2008-2009 SY and on and off during the period of September through November 2009. She stated that as a substitute IA in 2008-2009 for Student, she was also asked to be the IA for another student in the classroom. Ms. Rushing was not given any training regarding Student. Furthermore, she was not provided the regular trainings that District provides to the permanent IAs. Ms. Rushing's testimony credibly established that she did not know of Student's BIP, did not implement his BIP, did not implement any specific behavior strategies for Student and did not have any understanding of how to facilitate social interaction.

69. Ms. Tsuei testified that she shadowed Ms. Rushing and the other substitute IAs. Ms. Rushing had a difficult time understanding her responsibilities. Ms. Tsuei stated that she provides training to all of the IAs that work in her classroom.

However, Ms. Tsuei is not a behaviorist and the evidence did not establish that she trained Ms. Rushing on how to implement Student's BIP.

70. While the February 5, 2009 IEP states that Student's behaviors had improved, Parents did not agree. At the time of the February 5, 2009 IEP team meeting, Student continued to have behavior problems. He had an active BIP in place. Ms. Wilkinson was providing behavior consultation to the SDC specifically for Student at least one time per week. Despite the identified needs in the area of behavior, District did not develop behavior goals at the February 5, 2009 IEP team meeting. The evidence established that Student's BIP was implemented for part of the 2008-2009 SY by an untrained substitute IA. Accordingly, District denied Student a FAPE in the area of behavior.

71. At the February 5, 2009 IEP team meeting, Mother also expressed concerns regarding Handwriting Without Tears because she believed it was not being used with Student. District stated that it was using the program with Student and he would receive support in Handwriting Without Tears two days per week. Parents did not consent to the February 5, 2009 addendum.

#### The April 7, 2009 IEP

72. On April 7, 2009, and April 22, 2009, the IEP team met to develop Student's annual IEP for the upcoming 2009-2010 SY.<sup>15</sup> The PLOPs report that Student was reading at DRA level 22, which was middle-to-end of third grade. He continued to display difficulty in comprehension and could only read at second grade level with comprehension. Student was only able to write very simple sentences such as "I like games" or "They are fun." He lacked organizational skills in writing and went off topic.

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<sup>15</sup> The meetings and resulting IEP document are jointly referred to as the April 7, 2009 IEP.

Student was using the computer and the Handwriting Without Tears paper for writing. Student was meeting most grade-level standards in math. He could add, subtract, multiply up to four digits and divide using a single-digit divisor. According to the CMA test results, Student was deemed below basic in math and far below basic in language arts. Finally, Student was still displaying crying and tantruming behaviors when he did not get his way, displayed poor sportsmanship, or was asked to do class work, complete work and do homework.

73. District identified Student as having unique needs that required special education in the areas of academics, language and behavior. At the April 2009 IEP, District developed annual academic goals in the areas of reading comprehension, number sense addressing division and written expression addressing paragraph structure. Communication goals targeted the ability to retell details from passages, social problem-solving and providing multiple meanings of words. Behavior goals targeted teaching strategies for dealing with anger, disappointment and frustration, appropriate ways to ask questions and request help, perspective-taking<sup>16</sup> and identifying emotions in other individuals.

74. District recommended reducing speech therapy to 40 minutes per week; however, Parents did not agree with the proposal. District recommended removing Student's one-to-one IA and using the classroom aides. Parents did not agree. District offered placement in the SDC for 255 minutes per day, 110 minutes per day in regular education for lunch, recesses, physical education and preparatory periods for the teacher; and two sessions per week of speech therapy, 30 minutes per session, with one

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<sup>16</sup> Perspective-taking is a skill taught to a student to help the student understand the perspective of another person, designed to assist the student in making progress in his or her communication and social skills.

session of individual therapy and one session of group. District also offered 30 minutes per month of behavior specialist services to monitor implementation of the BIP.

75. On April 6, 2009, Ms. Wilkinson updated Student's BIP. This did not involve a new FBA, but was done through observation and based upon the behavioral data available to Ms. Wilkinson. In describing the previous intervention used by staff, Ms. Wilkinson pointed out that staff had been inconsistent in utilizing preventative measures and preventative measures were being used to react to behaviors rather than to diffuse behaviors before they occur. The April 6, 2009 updated BIP states that teacher and staff responses to Student's undesired behaviors were documented in detail in a separate section; however, no such detailed documentation exists in the BIP. The April 6, 2009 updated BIP by Ms. Wilkinson contains strategies for District's staff to use to address Student's behavior needs. Many of the strategies require parent participation and note Parents as responsible for implementing the strategies. However, the evidence established that the report was not translated and provided to Parents in Spanish until October 2009.

76. Parents did not consent to the April 2009 IEP. District maintained the prior levels of service for speech and language and the one-to-one IA for the remainder of the 2008-2009 SY and the 2009-2010 SY. However, Parents did consent to the annual goals and District implemented those annual goals. At hearing, Parents did not specifically challenge any of the annual goals. They also did not present any evidence to establish that the April 7, 2009 IEP failed to provide goals in any of Student's identified areas of need. Accordingly, the issue of whether the April 7, 2009 IEP should have contained measurable goals in the area of attention has not been considered in this decision.

77. District carried the burden to show that the April 7, 2009 IEP offered Student a FAPE. While Parents did not consent to the entire April 7, 2009 IEP, they

consented to the annual goals. At hearing, Student did not challenge whether the District failed to properly identify all areas of need, develop goals in the identified areas of need or offer appropriate placement and services. The evidence established that District complied with the procedural requirements in developing the IEP and Student does not contest this. However, as discussed in Factual Findings 95 through 98, Student continued to require a BIP and IA support during the 2009-2010 SY. As set forth in Factual Findings 95 and 96, when Student was not taking Adderall, he displayed behavior needs that the BIP and substitute IA could not meet. Accordingly, in the area of behavior, the April 7, 2009 IEP did not offer Student a FAPE.

#### Progress in the 2008-2009 SY

78. Student contends that he was denied a FAPE in the areas of language, academics and behavior. Pamela Jensen, District's speech therapist, testified regarding her work with Student during the 2008-2009 SY and established that the progress Student made on his annual goals was meaningful progress. According to the reported progress on each goal implemented by Ms. Jensen, Student met one goal out of five, showed sufficient progress on two goals and partial progress on two goals. Ms. Jensen established that Student made meaningful progress in the area of speech and language and was provided a FAPE for the 2008-2009 SY.

79. Based upon testimony and the April 7, 2009 PLOPs, the evidence established that Student had increased his DRA level to 22 from the prior year of level 14. Ms. Tsuei persuasively testified that while Student remained behind his typically developing peers in reading, over the SY he had made meaningful progress. Accordingly, Student was provided a FAPE in the area of reading for the 2008-2009 SY.

80. The evidence established that Student did not make meaningful progress in writing during the 2008-2009 SY. Based upon the PLOPs discussed in Factual Finding 72, Student was writing simple sentences at the end of the 2008-2009 SY and could not

stay on topic. As reported in the year-end report card by Ms. Tsuei, Student was more than one grade level below in writing. This is the same level of writing ability he displayed in the 2007-2008 SY. Accordingly, Student did not make meaningful progress in writing and was denied a FAPE during the 2008-2009 SY.

81. Ms. Wilkinson testified that Student's negative behaviors spiked at the start of the 2008-2009 school year, but that his behaviors dramatically improved over the course of the school year. However, in her updated BIP of April 6, 2009, she found that Student displayed behaviors of impulsivity, non-compliance, attention-seeking, aggression and awkward social interactions. Awkward social interactions was a previously unidentified interfering behavior by Ms. Wilkinson and was a new targeted behavior in Student's BIP. The severity of the behaviors was deemed moderate. The purposes of the behaviors were to escape from demands, express frustration and to gain power and control. District failed to develop behavior goals in the April 29, 2008 IEP and the October 20, 2008 and February 5, 2009 addendum IEPs. For part of the 2008-2009 SY, Student's BIP was implemented by an IA who was not properly trained. By the end of the 2008-2009 SY, Student continued to display the same behavior problems as in the prior school year and had added the behavior problem of social awkwardness to his BIP. Accordingly, Student did not make meaningful progress in the area of behavior during the 2008-2009 SY and was denied a FAPE.

#### Failure to Provide Translated IEPs in the 2008-2009 SY

82. Student contends that Parents were denied the opportunity to meaningfully participate in the decision-making process during the 2008-2009 SY. The evidence supports Student's contention. Ms. Williams stated that when Student moved to Hillview, District stopped translating IEPs because the office staff did not "catch" the request for translations as IEPs came into the office. In June 2009, Ms. Williams contracted with an outside agency to translate the IEPs from Hillview that had been

missed. She further stated that while she thought the IEPs from the prior school year had been translated timely, she was unsure. Therefore, she ordered all IEPs and other documents to be translated. Parents did not receive these documents until October 2009, four months later.

83. Parents' primary language is Spanish. The evidence established that at least one member of each IEP team during the school years was able to interpret from English to Spanish for Mother. Dr. Christina Goncalves, Student's behavior therapist from Children's Hospital, assisted Mother and interpreted during several of the meetings. Additionally, District either had an interpreter or one of its staff members who was able to interpret from English to Spanish present at each IEP team meeting.

84. District contends that even if there was a failure to timely translate IEPs, Parents were not denied meaningful participation because Mother is able to understand more English than she claims.<sup>17</sup> Mother's educational level is equivalent to fifth grade, at best. She attended school in Mexico through the third grade and attended two years of schooling when she came to the United States, which was her only exposure to formal education in English.

85. Several of District's witnesses, including Ms. Tsuei and Ms. Wilkinson, stated that they were able to communicate with Mother in English. These communications were in the course of parent observations, parent visits at school functions, when Mother dropped off or picked up Student from school, parent volunteering in Ms. Tsuei's class or other minor conversations. However, all substantive communications regarding the development or implementation of Student's IEPs or his progress on goals involved an interpreter. Ms. Wilkinson also stated that she had observed Mother at the IEP meeting for another child acting as the interpreter and that

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<sup>17</sup> District did not contest Father's inability to understand or speak English.



an official interpreter was not present, to her recollection. The IEP meeting in question was for a family relative and Mother went to support the relative. Student presented a signature sheet and District stipulated that an interpreter was present at that IEP meeting. Accordingly, District did not establish that Mother is capable of reading, speaking and understanding English to the level that she could participate in the development of an IEP without the assistance of an interpreter.

86. During the hearing, Mother was observed referencing the English copy of the October 20, 2008 IEP when testifying regarding Handwriting Without Tears. She successfully pointed out the page in the IEP that discussed Handwriting Without Tears. However, the term "Handwriting Without Tears" is the name of a specific program and can be easily discerned on the page that Mother reviewed, as it appears at the end of the notes. District then asked Mother questions regarding the February 5, 2009 IEP and asked her to point to a particular discussion within the English version of that IEP. Mother could not find the discussion and asked the interpreter for assistance. At this point, District abandoned its question and did not refer Mother to the Spanish version of the document. This pattern of questions and answers was repeated for the April 7, 2009 IEP. District's attempt to show that Mother can read English was not persuasive.

87. Mother testified that while she participated in IEP team meetings with the assistance of an interpreter, not having the documents in Spanish hurt her ability to understand Student's program and placement. She credibly stated that it was difficult to understand what had happened at the IEP team meetings and she was unable to timely review the written IEPs or to ensure compliance with the IEPs. She was frustrated because her only ability to understand the IEPs was to ask others like Dr. Goncalves to translate documents for her. Mother was a credible witness and her testimony was persuasive.

88. The evidence established that failure to get documents translated denied Mother meaningful participation. Mother persuasively testified that in October 2008 she became aware for the first time that Ms. Wilkinson's direct behavior consultation services had been terminated. The October 2008 IEP substantially changed Student's placement with respect to the amount of time he was in special education and general education. The April 6, 2009 BIP called for parental participation in its implementation, but a translated copy in Spanish was not provided. Parents expressed concerns regarding Student's behaviors and the substitute IA support during the 2008-2009 SY. Because District failed to translate any documents in Spanish for the 2008-2009 SY, Mother's ability to understand and monitor Student's program was limited. Parents were deprived of timely information in their native language and thereby, deprived of meaningful participation in the IEP process.

#### THE 2009-2010 SY

##### The March 22, 2010 and April 19, 2010 IEPs

89. On March 22, 2010, the IEP team met to develop Student's annual IEP. On April 19, 2010, the IEP team met to develop Student's transition IEP to transition him from elementary school to middle school. The information contained within the March 22, 2010 and April 19, 2010 IEPs, such as Student's PLOPs, is relevant to the issue of whether Student was provided a FAPE during the 2009-2010 SY pursuant to the April 7, 2009 IEP. The issues in this case do not extend to whether these IEPs offered or provided Student a FAPE. Accordingly, they are not considered in this decision for purposes of the FAPE analysis.

##### Progress in the 2009-2010 SY

90. Student contends that he was denied a FAPE in the areas of academics, language and behavior during the 2009-2010 SY. The 2010 PLOPs show that Student

was reading with comprehension at DRA level 26, which is fourth grade level. Student could form short paragraphs and used a graphic organizer to organize his thoughts. According to the 2010 PLOPs, Student could determine the prime factor of all numbers through 50, add and subtract fractions, change mixed numbers to fractions and find equivalent fractions.

91. As reported in the March 22, 2010 IEP, Student met his academic goals. While he could write paragraphs, according to the PLOPs, he continued to only write simple sentences and required prompting. A review of Student's work samples from the 2009-2010 SY show that there has been marked improvement in both the quality and the penmanship of his writing. Student contends that he is unable to write in cursive. However, he failed to establish that not being able to write in cursive resulted in lost educational benefit or was a denial of FAPE. Furthermore, Student failed to establish that the use of Handwriting Without Tears to improve his handwriting and the use of keyboarding denied him access to the curriculum. Accordingly, the evidence established that Student was provided meaningful educational benefit in the area of academics for the 2009-2010 SY through March 2010.

92. Of the four communication goals, Student made progress on three of them, two of which were recommended to be continued. There was no report on one of the communication goals. It was noted that Student required substantial prompting. The goals do not provide sufficient information to determine the level of progress Student made in the area of communication. Ms. Jensen, District's speech therapist, testified that Student met seven of his total 10 goals from the April 7, 2009 IEP. Student did not present evidence to show that he was denied meaningful educational benefit in the area of communication during the 2009-2010 SY.

93. By March 2010, Student had met one of his four behavior goals and had made meaningful progress toward the other three. For example Student mastered

identifying the feelings of others from pictures and was making progress towards generalizing it to real-life situations. Student had made more than 50 percent progress towards learning to raise his hand to answer questions and was working on asking for help.

94. During the March 22, 2010 IEP team meeting, District reported that Student's behavior had improved over the 2009-2010 SY. Parents stated that Student had been on Adderall, to address his ADHD, for the 2008-2009 and 2009-2010 SYs. Parents expressed concern and indicated that they may stop Student's Adderall. District informed Parents that if behaviors reappeared, District would develop behavior goals and a BIP.

95. The evidence established that Student's behavior over the 2009-2010 SY had improved. However, there were periods during the 2009-2010 SY where Student displayed aggressive, non-compliant, disruptive and disrespectful behaviors similar to those during the 2007-2008 and 2008-2009 SYs. Parents stated that for one week in February 2010 they took Student off Adderall. Parents contend that Student displayed behavior problems similar to the past school years and they put him back on the Adderall. During that week in February 2010, according to Student's report to Parents, he kicked another student in the genitals. District did not document the behavior incident. However, the incident and lack of documentation was discussed at the April 19, 2010 transition IEP team meeting. District did not deny that the incident occurred, only that it did not deem it worth documenting. Student was observed by Dr. Goncalves and Liz Lang, a speech therapist at Children's Hospital on March 25, 2010. Neither individual testified at hearing. However, their written account of the behaviors they observed show behaviors similar to those Student displayed during the 2007-2008 and 2008-2009 SYs. Dr. Grandison, Student's independent expert, observed him on May 13, 2010. Dr. Grandison's observations corroborate those of Ms. Lang and Dr. Goncalves.

96. District contends that Student was off his medication for ADHD during the March 25, 2010 and May 13, 2010 observations. Ms. Tsuei, Ms. Williams and Susan Krouskop, Student's IA during Dr. Grandison's observation, all stated that Student was not on Adderall. While they could not identify what the Adderall pill looked like or confirm that they knew Student had not taken the medication, they based their conclusions on how different Student acted on those days. According to Ms. Williams, when Student is not on his medication for ADHD he cannot sit still and is bouncing vigorously in his chair. Ms. Tsuei corroborated Ms. Williams' testimony of how Student presents much differently on days that he is not on the Adderall. Ms. Lang and Dr. Goncalves did not testify and Dr. Grandison could not confirm if Student was on Adderall on May 13, 2010. However, Dr. Grandison and Parents described Student as much calmer and more focused when he is on the medication.

97. Taking into consideration all of the evidence, Student behavior needs present differently depending upon whether he is on his medication. When Student is on medication, he has fewer behavior needs and District was able to meet those needs. However, when Student was not on the Adderall medication, he had greater behavior needs and the evidence established that District was not able to meet those needs. For example, when he was off Adderall for a week in February 2010, Student assaulted another student. Accordingly, for a portion of the 2009-2010 SY, District did not meet Student's behavior needs and he was denied a FAPE.

98. Evidence also established that in or around late fall of 2009, Student's permanent IA became ill, and Student required a substitute IA. Ms. Williams stated that she filled the position with a substitute IA in case the permanent IA for 2009-2010 SY was able to return. Ms. Williams kept Student's IA position filled with a substitute IA until May 2010, when it was determined that the permanent IA would not return. Therefore, for a substantial portion of the 2009-2010 SY, Student had a substitute IA, who did not

receive the same level of training as permanent IAs. Accordingly, for a significant portion of the 2009-2010 SY, Student's BIP was implemented by an untrained substitute IA.

#### Failure to Provide Translated IEPs in the 2009-2010 SY

99. Finally, the evidence established that after Ms. Williams ordered IEPs and other documents to be translated into Spanish in June 2009, Parents were provided all documents in Spanish. The evidence did not establish that District failed to timely provide IEP documents in Spanish to Parents during the 2009-2010 SY. Accordingly, Parents were not denied meaningful participation in the decision-making process during the 2009-2010 SY.

### LEGAL CONCLUSIONS

#### BURDEN OF PROOF

1. In this consolidated matter, both parties are petitioning parties. Each party carries the burden of proof as to the issues it has raised. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO ASSESS OR INAPPROPRIATELY ASSESSING STUDENT'S ACADEMIC, SPEECH AND LANGUAGE, OT, APE, BEHAVIOR AND MENTAL HEALTH NEEDS DURING THE 2007-2008, 2008-2009 AND 2009-2010 SYs, FROM OCTOBER 19, 2007, TO MARCH 22, 2010?

2. Under the Individuals with Disabilities Education Act (IDEA) and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The right to a FAPE arises only after a pupil is assessed and determined to be eligible for special education. (Ed. Code, § 56320.) A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. (Ed.

Code, § 56029, subds. (a)-(b).) All referrals for special education and related services shall initiate the assessment process. (Cal. Code Regs., tit. 5, § 3021, subd. (a).)

3. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) The pupil must be tested, where appropriate, in areas related to the suspected disability including, health and development, vision, hearing, language function, general intelligence, academic performance, social and emotional status, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed Code, § 56320, subd. (f).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child’s IEP. (34 C.F.R. § 300.304(b)(1)(ii).)

Assessment of Student’s OT, APE, academic, speech and language and mental health needs

4. Student contends that District failed to appropriately conduct an assessment for OT. Based upon Factual Findings 11 through 14, the evidence established that in March 2008, Ms. DeWitt conducted a complete OT assessment, examining Student’s fine motor, gross motor and sensory needs. She determined that Student had difficulty in handwriting and was using Handwriting Without Tears. She

recommended consultation services. Student did not establish that Ms. DeWitt's assessment failed to identify a particular fine or gross motor deficit. Accordingly, Student's OT needs were appropriately assessed by District and there was no showing that his needs changed or other circumstances called for reassessment in the subsequent SYs at issue.

5. Student contends that District should have conducted an APE assessment. As discussed in Factual Finding 16, Student was able to fully participate in regular physical education. Furthermore, he was an active child on the playground, able to successfully access his desired physical activities. Student's sole contention was that he had pain due to his Perthes. However, the evidence did not establish that Student was in pain at school to an extent that it prevented him from accessing general physical education or participating in physical play during lunch and recess. Student did not have any pain according to the June 4, 2008 OT assessment by CHO. Accordingly, Student did not establish that he required an assessment for APE.

6. Student contends that District failed to assess his needs in the areas of academics, speech and language and mental health. This contention is primarily based upon the findings of Dr. Grandison's assessment. However, as discussed in Factual Findings 5 through 10, Dr. Grandison's assessment did not identify an area of need that had not been identified by District's assessments from April of 2008. The evidence established that Dr. Grandison's results in cognitive functioning, attention and executive functioning, language, visual-spatial information and visual processing, academic functioning and autism, were similar to or mirrored the findings by District's April 2008 assessments. No evidence was presented to support that Student had mental health needs that warranted assessment. To the extent Student had behavior issues, those were identified and are related to his autism rather than to any mental health needs. Accordingly, Student was not denied a FAPE because District did not fail to assess or



appropriately assess Student's needs in the areas of academic, speech and language, OT, APE, and mental health during the 2007-2008, 2008-2009 and 2009-2010 SYs, from October 19, 2007, to March 22, 2010.

#### Failure to Appropriately Assess Behavioral Needs

7. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Federal law does not contain a specific definition of "behavioral intervention" and does not impose any specific requirements for how to conduct or implement a functional analysis assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Community Unit School Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.)

8. California has specific regulations regarding FAAs and BIPs. California has defined "behavioral intervention" as the systematic implementation of procedures that result in lasting positive changes in behavior through skill acquisition and the reduction of problematic behavior. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) "Behavioral interventions" are designed to provide the individual with greater access to a variety of community settings, social contacts and public events and to ensure placement in the least restrictive environment. (*Ibid.*)

9. A BIP is required when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student's IEP. A serious behavior problem is defined as behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional or behavioral approaches specified in a student's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (ab).) Under California regulations, the following criteria apply to BIPs: 1)

they must be developed by the IEP team, which must include the behavior intervention case manager; 2) they must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) they must be based on an FAA, be in the IEP and used in a systematic manner; 4) emergency interventions shall not be a substitute for a BIP; 5) behavioral interventions cannot cause pain or trauma; and 6) to the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

10. Upon determination by an IEP team that instructional or behavioral approaches in a Student's IEP have been ineffective, a functional analysis assessment may be conducted in order to develop a BIP. (Code Regs., tit. 5, § 3052, subd. (b).) An FAA includes: 1) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity; 2) systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; 3) systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior; 4) ecological analysis of the settings in which the behavior occurs most frequently by looking to factors such as the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities; 5) review of records for health and medical factors that may influence behaviors such as medication levels, sleep cycles, health, and diet; and 6) review of the history of the

behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)

11. Following the FAA, a report is required. The report must include: 1) a description of the nature and severity of the targeted behaviors in objective measurable terms; 2) a description of the targeted behaviors that includes baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs; 3) a description of the rate of alternative behaviors, their antecedents and consequences; and, 4) recommendations for consideration by the IEP team which may include a proposed BIP. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2).)

12. Student began displaying serious disruptive behaviors, including aggressive behaviors, while at Searles. As set forth in Factual Finding 40, in November 2007 Parents removed Student from the school setting. The November 27, 2007 IEP moved Student to Alvarado with a one-to-one trained IA and behavior specialist services added to his program. Based upon Factual Findings 42 and 43, at Alvarado Student continued to display the same behaviors he had at Searles. Here Student displayed assaultive behaviors towards staff and peers and displayed disruptive and non-compliant behaviors that were pervasive and maladaptive because he could not access his educational environment. Prior instructional and behavioral approaches contained in the May 25, 2007 IEP and its addendums of November 27, 2007, and January 29, 2008, including the May 25, 2007 BIP had been ineffective with Student.

13. Student's behaviors as at the time of the March 2008 assessment by Ms. Wilkinson, qualified him for a FAA. While District contends that it conducted a FBA of Student in March 2008, the evidence established that Ms. Wilkinson conducted a FAA under the Hughes Bill. In doing so, she failed to consider health or medical factors. The FBA report failed to provide the duration and intensity of each targeted behavior, to

identify the antecedent to each observed behavior and to provide a baseline for the behaviors. The report failed to analyze the antecedents and consequences that were maintaining the behaviors and to describe the rate of alternative behaviors and their antecedents and consequences. It failed to review the effectiveness of Student's prior BIP. Based upon Factual Findings 20 through 24 and Legal Conclusions 7 through 10, Ms. Wilkinson's FBA failed to meet the legal requirements for a FAA.

14. Ms. Wilkinson's report of March 15, 2007 failed to provide the nature and severity of the targeted behaviors in objective measurable terms. While it provided a chart of the behaviors, the frequency of the behaviors over a specific period of time, the duration of the behaviors and the intensity of the behaviors cannot be determined. The FBA report failed to identify alternative behaviors and provide their antecedents and consequences. Accordingly, her report following the FBA failed to meet the statutory requirements. As a result, Ms. Wilkinson presented a BIP dated March 17, 2008, that was substantially identical to the prior ineffective May 25, 2007 BIP, as updated on January 29, 2008.

DID THE DISTRICT DENY STUDENT A FAPE IN THE DISTRICT'S OFFERS CONTAINED IN STUDENT'S ANNUAL IEPs DATED MAY 25, 2007, APRIL 29, 2008, APRIL 7, 2009, AND THE ADDENDUMS TO SAID IEPs, BECAUSE THE OFFERED EDUCATIONAL PROGRAM AND ANNUAL GOALS FAILED TO MEET HIS UNIQUE NEEDS FROM OCTOBER 19, 2007, TO MARCH 22, 2010, IN THE AREAS OF ACADEMICS, SPEECH AND LANGUAGE, GROSS AND FINE MOTOR, BEHAVIOR AND MENTAL HEALTH NEEDS?

15. A FAPE is defined as appropriate special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No.*

1 *v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) The term “related services” (also known as designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

16. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) In *J.L. v. Mercer Island School District*, the Ninth Circuit found that the *Rowley* FAPE standard still applies and that the proper standard to determine whether a disabled child has received a FAPE is the “educational benefit” standard. (*Id.* at p. 951.) The Ninth Circuit has previously also referred to the educational benefit standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

17. The Ninth Circuit has endorsed the “snapshot” rule, explaining that the actions of the school cannot “be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams, supra*, 195 F.3d at 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School*

*District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*)

18. There are two parts to the legal analysis. First, the tribunal must determine whether the school system has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

19. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

#### Failure to Appropriately Support Behavioral Needs

20. Based on the FAA, interventions may include: 1) altering the antecedent event to prevent the occurrence of the behavior (e.g., providing choice, changing the setting, offering variety and a meaningful curriculum, removing environmental pollutants such as excessive noise or crowding, establishing a predictable routine for the individual); 2) teaching alternative behaviors that produce the same consequences as the inappropriate behavior (e.g., teaching the individual to make requests or protests using socially acceptable behaviors, teaching the individual to participate with

alternative communication modes as a substitute for socially unacceptable attention-getting behaviors, providing the individual with activities that are physically stimulating as alternatives for stereotypic, self-stimulatory behaviors); 3) teaching adaptive behaviors (e.g., choice-making, self-management, relaxation techniques, and general skill development) which ameliorate negative conditions that promote the display of inappropriate behaviors; and 4) manipulating the consequences for the display of targeted inappropriate behaviors and alternative, acceptable behaviors so that it is the alternative behaviors that more effectively produce desired outcomes (i.e., positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behaviors). (Cal. Code Regs., tit. 5, § 3052, subd. (d).) Acceptable responses to the targeted behaviors are: 1) the behavior is ignored, but not the individual; 2) the individual is verbally or verbally and physically redirected to an activity; 3) the individual is provided with feedback (e.g., "You are talking too loudly"); 4) the message of the behavior is acknowledged (e.g., "You are having a hard time with your work"); or 5) a brief, physical prompt is provided to interrupt or prevent aggression, self-abuse, or property destruction. (Cal. Code Regs., tit. 5, § 3052, subd. (e).)

21. Here, Student has not challenged whether District's March 17, 2008 BIP, as amended on April 29, 2008 and the April 6, 2009 updated BIP, as amended on April 7, 2009, met the procedural requirements regarding the requisite contents of the BIP. Student contends that the BIP was not successful in providing a FAPE because he did not make meaningful progress. Furthermore, Student contends that the IEPs failed to offer appropriate goals to meet his behavioral needs.

22. As determined above, District's March 2008 FBA was defective and it resulted in the development of a BIP on March 17, 2008, that was substantially identical to the BIP developed on May 25, 2007, and modified on January 29, 2008. District failed to develop behavior goals based upon the March 2008 FBA and BIP. As set forth in

Factual Finding 60, Student did not make meaningful progress in the area of behaviors for the 2007-2008 SY. District's contention that Student was progressing and District adjusted its placement for Student as he progressed is not persuasive. Student displayed the same aggressive, disruptive and inappropriate behaviors at the end of the 2007-2008 SY as he did at when he first entered Alvarado. Finally, Ms. Moriuchi testified credibly that she did not feel Student made progress behaviorally. Accordingly, Student was denied a FAPE for the 2007-2008 SY in the area of behavior needs.

23. For the 2008-2009 SY District failed to develop measurable behavioral goals for Student until the April 7, 2009 IEP. Furthermore, as set forth in Factual Findings 67 and 68, for at least two months of the SY, Student had an untrained IA who did not implement the BIP. By the time of the April 6, 2009 BIP update, Student was still displaying the same types of behaviors as he displayed in the 2007-2008 SY. Based upon District's failure to develop measurable behavior goals for the 2008-2009 SY, and as set forth in Factual Findings 55 and 81, Student failure to make meaningful progress in the area of behavior, Student was denied a FAPE for the 2008-2009 SY in the area of behavior.

24. During the 2009-2010 SY, based upon Factual Finding 93, Student met one behavior goal and made progress towards the other three. However, District continued to implement an ineffective BIP. Furthermore, as set forth in Factual Finding 98, for a substantial portion of the SY District failed to provide a trained IA. The evidence established that during the 2009-2010 SY when Student was taking Adderall, he displayed fewer behavior needs and District was able to address them with the use of the BIP and the IA. However, when Student was not taking his Adderall, his behaviors were disruptive and similar to those he had displayed in the 2007-2008 and 2008-2009 SYs. According to District witnesses, his behavior was markedly different, to the point where he could not remain seated. During these times, Student was not able to access



his educational environment and District was not able to meet his behavioral needs. Accordingly, for a portion of the 2009-2010 SY, when Student was not taking Adderall, he was denied a FAPE in the area of behavior.

#### Failure to Address Academic Needs

25. Based upon Factual Finding 59, the evidence established that Student did not make progress in reading during the 2007-2008 SY. His DRA level was 14 at the time of the May 25, 2007 IEP meeting. By January 29, 2008, District knew that Student had dropped to DRA level 8. District did not review or amend the annual goals for reading. Student continued to struggle with reading during the 2007-2008 SY. Ms. Moriuchi stated that at the end of the 2007-2008 SY, Student had not made progress in reading. Accordingly, the evidence established that for the 2007-2008 SY, Student was denied a FAPE the area of reading.

26. At the time of the May 25, 2007 IEP, Student could write simple sentences. Based upon Factual Finding 59, by January 29, 2008, Student was still writing simple sentences. At the time of the April 29, 2008 IEP meeting, Student was still writing at the same level. At hearing, Ms. Moriuchi established that Student had not made progress in writing. Ms. Moriuchi's testimony was persuasive in establishing that Student did not make progress in writing during the 2007-2008 SY. Accordingly, the evidence established that for the 2007-2008 SY, Student was denied a FAPE the area writing.

27. For the 2008-2009 SY, the evidence established that Student did not make meaningful progress in writing. Based upon Factual Finding 80, by the time of the April 7, 2009 IEP team meeting, Student was still only able to write simple sentences and could not write a single paragraph. Accordingly, the evidence established that Student was denied a FAPE for the 2008-2009 SY because he did not receive a meaningful educational benefit in the area of writing.

28. For the 2008-2009 SY, the evidence did not establish that Student was denied a FAPE in reading. As set forth in Factual Finding 79, Student's DRA level increased. The April 7, 2009 IEP found that Student was reading at DRA level 22, which was second grade reading equivalency. Student did not establish that this level of progress was not meaningful educational benefit.

29. Based upon Factual Findings 90 and 91, the evidence established that Student met all of his academic goals for the 2009-2010 SY to March 2010. The evidence established that Student's writing improved in both content and penmanship. Student contends that he was denied a FAPE because he was writing in print, could not use cursive and could not sign his name. However, as set forth in Factual Finding 91, Student did not establish that writing in print, using a keyboard and not being able to use cursive denied Student a FAPE in the area of writing. Student did not present evidence to show that he did not receive meaningful educational benefit in academics during the relevant portion of the 2009-2010 SY.

#### Failure to Address Attention Deficits

30. During the hearing and in his closing brief, Student contends that District failed to assess his ADHD. However, this issue was not specifically identified for hearing. To the extent that Student had attention issues due to his impulsivity and hyperactivity those were appropriately identified in Ms. Ortiz's assessment of March 2008. Student did not raise an issue of whether he was denied a FAPE because District failed to develop measurable goals in the area of attention during the relevant SYs. Accordingly, the issue has not been considered in this decision.

DID DISTRICT'S FAILURE TO TIMELY TRANSLATE IEP DOCUMENTS FROM ENGLISH TO SPANISH DURING THE 2007-2008, 2008-2009 AND 2009-2010 SYs, FROM OCTOBER 19, 2007, TO MARCH 22, 2010, DENY PARENTS THE OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE DECISION-MAKING PROCESS, RESULTING IN A DENIAL OF FAPE?

31. Student has alleged a procedural violation of his Parents right to meaningful participation in the decision-making process. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has 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].)

32. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement or related services. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526.)

33. Local educational agencies “shall take any action necessary to ensure that the parent or guardian understands the proceedings at a meeting, including arranging for an interpreter for parents or guardians . . . whose native language is other than English.” (Ed. Code, § 56341.5, subd. (i); see also 34 C.F.R. § 300.322(e) [same].) The local educational agency shall also “give the parent or guardian a copy of the individualized education program, at no cost.” (Ed. Code, § 56341.5, subd. (j); see also 34 C.F.R. § 300.322(f) [same].) California has clarified that the obligation to ensure that a parent or guardian understands the proceedings extends to the IEP documents themselves, which must be provided to the parent in his or her primary language upon request. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) Finally, informed consent is defined as consent obtained after the parent has been informed of all information relevant to the activity for which consent is sought in his or her native language. (Ed. Code, § 56021.1, subd. (a).)

34. Student contends that Parents did not receive copies of IEPs in Spanish for the 2007-2008 and 2008-2009 SYs, until after their written complaint in May 2009. District contends that Parents were not provided copies of IEPs in Spanish only for the time period in which Student moved to Hillview until, June 24, 2009, when Ms. Williams ordered all IEPs and other documents to be translated. However, Ms. Williams could not confirm if IEPs for the 2007-2008 SY were or were not timely translated for Parents. Similarly, Ms. Ogondjo could not confirm whether the entire May 25, 2007 IEP was translated and when. Mother persuasively testified that she was not provided copies of IEPs during the 2007-2008 and 2008-2009 SYs. Based upon Factual Findings 62 through 64 and 82, Parents were not provided copies of IEP documents in Spanish during both the 2007-2008 and the 2008-2009 SYs. Therefore, District committed a procedural violation of the IDEA.

35. District contends that the procedural violation does not amount to a substantive denial of FAPE because it provided translators at IEP team meetings and

Parents participated in the discussions in the IEP meetings such that they were not denied a meaningful participation in the development of Student's educational program. District also asserts that Mother is proficient in English to the extent that she understands the English version of the IEP documents. District's contentions fail.

36. The evidence did not establish that Mother understood English to the level District attributes to her abilities. The evidence did establish that Parents participated in the IEP meetings with the assistance of translation provided by District and individuals such as Dr. Goncalves. However, Parents' ability to follow some or all of the discussion in the IEP team meetings does not ensure that Parents have had meaningful participation in the development of the IEP if Parents are not provided a copy of the IEP in their native language. As set forth in Legal Conclusion 33, California requires a school district to provide copies of IEPs in the native language of the parents if requested. Furthermore, informed consent is only achieved once the parent is informed of all relevant information in their native language. In cases where parents are non-English speaking individuals, if school districts could meet the requirement of ensuring meaningful participation by only providing a translator at the meeting, the purpose of the law requiring translation of documents would be rendered meaningless. Parents are not required to try to remember everything discussed or decided upon at an IEP meeting, and are entitled to read and review the documents themselves.

37. As discussed in Legal Conclusion 32, Parents are entitled to a written offer of the placement and services District proposes for Student. One of the purposes of that written offer is so that having a written offer assists Parents in presenting complaints with respect to any matter relating to the educational placement of Student. The purpose would be defeated if Parents were not provided the written offer in their native language and in a timely manner. As set forth in Factual Findings 64, 87 and 88, Mother stated that because she did not have Student's IEPs in Spanish she was unable to

understand what had happened in the IEP team meetings. After the IEP meetings, she had to continue to rely upon other individuals to interpret for her what the IEP documents said. Accordingly, the failure to provide IEPs during the 2007-2008 and 2008-2009 SYs resulted in a denial of FAPE because it denied Parents meaningful participation in the decision-making process.

38. The evidence did not establish that District failed to timely translate IEP documents for the 2009-2010 SY to March 2010. Accordingly, a determination of whether Parents were denied meaningful participation because IEP documents were not translated into Spanish for the 2009-2010 SY is not necessary.

#### DID THE DISTRICT OFFER STUDENT A FAPE PURSUANT TO THE APRIL 7, 2009 IEP?

39. In the April 7, 2009 IEP, District identified Student as having areas of need in reading, writing, math, communication, social skills and behavior. As set forth in Legal Conclusion 24, Student was denied a FAPE in the area of behavior for the 2009-2010 SY because his BIP and IA support could not meet his behavioral needs when he was not on Adderall. Accordingly, District's offer in the April 7, 2009 IEP to eliminate Student's BIP and one-to-one IA support did not offer Student a FAPE.

#### REMEDIES

40. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.)

41. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE

and (2) the private placement or services are determined to be proper under the IDEA. (*School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996]; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents are not required to have procured an exact proper placement under the IDEA in order to be entitled to reimbursement. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir. 1986) 79 F.2d 1153, 1161.)

42. A district may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361]; *Parents of Student . v. Puyallup School District No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 [*Puyallup*].) Compensatory education is an equitable remedy. (*Id., supra*, at p. 1497.) The law does not require that day-for-day compensation be awarded for time missed. (*Ibid.*) Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid.*)

43. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) When determining an award of compensatory education, the inquiry must be fact-specific. (*Ibid.*)

#### Reimbursement for Dr. Grandison's Assessment

44. Here, Student seeks reimbursement for Dr. Grandison's assessment. Student does not seek an IEE, but rather equitable reimbursement for District alleged failure to properly asses Student. As set forth in Legal Conclusion 41, reimbursement

may be awarded as an equitable remedy where a school district has failed to provide a student with FAPE. However, as discussed in Factual Finding 10 and Legal Conclusion 6, Dr. Grandison's assessment did not reveal information regarding Student that had not already been identified by District's assessments. Therefore, Student did not establish that District had denied him a FAPE by failing to assess in all areas of suspected disability. Accordingly, Student is not entitled to reimbursement for Dr. Grandison's assessment.

#### Placement at CLC

45. As set forth in Legal Conclusions 22 through 24, Student was denied a FAPE for the 2007-2008, 2008-2009 and 2009-2010 SYs with respect to his behavior needs. Based upon Legal Conclusions 25 through 27, Student was denied a FAPE for the 2007-2008 and 2008-2009 SYs in the area of academics. Finally, based upon Legal Conclusions 34 through 37, Student was denied a FAPE for the 2007-2008 and 2008-2009 SYs because Parents were denied meaningful participation in the decision-making process.

46. As a remedy, Student seeks prospective placement at CLC. However, Student did not demonstrate that his needs can only be met in a nonpublic school setting. Nor did Student establish that the failures by District require placement in a more restrictive setting. The only evidence presented regarding CLC was through Dr. Grandison, whose observation of Student's setting at Hillview was given little weight. Dr. Grandison failed to consider any other placement for Student. While she observed the middle school, she failed to discuss with Parents or District whether middle school required modification or could be modified to provide Student compensatory education for the prior denial of FAPE. Accordingly, Student did not establish that placement at CLC is an appropriate remedy.



## Compensatory Education and Assessment

47. Several witnesses testified that they had received behavior intervention training and training regarding autism from Dr. Partington of BAI. Based upon the testimony, these trainings were provided through a contract with BAI by District. Testimony also established that District has contracted with Sarah Trautman-Eslinger Consultants (STE) to provide similar training to its staff. Student is going into a middle school environment for the 2010-2011 SY. He has been denied a FAPE in the area of behavior intervention because District's behaviorist failed to conduct an appropriate FBA, the BIP did not meet Student's needs, and District provided untrained staff to implement the BIP. Having considered all of the evidence and the conduct of the parties, the appropriate equitable remedy is to order that District shall contract with BAI to conduct a behavioral assessment of Student in his middle school environment and for District to implement the recommendations of the assessor, if any, including providing appropriately trained staff to implement the recommendations. If BAI is unavailable to timely provide this compensatory service, District may contract with STE Consultants to provide the same compensatory remedy.

48. Student has been denied a FAPE in the area of reading and writing. Having considered all of the evidence and the conduct of the parties, the appropriate equitable remedy is to order compensatory education in the areas of reading and writing. The specifics of the remedy are set forth below. Neither party has provided guidance on an equitable compensatory remedy in the areas of reading and writing. The remedy ordered below has taken into consideration the denial of FAPE, the progress Student made during the time he was not denied a FAPE, the fact that Student will continue to receive special education services in academics in 2010-2011 SY as part of his prospective placement and Student's weekly schedule of prospective special education, regular education and related services.

49. Student was denied a FAPE because Parents were denied meaningful participation in the development of Student's educational program for the 2007-2008 and 2008-2009 SYs. However, Student did not identify a remedy for this denial of FAPE. Furthermore, District provided copies of all documents translated in Spanish in October 2009, and has continued to translate all IEPs into Spanish since the beginning of the 2009-2010 SY, onward. Accordingly, District has corrected the violation and no specific remedy is ordered for this denial of FAPE. However, the denial of Parents' meaningful participation in past IEPs has been considered in fashioning the remedies ordered herein.

## ORDER

1. Within 30 days from the date of this decision, District shall contract with BAI to conduct a behavioral assessment of Student. The assessment shall examine Student's behavior needs in the middle school environment upon Student beginning the 2010-2011 SY in that environment. The assessment shall take into consideration Student's attention, language and social deficits as they may impact his behaviors and shall consider his need for IA support. District shall review the assessment report with Parents and shall implement the recommendations of the assessor, if any, including providing trained staff. District shall implement the recommendations of the assessor within 20 days of the assessment report. If IA support is needed, District shall ensure that at least two permanent IAs, trained according to the recommendations, are available to Student, so that if an IA is absent, the back up IA is already trained in Student's program.

District shall ensure that the assessment, review of the report and implementation of the recommendations, if any, are carried out within 60 days from the start of the 2010-2011 SY. District shall contract with BAI to provide behavior supervision, if recommended, or provide an equally qualified behaviorist for supervision.

However, District shall not use Ms. Wilkinson to implement any recommendations from BAI. Finally, if BAI is unavailable to provide the compensatory remedy, District shall contract with STE Consultants to provide the same service. If STE Consultants is unavailable, District shall provide the same service through another nonpublic agency with qualifications equivalent to BAI or STE Consultants.

2. District shall provide Student with 50 hours of reading instruction and 50 hours of writing instruction as compensatory education. These services shall be provided by a credentialed special education teacher with training and experience in remediating reading and writing. A resource specialist such as Ms. Smith-Harrison would be an appropriate credentialed special education teacher. The hours shall be completed by the end of the 2010-2011 SY and be provided at a reasonable rate of frequency and duration. Parents shall make Student available to receive the compensatory education.

3. All of Student's remaining requests for relief are denied.

4. District's request to implement the planned elimination of Student's one-to-one IA service pursuant to the April 7, 2009 IEP is denied in part. The determination of whether Student requires an IA and for what portions of the day, shall be determined by the assessment ordered above.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed in part on Student's Issue Nos. 1, 2 and 3. District prevailed partially on Student's Issue Nos. 1, 2 and 3. Student and District prevailed in part on the sole issue heard and decided for District.

## NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this decision. The parties are advised that they have the right to appeal this decision to a court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. (Ed. Code, § 56505 subd. (k).)

Dated: July 14, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
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Bob N. Varma

Administrative Law Judge

Office of Administrative Hearings