

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008100500

DECISION

The due process hearing in this matter was held before Administrative Law Judge (ALJ) Darrell Lepkowsky of the Office of Administrative Hearings (OAH), State of California, in Garden Grove, California, on December 7, 8, 9, and 10, 2009, and in Laguna Hills, California, on March 1, 2, 3, 4, 9, 10, and 11, 2010. A certified Spanish language interpreter was present on each day of the hearing to interpret for Student's parents (Parents).

Attorney Maureen Graves represented Student and Parents. She was accompanied on most days by Attorney John Nolte. Student's mother (Mother) was present each day of the hearing. Student's father (Father) attended about half of the hearing as well. Student did not attend the hearing.

Attorney S. Daniel Harbottle represented the Garden Grove Unified School District (District). He was accompanied each day by Dr. Gary Lewis, a District Assistant Superintendent.

Student filed a due process hearing request (complaint) in the instant case on October 15, 2008. OAH granted the parties' joint motion for continuance on November 26, 2008, in what was the first of numerous continuances in this matter. On May 28,

2009, OAH granted Student's motion to amend his complaint. During the prehearing conference (PHC) on October 15, 2009, Student requested permission to file a second amended complaint to encompass additional issues he had raised in his prehearing conference statement. The District did not oppose the amendment, subject to its ability to object if Student raised issues at hearing not discussed at the PHC and subject to continuing the hearing from October 19, 2009, to October 26, 2009, so that it could review the complaint. The District also requested a continuance in order to review Student's evidence binders, which then amounted to more than 3200 pages of documents. Student agreed to the continuance if he was given leave to file the amended complaint. The District and Student stipulated to waiving the resolution session with regard to the amended complaint. Student filed his amended complaint on October 15, 2009. OAH thereafter granted the parties' joint motion to continue the matter, based upon the illness of Student's attorney, until December 7, 2009, at which time the hearing commenced.

At hearing, the ALJ received oral and documentary evidence. The following witnesses testified: Parents, Dr. Gary Lewis, Susan McClellan, Richard Cochrane, Susan Dunaway, Kathleen Kearney-Porter, William J. Gates II, Dean Jacobs, Adrien Kalfus-Diaz, Dr. Robin Steinberg-Epstein, Jessica St. Clair, Tricia Chinn, Dr. Caroline Bailey, Cayce Korhonen, Dr. Patricia Schneider-Zioga, Rhonda Krietemeyer, Dr. Gabriela Mafi, Sean Sailors, and Dr. Michael Keller.

At the request of the parties, the record remained open for the submission of written closing arguments. Student requested, and was granted, two continuances for the filing of written closing argument based upon the illness of his attorney. The parties

timely filed their written closing arguments¹ on May 10, 2010, at which time the ALJ closed the record and the matter was submitted.

ISSUES²

Whether the District has denied Student a free appropriate public education (FAPE) since October 15, 2006, by:

- I. Failing to provide appropriate goals and failing to offer adequate services or an appropriate placement capable of meeting Student's needs in the following areas:
 - a. Reading and written language;
 - b. Social interaction;
 - c. Behavior;
 - d. Speech, language, and communication;

¹ The ALJ ordered that written closing argument not exceed 35 pages, double-spaced. Student's brief contains single-spaced footnotes on 32 of the 35 pages of his brief; approximately 20 of the 32 pages contain footnotes that comprise from one-third to over one-half of each page. The majority of the footnotes expand on the argument made on the respective page. Student, in effect, has improperly submitted a brief well in excess of the page limitation directed by the ALJ.

² Student also raised an issue that asserted that the District had denied him a FAPE by failing to provide him with in-home applied behavioral analysis services as well as corresponding parent training. However, Student failed to present any evidence on this issue at hearing and failed to argue it in his brief. This Decision therefore does not address the issue of in-home ABA services.

- e. Mathematics;
 - f. Social Sciences;
 - g. Natural Sciences;
 - h. Functional/adaptive/self-help skills.
- II. Failing to allow him adequate access to the general education curriculum by restricting Student's ability to take elective courses.
 - III. Failing to provide him with an education in the least restrictive environment.
 - IV. Failing to provide Student with adequate supports in the general education environment.
 - V. Failing or refusing to provide critical information regarding District staff's incapacity or unwillingness to provide Student with a FAPE.
 - VI. Predetermining its individualized educational program (IEP) offers and refusing to consider a full continuum of services by consistently ruling out important options that should have been considered for Student.
 - VII. Failing to adequately assess him.
 - VIII. Failing to fund an independent educational evaluation (IEE) for Student when the District did not take steps to establish the adequacy of its own assessment.
 - IX. Failing to offer or provide an adequate program during extended school years 2008 and 2009.
 - X. Failing to consider or meet his needs related to transition to postsecondary outcomes.
 - XI. Failing to consider his needs as an English Language Learner.

- XII. Failing to appropriately assess or meet his needs with regard to assistive technology to compensate for Student's deficits in reading, handwriting, and organization.

PROCEDURAL ISSUES

On October 20, 2009, a year after filing his original complaint, Student served the District with six subpoenas duces tecum seeking records in addition to the some 3500 pages of documentation he had served on the District as potential evidence in this case. The District moved to quash the subpoenas. In an Order dated November 4, 2009, the ALJ partially granted and partially denied the motion to quash, ordering the District to produce certain of the subpoenaed records prior to the start of the first day of hearing on December 7, 2009, which the District did just before the hearing started. The ALJ heard approximately three-and-a-half days of testimony beginning on December 7. Based upon conflicts in the schedules of both attorneys, and at their joint request, the ALJ thereafter continued the hearing until March 1, 2010.

On February 18, 2010, prior to the recommencement of the hearing, Student served another set of documents on the District totaling approximately 1100 pages, and consisting of 32 additional exhibits. Of the 32 new exhibits, only approximately five of them were based upon documents produced by the District on December 7, 2009, in response to Student's subpoenas duces tecum. On February 26, 2010, the District filed a motion to exclude the 32 documents. Student filed an opposition to the motion on March 3, 2010. After reviewing the pleadings, hearing additional argument, and reviewing the documents in question, the ALJ denied the District's motion to exclude as it pertained to the documents the District produced pursuant to Student's subpoenas duces tecum, and denied the motion as to any document the Student would seek to admit as impeachment evidence. She granted the motion to exclude as to all other documents. Ultimately, some of the documents not excluded were received into

evidence and others were not either because Student did not seek to move them into evidence or based upon the ALJ sustaining the District's objection to a document based upon lack of relevance or lack of foundation for the document.

CONTENTIONS OF THE PARTIES

The time period covered by this case begins on October 15, 2006, two years before Student filed his original complaint, when he had just begun fourth grade. Student generally contends that the District failed to offer him a FAPE from then until Parents privately placed him at what was, at the time he started, a state-certified non-public school. Student contests almost every aspect of his IEPs over the last three-and-a-half years he attended a District school. However, the focal point of his case is that the District failed to implement with fidelity the evidence-based reading intervention program it provided to Student. As a result, Student contends that he failed to demonstrate meaningful progress in the curriculum. Student also contends that the District's failure to offer him special education placement for summer school also deprived him of a FAPE. Student asserts that his Parents are entitled to reimbursement for the cost of providing him with a reading intervention program during summer 2008 and for the cost of tuition at his private school for the 2009 – 2010 school year. Student also contends that the District should be ordered to provide him with some 970 hours of compensatory education and that it should be ordered to prospectively fund placement at his private school for the 2010 – 2011 school year.

The District responds that it provided Student at all times with a FAPE, that Student made legally sufficient progress in the curriculum, and that Student did not require special education summer school placement. The District argues that it properly implemented its reading intervention program and that even if it did not, the manner of implementation is part of the methodology it chose to provide reading intervention to

Student and, as a methodology, is solely within the District's discretion. The District therefore contends Student is not entitled to any of the relief he requests.

As elaborated below, this decision finds that Student has met his burden of proof that the District's language program eventually failed to provide him with a FAPE once the District should have realized that Student was not making legally sufficient progress in the curriculum. The decision also finds that the District should have provided special education summer school or some type of reading intervention program to Student for extended school year 2008. Student is therefore entitled to an award of compensatory education and Parents to reimbursement for their out-of-pocket costs for the reading intervention program they self-funded in summer 2008. In all other respects, this decision finds that Student has not met his burden of persuasion and therefore is not entitled to any of the other relief he has requested.

FACTUAL FINDINGS

JURISDICTION AND FACTUAL BACKGROUND

1. Student is presently thirteen years old. He lives with Parents within the District's boundaries. Student has a history of challenges with oral communication, with reading and with written language. His greatest academic challenges have been in subject areas that require phonemic awareness, decoding skills, and language processing skills. Parents are both native Spanish-speakers and Spanish is the primary language spoken in Student's home. As a result, and based on his scores on the California English Language Development Test (CELDT), Student is designated as an English Language Learner (ELL) who qualifies for and has received English Language Development (ELD) instruction at school. Student has progressed from grade to grade at a normal pace.

2. Student attended Lawrence Elementary School in the District for his entire elementary school career. For school year 2009 – 2010, Student was scheduled to attend Alamitos Intermediate School in the District. Instead, Parents privately placed him at the Prentice School where Student was enrolled at all times during the hearing in this matter.

3. The District originally placed Student in special education in May 2003 when he was in kindergarten. Student's initial eligibility classification was speech/language impairment with a secondary classification under specific learning disability. The District has provided Student with speech and language services and with English language arts (ELA) support through its resource specialist program (RSP) since kindergarten. RSP is generally delivered to students through a "pull-out" model. This means the student leaves his or her general education classroom and receives RSP instruction in a different room with an RSP teacher. RSP can be given individually or in groups of varying sizes, although the RSP group is usually much smaller than the number of children found in a general education classroom. The District generally used the pull-out model with Student since he began receiving RSP support.

4. In May 2004, while he was in first grade, Student's private psychiatrist at Kaiser Permanente Hospital found that Student met the criteria for autistic disorder. Based upon this diagnosis, Student's IEP team added autism as a secondary special education eligibility category for Student. The IEP team removed the designation of speech and language impairment as a disability category for Student when he was in fourth grade. His eligibility classifications have continued to be specific learning disability as the primary category with autism indicated as a secondary disability since then.

5. In October 2004, Kaiser Permanente conducted a comprehensive assessment of Student which included a medical evaluation by a physician and a

psychological evaluation by a clinical psychologist. The physician found that Student did not meet the diagnostic criteria for autism spectrum disorder. The clinical psychologist found that Student met the diagnostic criteria for a mixed receptive and expressive speech and language disorder and also found that there were potential indicators of ADHD. Student eventually began to take medication to address his ADHD symptoms.

6. The Kaiser clinical psychologist also administered the Wechsler Intelligence Scale for Children, Third Edition (WISC-III) to Student to assess his verbal and non-verbal problem solving skills. The WISC-III is a broad-based intelligence test which yields both verbal and performance scores, as well as a full-scale estimate of intelligence. Student's full-scale intelligence quotient (FSIQ) was 101, in the middle of the average range. However, as early testing by the District had also indicated, there was a considerable difference between Student's scores on the verbal and the performance portions of the WISC-III. On the verbal portion, Student's score was 72, which placed him in the below average range. On the performance portion of the assessment, Student scored a 135, which placed him in the superior range. The Kaiser psychologist's report stated that this discrepancy was greater than four standard deviations (a standard deviation is 15 points) and may have been the most significant differential between verbal and performance IQ that he had seen in his professional career.

7. In November 2004, Student's IEP team met and discussed the differing opinions of the Kaiser Permanente medical providers regarding whether Student was on the autism spectrum. After discussions with and input from Parents, the team retained autism as a secondary eligibility category for Student.

8. Student's IEP team met again in January 2005 to discuss his sensory processing and other occupational therapy needs. The team also discussed whether Student, who was spending approximately 49 percent of his time outside of his general education classroom, required a more restrictive placement such as a special day class

(SDC). However, Mother opposed the placement believing that the other students in the SDC would have much lower academic skills than Student. Based upon her input and concerns, the IEP team maintained Student's placement in general education with RSP supports.

9. Student's annual IEP meeting during second grade took place in May 2005. The IEP team noted that Student was making friends although communication was still a challenge for him. The entire IEP team agreed that Student should continue to remain in general education with RSP supports as well as with the related services he was receiving. As he did in first grade, during second grade Student met or exceeded the expected standards for mathematics but was behind grade level expectations for reading and language arts.

10. At the request of Parents, the IEP team convened in December 2005, during the middle of Student's third grade year, to discuss Student's placement. Parents were concerned that Student was not making progress that year and that it was taking him too much time to complete homework. Mother also expressed concerns that other children did not want to play with him at recess. However, Student's RSP teacher, Susan Dunaway, noted that she had seen progress since the beginning of the school year and that Student's vocabulary was increasing.

STUDENT'S 2006 TRIENNIAL PSYCHO-EDUCATIONAL ASSESSMENT AND APRIL 3, 2006 IEP³

11. Dr. Michael Keller, who is a District school psychologist, is licensed as an educational psychologist, and who has a doctorate in education, administered Student's

³ Student's April 3, 2006 IEP was the operative IEP for the majority of the 2006 – 2007 school year, when Student was in fourth grade. The time frame covered by Student's complaint starts on October 15, 2006, soon after the school year began.

triennial psycho-educational assessment⁴ over four days in February and March 2006 during Student's second semester of third grade. The purpose of the assessment was to assess Student's special education placement and services with respect to his present levels of performance and progress in his program to determine if Student's educational program needed to be modified.

12. Dr. Keller's assessment consisted of a review of Student's records, a report from Student's third grade teacher, observations of Student, and the administration of three standardized assessments: the Wechsler Individual Achievement Test, Second Edition (WIAT-II); the Test of Nonverbal Intelligence, Third Edition (TONI-3); and the Comprehensive Test of Phonological Processing (CTOPP).

13. Dr. Keller noted that Student's native language was Spanish. Although Student's earlier scores on the CELDT had increased from beginning to intermediate to early intermediate, his most recent scores indicated Student's English proficiency again to be in the beginning range. Dr. Keller attributed Student's scores to his difficulty with speech and language skills rather than to any difficulty in acquiring English language skills. This was based on the fact that Student demonstrated well-developed basic interpersonal communication skills, which were the foundation for higher level thinking in English. Student also demonstrated well-developed cognitive academic language proficiency in English, specifically in the areas of math and math reasoning.

14. During the course of his assessment, Dr. Keller noted that Student had noticeable articulation difficulty when conversing, often speaking in phrases or short

⁴ The terms "assessment" and "evaluation" are synonyms. Federal statutes and regulations generally use the term "evaluation". California statutes and regulations generally use the term "assessment". This decision will use the term "assessment" (except when referring to an IEE) since that is the common usage in California.

sentences. However, Student's receptive language skills were well-developed, demonstrated by his ability to follow multiple step instructions during the assessments.

15. The TONI-3 is a language-free standardized assessment that measures reasoning skills. Dr. Keller selected this particular test because of Student's speech and language impairment at the time as well as because of his designation as an English Language Learner. The TONI-3 uses abstract/figural problems to solve that do not require verbal communication to administer. The student taking the test only needs the ability to identify an item that fits within a series of given shapes or objects. The TONI-3 only measures a portion of the competency involved in intelligence but the results of the test can be used to estimate intellectual functioning. Student's score on the TONI-3 was 121, in the superior range of intelligence when compared to same-age peers, indicating that Student continued to have strong non-verbal problem solving skills.

16. To assess Student's academic achievement in the areas of mathematics, reading skills, and written language, Dr. Keller reviewed Student's class work, received input from Student's teachers, interviewed and observed Student, and administered the WIAT-II, a standardized assessment that measures academic achievement.

17. In mathematics, Student's teachers indicated that he was performing at grade level. His difficulties stemmed from word problems, where he tended to rush through work. However, if Student read the word problem out loud with an adult he was more successful in solving the problem.

18. The mathematics portion of the WIAT-II consists of two subtests: numerical operations and math reasoning. Student scored a composite score of 105 on the two subtests which placed him right in the average range of students when compared to his peers.

19. With regard to reading, Student's teachers estimated that he was at the beginning first grade level although he was then in the second semester of third grade.

Student's reading fluency was below grade level and he only scored 50 percent correct in a test to identify sight reading words from a first grade, second trimester list.

Student's reading comprehension was highly impacted by his poor decoding skills.

20. The WIAT-II reading composite assessment contains three subtests: word reading, reading comprehension, and pseudo-word decoding. Student's composite score was 70, which is in the lower limits of the below average range when compared to same-age peers. Student's reading errors typically involved taking an initial consonant sound and then guessing the rest of the word. Student did this both on the word reading subtest, where he was asked to decode real words, and on the pseudo-word subtest, where he was asked to read made-up words. Poor performance on the pseudo-word subtest is highly associated with basic reading disabilities. On the reading comprehension subtest, Student was only successful extracting meaning from text when reading passages at the first grade level. When the reading passages approached the third grade level, Student had difficulty with both fluency and decoding accuracy.

21. Student's teachers noted that he was also only at first grade level overall in writing. While he could write a complete sentence, Student had difficulty formulating a paragraph. He tended to spell phonetically. Although he did well on initial spelling tests, Student would then forget how to spell the words.

22. To test written language skills, the WIAT-II uses two subtests: spelling and written expression. Student's composite score was 79, in the below average range. Student scored in the below average range on the spelling subtest. He scored in the low average range on the written expression subtest. While Student was able to generate good examples of words on a writing fluency task, he had difficulty when given sentences to combine. He could copy well from a given model, but his spelling errors increased dramatically without the written model. The final written expression task was for Student to write a paragraph about his favorite game. The majority of words in

Student's paragraph were written so incorrectly as to be unintelligible to another reader. Student, however, was able to decipher his own spelling.

23. Dr. Keller also assessed Student in behavioral functioning and social adaption, basing the assessment on teacher input and his own observations of Student using the Pupil Behavior Observation System (BOSS), which is an interval observational approach to assess a student's behavior relative to other children in the same class. The BOSS looks at student engagement in class as being active or passive compared with off-task behaviors either characterized as motor, verbal, or physical.

24. In class, Student was able to adequately follow directions and was generally cooperative and obedient. He had appropriate social interactions with peers and adults, followed playground rules, and coped well with conflict and stress. He had developed some friends, played in a group of boys at recess, and understood cause and effect in school and social situations. Student had a goal in that area and was meeting it. He completed his homework and adequately started and completed in-class assignments, particularly with regard to math. He generally demonstrated effort and worked independently in math. Student's weaknesses in class were with organization of materials, participating in discussions, and attending to instructions. He loved computers, but needed prompting to complete reading and writing tasks. However, Student did not demonstrate any extreme behaviors in class or elsewhere at school that required any intervention during third grade.

25. Dr. Keller observed Student in class for 30 minutes using the BOSS criteria. Student was generally engaged in the lesson; he was only off-task about 20 percent of the time. Although Student would call out frequently, spread his body across a large area, and sprawled his body on top of his desk a couple of times, and required several prompts to comply with the class activity, he was easily redirected to task. During the standardized testing, Student also had to be prompted to return to task.

26. To measure Student's processing abilities, Dr. Keller administered the CTOPP, which contains subtests to test phonological awareness, phonological memory, and rapid naming. Rapid naming testing requires the student to rapidly name objects, letters, colors or digits. It requires efficient retrieval of phonological information from long-term or permanent memory. Student scored 100 in rapid naming, placing him squarely within the average range when compared to his peers.

27. On the phonological awareness composite, which contains two subtests, Student scored 85, in the low average range when compared to his peers. Phonological awareness refers to a person's awareness of and access to the sound structure of oral language. It is an important skill in the development of overall reading skills and is a component of auditory processing. Student's score demonstrated a weakness in phonological awareness.

28. Student scored 73 in the phonological memory composite, placing him in the below average range. The composite contains subtests in memory for digits and non-word repetition. Phonological memory refers to coding information phonologically for temporary storage in working or short-term memory. Weaknesses in phonological memory, such as what Student demonstrates, can limit the ability to learn new written and spoken vocabulary.

29. Student was also assessed by an occupational therapist; his overall occupational therapy needs were not put at issue in the instant hearing. However, with regard to his fine motor skills, Student had improved in his ability to write legibly although he often reversed letters, something that was commensurate with his overall weakness in written expression skills.

30. Based upon Dr. Keller's assessment, Student continued to meet the criteria of the California Code of Regulations for a student with autistic-like behaviors. Student demonstrated a difficulty in his use of oral language for appropriate communication and

demonstrated a mild to moderate preoccupation with objects as well as occasional peculiar motor mannerisms. Dr. Keller also noted that there was some evidence that Student suffered from impaired social interaction, but that Student's school history and Dr. Keller's present assessment did not demonstrate clear evidence of these other autistic-like symptoms.

31. Student, however, demonstrated a concrete specific learning disability in the areas of basic reading skills, reading comprehension, and written expression due to an auditory processing disorder. He had a significant discrepancy between his estimated intellectual ability and his academic achievement in the areas of overall reading skills and written expression that was not due to other factors, such as Student's status as an ELL or any cultural differences. Based on his findings, Dr. Keller recommended that Student's IEP team place him in RSP to target skill development in areas of need. Dr. Keller also recommended consideration of a more restrictive placement if Student did not show progress in improving his reading skills.

32. Student's IEP team met on April 3, 2006, continuing the meeting on May 11, 2006, to simultaneously develop his triennial and annual IEP which would address the remainder of third grade and the majority of fourth grade for the upcoming 2006 – 2007 school year. As was routine, a Spanish language interpreter was present to assist Mother.

33. Student had been receiving occupational therapy (OT) services from a District occupational therapist as part of his previous IEP. Based upon her assessment of Student, the occupational therapist believed that Student no longer required OT intervention. The IEP discussed having the occupational therapist provide consultation in the classroom. The team originally recommended two consultation sessions. However, after considering input from Mother as well as from the occupational therapist, the team increased the consultations from two to four.

34. The IEP team reviewed Student's present levels of performance with regard to communication. A District speech and language pathologist (SLP) had also assessed Student in preparation for the triennial IEP team meeting. Student had been receiving three sessions of speech and language therapy a week based on his previous IEP: two individual and one group session, each 20 minutes long, for a total of 60 minutes per week. Mother expressed concerns about the amount of speech therapy, believing Student required more. She presented the report of an independent assessor whose recommendation was for two 30-minute speech therapy sessions a week. Student presented no evidence at hearing as to why the District's recommendations for three 20-minute sessions of speech did not address his needs or how the recommendations of his private assessor would have better addressed those needs. The IEP team decided to review speech and language issues at a continued IEP meeting when the District SLP, who was not present on April 3 due to illness, could review the independent report.

35. When the team reconvened on May 11, the SLP reviewed Student's progress on his previous goals. Student had met all the goals. He was able to make all letter sounds except "s." Although Student still had a frontal lisp, he was able to produce all other phonemes (which are the smallest phonetic unit in a language that is capable of conveying a distinction in meaning) age appropriately. Student was able to identify nouns and verbs in a sentence and write a simple paragraph after brainstorming. He had difficulty, however, with subject/verb agreement and with spelling. Mother indicated that Student read at home with her and with Father. Student was able to read every word and to understand what he was reading, but often mumbled when he read with Mother. The SLP, Nicole McLaughlin,⁵ felt that Student was capable of reading clearly if

⁵ Ms. McLaughlin did not testify at the hearing.

he put his mind to it. Ms. McLaughlin indicated to the IEP team that during her speech sessions with Student, in addition to articulation and receptive language goals, she was working with him on expressive vocabulary and grammar.

36. The IEP team also reviewed Student's present academic and functional skill levels. The team found that Student only knew kindergarten and first grade, first trimester sight words, that his reading fluency was low at 50 words per minute, that he had good phonemic awareness (demonstrated by his ability to rhyme words) but that he had not been able to pass the District's decoding test at any level. The District's informal decoding assessment is called the Comprehensive Literary Assessment or "CLA." At hearing, Susan Dunaway, Student's RSP teacher for all his seven years of elementary school, explained that the CLA results determine a student's instructional level for reading but not his independent reading level. An instructional level is the level at which a student can understand his textbooks. An independent reading level is the level at which a student is comfortable picking books for free reading. Generally, a student's instructional reading level is higher than his or her independent reading level. The CLA is not a normed, standardized test.

37. With regard to mathematics, the IEP team determined that Student was presently able to do third grade work in his general education classroom.

38. The IEP team also addressed Student's present levels with regard to self-help skills. The team noted that Student could tell time, care for his personal needs, and knew his birth date, phone number and part of his address. No one on the team indicated that Student was having behavior problems in class or having difficulties interacting with his classmates. Mother acknowledged that Student was becoming more interactive with peers at Boy Scouts and soccer and would ask other children if he was not sure what he was supposed to be doing.

39. The IEP team also discussed placement for Student. Mother was concerned about the upcoming 2006 – 2007 school year when Student would be in fourth grade. She felt that Student needed an aide in the general education classroom. At the same time, Mother expressed that she believed Student needed to be challenged more and should spend more time in the general education classroom. The school principal explained that there was already an additional teacher in class to help the students who needed added support. Additionally, the District team members explained that there was an aide from Student's RSP class who was going into his general educational classroom to give him support there as well. The District team members believed that an aide specifically assigned to Student would be too restrictive for him and that the additional aide support already being provided was sufficient to address his needs. Based upon Mother's concerns, the District IEP team members recommended meeting again the following October to review Student's progress and discuss whether he needed an individual aide. Mother agreed to this suggestion.

40. The IEP team also developed six annual goals for Student to enable him to be involved in and make progress in the general curriculum, and meet each of his other educational needs that resulted from his disability. The first goal addressed Student's area of need in reading, decoding, and word recognition. It was based on Student's present levels of performance, which had been derived from Dr. Keller's assessment, the input of Student's general education and RSP teacher, and Mother. The goal focused on working on increasing Student's reading fluency and vocabulary development.

41. Based upon Student's designation as an ELL and his CELDT score indicating that, overall he was then in the beginning range of English competency, the IEP team developed a reading and decoding goal for him in the area of English Language Development. The goal focused on addressing Student's ability to understand opposite words and synonyms, and define multiple meaning words. To address his

English language needs, the District also provided Student with specific ELD instruction in addition to his RSP class time and his general education class time.

42. The third goal developed by the IEP team was in the area of writing conventions. It called for Student to use a variety of written and oral English language convention skills in order to demonstrate mastery of correct grammar, spelling and sentence structure.

43. Based upon Student's difficulty in maintaining attention to classroom activities he found challenging, the IEP team developed a sensory processing goal for him that was related to attention. The goal called for the classroom staff to utilize sensory strategies to address Student's attention issues. As stated above, the IEP directed the occupational therapist to consult with Student's teachers on his sensory issues. The teachers would implement the strategies suggested in order to address this goal.

44. The IEP also included two communication goals that had been developed by Ms. McLaughlin to address Student's speech and language needs. The first communication goal was based on Student's delays in auditory processing and receptive language. The goal called for Student to be able to identify characters, setting, plot and the moral of a written or oral story. Student's articulation was age appropriate except for the fact that he was still demonstrating a frontal lisp, which he was able to correct when given cues. Ms. McLaughlin therefore wrote a second goal to concentrate on having Student work with her to make his language more intelligible.

45. All IEP team members were instrumental in developing the goals, which were all based upon Student's present levels as determined through the assessment process and input from his teachers and Mother. Mother did not object to the goals, ask to have them modified, or suggest any additional ones.

46. At hearing, Student presented the expert testimony of Dr. Caroline Bailey, who is a staff psychologist at the University of California, Los Angeles, and who has also taught at California State University, Fullerton, and has been a clinical supervisor at the University of Southern California's psychological services center. Dr. Bailey has a master's degree in psychology and a doctorate in clinical and developmental psychology, but is not a licensed clinical psychologist and is not a credentialed public school teacher.

47. Dr. Bailey criticized the attention goal in Student's April 3, 2006 IEP as not being sufficient enough to address Student's autism. She felt that the goal was more directed at sensory-seeking issues, which Student does not and did not have, rather than focusing on his needs as a high-functioning autistic child. She felt that the IEP should have included a behavior support plan to help him self-regulate his problems with attention.

48. Dr. Bailey was generally a knowledgeable, attentive and credible witness. Her testimony was thoughtful and deliberate. However, her comments with regard to this goal, as well as goals in Student's subsequent IEPs as discussed below, were overly critical. Dr. Bailey did not explain how the District's goal failed to support Student. Nor did she give an example of how the goal should have been written. Indeed, Student presented no evidence that his inattention in class during third grade, at the time the goal was developed, could not be addressed by re-direction from his teachers or the classroom aides. Nor was there any evidence presented that would support the contention that the lack of a more specific attention goal impeded Student's ability to access his education during the 2006 – 2007 school year, while he was in fourth grade. Rather, the evidence presented by the District through testimony of Student's teachers was that Student's inattention was related to those activities that he found challenging, such as reading and writing, and Student could be redirect with prompts and cues. In

those areas where he had strengths, such as in math, there is no indication that his lack of attention interfered with his ability to access or benefit from instruction.

49. The District's ultimate offer of FAPE for Student at the end of the two IEP team meetings consisted of two hours of RSP support, one hour of which was in the RSP classroom with an additional hour of RSP support within the general education classroom. Additionally, the District offered an hour a week of speech and language, divided into two 20-minute individual sessions and one 20-minute group session. Commensurate with the recommendations of the occupational therapist, the District also offered Student four OT consultations. Additionally, the IEP team agreed on several accommodations and modifications for Student regarding the curriculum and test taking. These included small group instruction, reduced level of difficulty, language level, and reading level, a reduction in pencil and paper tasks, revised directions, and shortened assignments. The accommodations/modifications also included frequent feedback and having math, social studies, and science test questions read to Student. Mother did not request or suggest any other placement or programs for Student. Mother agreed with and consented to the IEP.

50. The District administered the California Standardized Testing and Reporting (STAR) assessment in Reading, Language, and Math to all its third graders in the spring of 2006. The scores were sent to the students' parents the following October. Student scored far below basic on the California Content Standards for English language arts, at the third percentile in the California Achievement Test in total reading, and at below basic in phonemic awareness and phonics and decoding. Student scored at the basic level for the California Content Standards in math.

THE 2006 – 2007 SCHOOL YEAR: FOURTH GRADE

The Language! Program , Third Edition

51. Although not entirely clear from the evidence, it appears that the District was using the second edition of a reading program called Language! from publisher Sopris West as Student's reading intervention program in RSP prior to fourth grade. Language! was the intensive reading intervention program chosen by the District at the elementary school level to address students' reading deficits. Although it was the primary program used for that purpose, Dr. Lewis testified that the District had occasionally provided students with other programs, such as Lindamood-Bell if the student needed it. At the beginning of the 2006 – 2007 school year, the District moved to the new third edition of Language! which gave additional support to students who were behind in reading skills. The third edition apparently was more intensive. As a result, at the beginning of the school year, Student's IEP team increased the time he would spend in RSP from 18 percent of his school day to 25 percent of his school day due to the demands of the new Language! edition. Hereafter, the ALJ will refer to the third edition of Language! merely as Language!.

52. The majority of the testimony at hearing in this case was directed at the structure of the Language! program, whether RSP teacher Susan Dunaway followed that structure with fidelity, and how her instruction method may have affected Student's progress, or lack thereof, in mastering reading and writing. It is therefore appropriate to spend some time discussing the Language! program in detail. Evidence admitted at hearing addressing the Language! program included a written description of the program from publisher Sopris West and from the Florida Center for Reading Research, and testimony from Dr. Bailey and from District teacher on special assignment (TOSA) Tricia Chinn, who trained District teachers to use the program, as well as from Susan Dunaway, Student's RSP teacher.

53. Ms. Chinn was trained on Language! by the program's publisher. In addition to her initial intensive training, she receives annual training reviews. She also attends annual conferences. The program's publisher provides telephonic support and will go to a school site if requested although no representative has watched delivery of the program at a District school. Ms. Chinn provides the training in Language! to District RSP teachers. The training is generally a week long, which is what Ms. Dunaway received before the start of the 2006 – 2007 school year. While Ms. Chinn provides ongoing support to District RSP teachers, she does not generally observe the teacher delivering the program in the classroom, and did not do so at any time for Ms. Dunaway. Ms. Chinn was very knowledgeable about Language! but also freely admitted when she could not recall any aspect of the instruction protocols.

54. Dr. Bailey has never taught the Language! program but has reviewed the program literature and materials extensively, has watched training videos on the program, has spoken with representatives from Sopris West, has attended workshops where it was discussed, and observed Ms. Dunaway implement the program for Student when he was in fifth grade. It was obvious from her testimony that she was well-versed in all aspects of the program based on the publisher's manuals, materials, and texts. Whether from attendance at conference where Language! was discussed or from her own review of the manuals and materials, Dr. Bailey's knowledge of the program was extensive and her explanation of it was precise and easy to follow.

55. Language! is an evidence-based, multisensory, comprehensive literacy curriculum for reading intervention that is based on what is called direct instruction. It has been approved by the State of California to address reading and writing deficits in students who are two or more years behind grade level in reading. Its efficacy has been proven through numerous research studies in classrooms throughout the United States. Language! is generally regarded as a solid program to address reading deficits in

children who have learning disabilities such as dyslexia. None of the parties dispute that Language! is evidence-based, is an appropriate reading intervention, or that it should not have been initially used with Student.

56. Dr. Bailey described the difference between direct instruction and precision instruction. As a clinical psychologist, she has specialized to a great extent in researching reading disorders. Her dissertation was entitled *Cognitive Correlates of Developmental Dyslexia: Evidence from a Three-Year Longitudinal Study*. Dr. Bailey is herself dyslexic and learned to read using the Slingerland method. Slingerland is a simultaneous, multisensory, structured language methodology for the classroom teaching of oral and written language skills to students with dyslexia. It is one of several teaching methodologies based on the Orton/Gillingham Tutorial, a simultaneous multisensory presentation model for the teaching of language arts.⁶ Slingerland uses a precision teaching method as opposed to the direct instruction method on which Language! is based.

57. Direct instruction signifies that an instructional program is scripted, with a specific lesson plan and specific instructional exercises to follow. It is meant to be implemented with fidelity with no deviations from the manual. Individualization to address a student's needs is based upon the pacing of instruction and the re-teaching of concepts rather than on changes to the instructional program. In contrast, a precision teaching program such as Slingerland, or the Houghton-Mifflin reading program used in the District's general education classrooms, is not scripted. Rather, it gives a basic structure and methodology to the instructor but the curriculum can be modified as can the manner of instruction pursuant to the needs of the student and the teaching style of

⁶ *Student v. Manteca Union School Dist.* (2006) Cal.Offc.Admin.Hrngs Case No. 2006010033

the instructor. In a precision teaching program, the instructor is free to add or delete materials as long as the core program is followed.

58. In the direct instruction approach utilized by Language!, the teacher gives sequenced, systematic, cumulative and explicit instruction for 90 minutes a day, generally in two daily lessons. Language! is designed to scaffold literacy sequentially and cumulatively, building logical links of literacy step-by-step and book by book. The program contains five curriculum components. The first component is a teacher edition which orchestrates the curriculum by coordinating what to teach and how to teach it and gives explanations, directions, and suggestions for differentiation or individualization of instruction. The second component is a student text which contains reading selections that have steadily increasing levels of difficulty. The third component is an interactive text which contains practice exercises that develop mastery of each step of the program. The fourth component is composed of assessment materials. The fifth component is a teacher resource kit which contains compact discs for instructional planning, a program for speaking and listening to the English language for English Language Learners, transparencies and templates, letter cards, and other such instructional support materials.

59. The Language! curriculum includes six books, A through F, although books E and F were designed for the middle school level and therefore were not part of the Language! curriculum at Lawrence Elementary School. Each book has six units, each unit has ten lessons, and each lesson has six steps. The program addresses the components of phonemic awareness and phonics, word recognition and spelling, vocabulary and morphology, grammar and usage, listening and reading comprehension, and speaking and writing. The Language! program materials state that it is designed to direct students toward full understanding of relationships between and among the components of

language using activities that scaffold critical thinking skills in order to create a fully aware understanding of English.

60. There are three types of assessments in addition to the initial placement test. The content mastery and fluency task tests assess ongoing student performance on the content of the curriculum. The tests are distributed throughout each unit of each book and are linked to the objectives of the units. The instruction manual indicates to the teacher when he or she should reinforce or re-teach each concept if the student has not mastered it. If the student scores at or below 60 percent, the teacher is directed to re-teach the concept. If the student scores below 80 percent (the mastery level), the teacher is directed to reinforce the concept. The instruction manual has a prescriptive teaching box directing the teacher to what he or she should be re-teaching or reinforcing, what activity to use, and where to find it.

61. The summative tests assess cumulative concept and skill acquisition and are administered at the end of each book. Progress indicators measure growth against the student's placement baseline. They are used to monitor the student's progress toward grade level performance. The Language! placement test as well as testing in each of the books is based on three measures: the Test of Silent Word Reading Fluency (TOSWRF) to assess word reading fluency, the Spelling Inventory to assess spelling proficiency, and the Degrees of Reading Power (DRP) to assess text comprehension.

62. Although a scripted direct instruction reading program, Language! is designed so that the pacing of the program can be individualized for each student. Each student is given a placement test before starting the program. Based on the results of the placement test, the student begins either with Book A if his or her placement test revealed significant literacy delays or in Book C if the placement test demonstrated mastery of the contents of Books A and B. Units one through 18, found in books A, B, and C, are designed for readability at the level of primer (basically kindergarten) to

grade two-and-a-half. Therefore, a child who places in book A is reading at about the kindergarten or first grade level.

63. The purpose for allowing individualized pacing for each student in the Language! program was to allow a student to continue at a level until he or she mastered the level's concepts and skills. According to the Language! protocols, mastery is defined as automatic application of skills and concepts at a level of 80 percent correct. Therefore, each student might progress through the program at a different rate, based upon whether he or she had mastered a concept or needed to spend more time on it before advancing. The assessment results are designed to guide differentiation of instruction so that students could be grouped according to their progress through the program. Therefore, the program is designed so that while a teacher might be giving direct instruction to a small group of students, other students could be assigned tasks such as practicing lessons, engaging in independent reading, and journal writing, or even working on the same step of instruction but with different materials or media. The program can be given in small, medium, or large groups, or in a one-on-one setting.

64. Language! also recognizes that each child is an individual. Therefore, the program indicates that if the child demonstrates little or no progress then it might not be the right intervention for that child and some other program or methodology should be employed. Additionally, both Dr. Bailey and Student's physician, Dr. Robin Steinberg-Espstein,⁷ (who has been treating Student since 2005) acknowledged that no matter how good the reading intervention program, some students will never be able to close the gap between their ability and their achievement in reading.

⁷ Dr. Steinberg-Epstein is a developmental pediatrician. She is presently an Associate Clinical Professor at the University of California, Irvine, and sees patients as well.

Student's Educational Program and Progress During Fourth Grade

65. Adrien Kalfus-Diaz was Student's fourth grade teacher. She is a credentialed elementary school teacher who has taught at the District for 22 years generally teaching fourth grade. She has a CLAD teaching credential which enables her to teach English Language Learners. Although she gives English language development instruction to students, another teacher provided Student with ELD for 30 minutes a day while he was in fourth grade. The ELD program initially used by the District was from publisher Houghton-Mifflin. Sometime during the year Student was in fourth grade the District switched to an ELD program entitled English Now.

66. The curriculum in Ms. Kalfus-Diaz's classroom included textbooks for four subjects: reading, science, math, and social studies. All the textbooks were written at a fourth grade reading level. However, she did not use her reading book with Student. During the time Ms. Kalfus-Diaz normally gave ELA instruction Student went to his RSP class with Ms. Dunaway. Student, however, was able to read and understand the content of the math, science, and social studies textbooks Ms. Kalfus-Diaz used in her classroom. Student's comprehension of the textbooks was enhanced by the fact that the students read the material in class and Ms. Kalfus-Diaz orally explained the information in the readings. Additionally, an aide from Ms. Dunaway's RSP classroom often came to assist Student in his general education class.

67. The District provided Ms. Kalfus-Diaz with a copy of Student's IEP at the beginning of the school year. Pursuant to his IEP, she modified his homework for him so that Student was not required to do as much work as the rest of the class. For example, if there were 20 questions to answer, she would only require Student to answer a portion of them. However, although she reduced the amount of work, she did not reduce or modify the content of the work. Student therefore received the same

conceptual materials as did the typically developing students in class. Ms. Kalfus-Diaz recalled that Student had no difficulty reading the math textbook.

68. Neither Ms. Kalfus-Diaz nor the other students in class had any notable difficulty understanding Student's speech. On the occasion when she was not able to understand something he said, she would ask Student to repeat it.

69. Ms. Kalfus-Diaz did not see any autistic tendencies in Student's interaction with his classmates. He appeared to have friends in the class and interacted appropriately with other students both in class and on the playground.

70. Parents were concerned about Student's lack of progress early in fourth grade and requested an IEP meeting. The District convened a meeting on November 17, 2006, in response to Parents' request. The IEP team discussed Student's difficulties with homework and focus in class. Mother felt Student was regressing and that he was having too much trouble concentrating on homework. She also believed that modifications pursuant to Student's IEP had not been implemented. However, Ms. Kalfus-Diaz assured her that she was implementing them and showed Mother the modifications she was making to Student's homework assignments. The IEP team developed a behavior support plan (BSP) for Student subsequent to this meeting to attempt to motivate Student to stay on task and complete his assignments, particularly at home. The team also discussed how to address Student's inability to concentrate in class at times due to noise and agreed that playing music in the background at class might help. Ms. Kalfus-Diaz attempted to use the background music in class, but stopped doing so when Student indicated he was not interested in hearing it.

71. In order to assist Student with his writing, the District provided him with assistive technology (AT) through an Alphasmart, which is a word-processing keyboard that also has a memory. Student used it every day in Ms. Kalfus-Diaz's class to compose

written assignments. The Alphasmart could then be connected to a computer in Ms. Dunaway's classroom where she would print out what Student had written.

72. Student had significant difficulties with the mechanics of writing that were notable from the time he began fourth grade and which continued through the entire school year. For example, in spring of the 2006 – 2007 school year, Ms. Kalfus-Diaz gave two writing prompt assignments to her class. In the first assignment, she directed the students to write about pollution. Student's scores in ideas and development, organization, voice and audience awareness, and word choice were all "3s," meaning he was at grade level standards. However, in sentence fluency and written language conventions Student scored "1s," meaning he was only approaching grade level standards. Ms. Kalfus-Diaz administered another writing prompt in May 2007 at the end of the school year in which the students were directed to write a summary about an informational article concerning fish. Student's score on the writing assignment was only a "1," signifying that the content, organization, voice and style, and mechanics of his writing was below grade level standards. Student did not completely write what he was supposed to. What he did write was difficult to read both because of Student's fairly illegible writing and because he spelled many words phonetically.

73. Student also had difficulties with the Language! program. Ms. Dunaway administered the placement test to Student which indicated that he needed to start with Book A. The District was not able to locate Student's placement test for the hearing so it is unclear exactly where he was in terms of the program before he began it. However, as stated above, placement in Book A signified that a student was at a kindergarten or first grade level in reading and writing. Ms. Dunaway began instruction in Language! in approximately late September 2006. Student received instruction along with some 10 to 15 students in her RSP class. The class finished Book A in February 2007.

74. Student's scores on the Language! Book A assessment workbook were erratic. While he sometimes would score as high as 70 to 100 percent correct, more often his scores were under 50 percent correct. He would sometimes write answers in block printing and sometimes in cursive, but his writing was generally difficult to read.

75. Although Ms. Dunaway had received at least a week of training on the Language! program, she did not always follow the specific instructions for the program from the manuals. For example, instead of always using program materials, Ms. Dunaway sometimes used instructional materials she had developed. She had her RSP students do word searches and word scrambles, neither of which were part of the Language! program. She also used some of her own spelling words and testing rather than relying solely on the Language! spelling tests. She deviated from some of the Language! written language procedures as well. Additionally, Ms. Dunaway did not generally integrate the kinesthetic elements into her teaching style that were a component of the multisensory teaching approaches that Language! followed. Dr. Bailey, who observed Ms. Dunaway teaching classes, opined that Ms. Dunaway was using a more "brick and mortar" approach to teaching; that is, Ms. Dunaway was using more classical teaching methods and was not incorporating the kinesthetic hand movements that were part of the Language! program into her teaching style.

76. Additionally, Ms. Dunaway did not generally follow the Language! criteria for re-teaching and reinforcing concepts when Student scored below 60 or 80 percent on the Language! assessments. At hearing, she testified that she did not believe that it was necessary for the students to demonstrate mastery of each concept because the program "spirals" information. That is, it builds upon concepts by returning to them in each book. However, Ms. Dunaway's belief contradicts the specific directives of the Language! program which state that a student who scores 60 percent or below on a concept needs to be re-taught the concept and a student who scores below 80 percent

needs to have the concept reinforced, before moving on to the next concept being taught.

77. Student's summative score at the end of Book A was only 22 percent correct. On the TOSWRF for Book A Student's grade equivalency was 2.4. On his end of book spelling test, Student only spelled four out of 30 words correctly. On the DRP, Student's score indicated he was at a grade equivalency of less than 2.5. In spite of these dramatically low scores, Ms. Dunaway moved Student to Book B in March 2007 along with the other children in his RSP class. She did not re-teach or reinforce the concepts in Book A before doing so. There was no indication from Ms. Dunaway's testimony that she was deliberately deviating from any of the Language! requirements. She appeared to be a caring and deeply committed teacher. However, she either was never concretely taught that Language! was a directed teaching program with specific scripted lessons that she should have followed explicitly or she failed to recall that part of her training.

78. The District does not give actual grades on its report cards for elementary school students. Progress on reading, written language and mathematics is reported using a matrix with the numbers one to four. A score of one indicates that the student is below grade level standards; a score of two that the student is approaching grade level standards; a score of three that the student meets grade level standards; a score of four that the student excels at grade level standards. For science, history, and social science, the District does not report progress based on grade level standards. Rather, the students are graded based upon their progress, effort, and participation. The progress indicators are "U" for unsatisfactory, "N" for needs improvement, "S" for satisfactory, and "O" for outstanding.

79. Student earned an "S" in social science and history during each of three trimesters he received a progress report in fourth grade. Although he received an "N" in science the first trimester, he received an "S" for each of the subsequent trimesters. Ms.

Kalfus-Diaz could not recall Student having any difficulty in any of those subject areas. She did not modify the standards in science for Student or anyone else in her class that year.

80. However, in spite of 90 minutes a day of RSP support using the Language! program, Student also did not demonstrate much progress over the year in reading and literature. In reading/literature his scores started at and remained at "1s" from the first trimester's grades to the end of the school year, except in his ability to read aloud at the fourth grade level, where Student progressed from a "1" to a "2." Student did demonstrate some improvement in written and oral language: his scores in editing strategies, use of reference materials, grammar conventions and listening all went from a "1" at the end of the first trimester to a "2" at the end of the school year.

81. Neither did Student's scores on the California Standardized Testing and Reporting (STAR) assessment for fourth grade show any improvement in the area of English language arts. The ELA portion of the assessment has reading and writing components. Student's scores on each subtest of the ELA ranged from a low of 11 percent correct answers to a high of 33 percent correct answers. His overall scaled ELA score was 245, placing him at a level of far below basic. Conversely, Student's math composite overall score was 317, placing him at the basic level for that portion of the test.

82. On the CELDT for fourth grade, Student scored in the low intermediate range for listening and speaking, but in the beginning range for reading and writing. His overall score was 424, which placed him at the high beginning range for a fourth grader.

Student's March 21, 2007 IEP

83. Student's IEP team convened on March 21, 2007, to hold his annual IEP meeting and to plan his educational program for the 2007 – 2008 school year when Student would be in fifth grade. Mother and Father both attended the meeting, as did a

representative of the Children's Hospital of Orange County. District participants included Susan McClellan who is a program supervisor for the District's special education program, general education teacher Ms. Kalfus-Diaz, RSP teacher Ms. Dunaway, an occupational therapist, a speech language pathologist, a school psychologist, and a District representative. Also present was a Spanish language interpreter.

84. The IEP noted that Student exhibited a specific learning disability in basic reading skills, reading comprehension and written comprehension due to autism and processing deficits. The IEP also noted that Student had speech and language deficit impairments that limited his participation in the general education classroom. However, the IEP team removed speech and language impairment as a disability category. Specific learning disability was indicated as Student's primary disability with autism indicated as his secondary disability.

85. The IEP contained Student's present levels of performance (PLOPS). In the area of academics, the IEP noted that Student had scored far below basic on his STAR testing in ELA and at the basic level in math. It also noted that on the Houghton-Mifflin independent reading level, Student scored in the early first grade range and in the mid-first grade range on the test measuring his instructional level. Student was only able to read 80 percent of sight words for the second trimester of first grade. He could only read 62 percent of sight words for the third trimester of first grade. This indicated that Student had made only minimal progress from his annual IEP the year before where the IEP indicated Student could read 50 percent of sight words for the second trimester of first grade. Therefore, although at the time of this IEP Student was almost finishing fourth grade, he was still reading at a first grade level. The IEP noted, however, that given assistance with words Student was able to comprehend at grade level. With regard to math, Student was participating at grade level with good scores and had mastered over half of the multiplication facts.

86. In the area of communication development, the IEP noted that Student still had difficulty saying the endings of words, such as an ending "s" or "ed." The difficulty transferred to his spelling and oral reading as well. Additionally, Student continued to have difficulty processing information presented to him.

87. With regard to the legibility of his writing, the IEP noted that Student was frequently careless or sloppy and tended to write small. However, he preferred to use the computer to do paragraph writing so motor development was indicated not to be an area of need.

88. In the area of social/emotional development, the IEP noted that Student enjoyed the company of other students with similar interests, that he had friends, and appeared to be happy. The IEP noted that Student showed empathy and respect for peers and adults. Mother indicated to the IEP team that she was pleased that Student was interacting with his peers and participating in group games. Mother had come to school one day to observe Student during recess and had been happy to see him playing with friends. The IEP team therefore appropriately determined that Student had no unique needs in the area of social or emotional development that needed to be addressed in his IEP.

89. Neither were the areas of adaptive/daily living skills and vocational indicated as areas of unique need since Student was able to care for his personal needs and was addressing his inability to complete school work and homework through a completion contract with his teachers. The only special factor indicated was that Student continued to be designated as an ELL, with his overall CELDT score at the beginning level.

90. The IEP team determined that Student would receive testing accommodations by having math and reading questions read aloud to him on the California Standard Tests and for other District-wide assessments. The team also agreed

that Student would continue to have the amount of homework questions reduced and that Parents would continue to implement their reward system for Student at home to address Student's reluctance to do homework since the reward system appeared to be working.

91. The IEP team developed five goals for Student to address the following areas of need: reading/decoding, written conventions, ELD/vocabulary, speech and language articulation, and speech and language processing. Each goal was designed to address Student's unique needs in the areas of written language, reading comprehension, and speech. As discussed below, an IEP is required to contain goals that are measurable, including academic and functional goals that will meet the needs of the individual student. Here, all five goals in this IEP indicated appropriate baseline information for Student and were measurable.

92. Student, however, contends that the goals were inadequate. Dr. Bailey opined that overall the reading goals developed for Student were insufficient because they were not demanding enough progress of Student. For example, goal one, the reading and decoding goal, only required that Student progress from being able to identify 62 percent of first grade, third trimester sight words to being able to progress to being able to identify 80 percent of those sight words by the end of 12 months. In other words, Student would only advance from a level of first grade, second trimester to first grade, third trimester in a year's time. It would therefore take Student three years to advance one full grade. The Language! program was designed to do much more than that: it was designed to attempt to close the gap in reading for students with reading deficits. Given the pace indicated by this goal, Student could never come close to reducing the gap between his reading ability and his actual grade level.

93. Student's criticisms of the District's low expectations for him are well-taken. The District's own assessments indicated that Student had an overall average IQ,

and that he had a much higher than average performance IQ. He was able to perform at grade level in math and, according to his teacher, was also accessing grade level materials in other academic subjects. The District did not present any evidence that Student would never be able to close the gap in his reading deficit or that one third of a school year's progress was meaningful for Student. As shown with the progress Student made in sixth grade, he was capable of much more than the goal in question acknowledged. The evidence therefore supports a finding that Student had the capability of progressing more in reading than the minimal amount the District was indicating as appropriate in this goal. Because the District had such a low expectation for Student, it did not consider that the minimal progress he made in ELA was significant. The District therefore failed to intervene and consider other reading interventions for Student. The failure to write an appropriate goal thus resulted in the loss of educational benefit to Student. As discussed below, the minimal progress addressed by this goal and the minimal progress Student actually made in reading result in a finding that the District ultimately did not provide a FAPE to Student in the area of reading intervention by the end of the 2007 – 2008 school year.

94. Student also contends that the articulation goal developed for Student was inappropriate because it placed responsibility on Student for correcting his own speech mistakes. The goal indicates that Student is capable of producing all sounds in English but that he is not taking responsibility when speaking to say the sounds correctly. Rather, Student was omitting the final syllable of words during spontaneous speech. The goal required Student to remember to correctly use all sounds with 90 percent accuracy by the end of 12 months.

95. Student expert Dr. Bailey agreed that the responsibility for correcting his speech should not have been placed on Student. However, Dr. Bailey, while having expertise in a variety of areas, is neither a speech and language pathologist nor a

linguist. Her opinion with regard to Student's speech articulation goals was therefore not given much weight.

96. Student also presented the expert opinion of Dr. Patricia Schneider-Zioga. Although not a speech and language pathologist, Dr. Schneider-Zioga does have a doctorate degree in linguistics and teaches classes at the university level in subjects such as speech and language development emphasizing articulatory phonetics. She was qualified to give opinions concerning Student's speech goals. She opined that from a linguistic point of view it did not make sense for Student to be responsible for self-correcting his speech because speech sounds are tied to each other and a person generally cannot recall the speech sounds they are making in conversation. The District presented no witness who disputed Dr. Schneider-Zioga's opinion.

97. However, even if writing the goal to place responsibility on Student for self-correcting his speech was not appropriate, Student has failed to demonstrate that the format of the goal ultimately impeded his right to a FAPE or caused him a deprivation of educational benefits. That is because the District, through its offer in this IEP of speech and language services with a speech and language pathologist, addressed all of Student's needs in the area of articulation. In this IEP, the District offer was for one 30-minute group session per week of speech and language services (an increase of 10 minutes per week from Student's April 3, 2006 IEP) and two 20-minute sessions per week of individual speech and language services. Student presented no evidence that this level of speech and language services did not address his needs. Neither Dr. Bailey nor Dr. Schneider-Zioga addressed the appropriateness of the level of speech services in any of Student's IEPs. Irrespective of how the articulation goal was written, the District provided appropriate and adequate speech and language services to address Student's articulation deficits. Therefore any deficiencies in the wording of the goal did not deny Student a FAPE.

98. Student also appears to contend that the District should have offered him goals and services to address deficits in the areas of natural science and social science. Student offered no evidence at hearing in support of this contention. The evidence proves the contrary. The District's goals and services for Student were designed to address those areas in which he had known deficits, specifically, reading, writing and language. There is no evidence that Student had a deficit in his ability to comprehend the concepts of the social or natural sciences or that he was not able to access the curriculum in any of these subjects. Student's teachers all indicated that Student adequately accessed the curricular content of science, social studies, and history. Student's grades reflect this as well. The District's emphasis on providing Student with a language program to address reading and writing would also address any deficits he had with other academic subjects because Student's weakness was not in his ability to comprehend concepts but rather in his ability to read the materials and produce coherent written work. Student has thus failed to support his contention that the District should have provided goals and services in all his IEPs during the time period at issue to specifically address the areas of the social and natural sciences.

99. With regard to OT, Student's April 3, 2006 IEP had provided for four consultations between an OT provider and Student's teachers. At the March 21, 2007 IEP, the OT provider (who was from an outside agency) was present and reviewed the services she had provided to Student through the consultations with his teachers. She indicated that Student's educational team was implementing a variety of strategies she had recommended to assist Student with his attention issues in class. Student was constantly touching things, including the person sitting next to him. The OT had previously recommended that Student use a cushion ball as a "fidget" toy that he could manipulate but it did not work so the teacher had him use erasers to fiddle with, which appeared to help Student. The OT recommended a full discontinuation of her

consultative services because Student's educational providers had been taught all the strategies they needed to address Student's sensory issues and expressed their ability to implement them.

100. Mother, however, had a concern with discontinuing all consultative services for OT since the OT was the person who specifically knew what did and did not work with Student. Although the District IEP team members felt school staff knew the OT strategies enough to make changes when necessary, it acknowledged Mother's concerns and suggested the District provide a consultation between the OT and Student's new fifth grade teacher at the beginning of the next school year to ensure that the new teacher was aware of Student's needs and the appropriate strategies to use. Mother agreed to the proposal and it was added to Student's IEP.

101. The IEP team also reviewed Student's reading and writing deficits and needs. Student continued to demonstrate strength in comprehension but also demonstrated a continuing difficulty with word decoding and spelling. Student was frustrated with his inability to write. Student continued to use the Alphasmart in class, but his spelling was still based on his own phonetic code. He could read it but it was hard for others, even his teacher Ms. Dunaway, to do so.

102. In response to Mother's questions about Student's reading program, Ms. Dunaway gave her an explanation of Language! Mother asked the District team members about using the Lindamood-Bell reading program for Student. Lindamood-Bell (LMB) is multisensory, scientifically researched, language-based reading program that is usually delivered in private reading centers to students on a one-to-one basis. It has different components which address all aspects of reading. Student's physician, Dr. Steinberg-Epstein, believed that Student was reading at a level much lower than she would have expected given his high non-verbal IQ score. She recommended LMB as an intervention because she believed it would address Student's reading deficits.

103. The District discussed the similarities between LMB and the Language! program with Mother. The District believed that Language!, like LMB, was specifically designed to address the needs of students with reading and processing deficits. The District team members therefore felt that Student's needs could be appropriately met through Language! and that switching to an LMB program was not necessary. Student contends that LMB and Language! are dissimilar and that the District improperly told Mother that the programs were alike. However, Student failed to present concrete evidence on the differences between the programs. In any case, Student's expert witnesses (Dr. Schneider-Zioga, Dr. Steinberg-Epstein, and Dr. Bailey) all testified that Language! is an evidenced-based, appropriate intervention for students with reading deficits such as Student's when properly implemented. That LMB may not have the similarities to Language! that the District stated it had is therefore immaterial to the issue of whether the District offered Student a FAPE.

104. The District's offer of FAPE in Student's March 21, 2007 IEP was for 120 minutes per day of RSP support, a total of one hour a week of speech and language services, a consultation between the OT and Student's fifth grade teacher two months after the next school year began, and accommodations and modifications for Student in testing and in the curriculum. Mother consented to the IEP.

105. In spite of Student's low grades, low test scores, low scores on the Language! end of Book A testing, and Student's slow progress in reading during the year, Student's IEP team did not offer extended school year (ESY) services to him. Rather, the IEP notes merely indicate that Student would attend general education summer school. Student attended the general education summer school program but did poorly. His progress was unsatisfactory. His summer school report card indicates that Student showed little or no effort in the class and was easily distracted. No special education or other reading intervention was provided to him during ESY 2007.

THE 2007 – 2008 SCHOOL YEAR: FIFTH GRADE

Student's Educational Program and Progress During Fifth Grade

106. Student began working on Book B of the Language! program in March 2007 when he was in fourth grade. He and his RSP classmates did not finish the book that year and therefore finished it at the start of the 2007 – 2008 school year, sometime in October 2007.

107. Student's scores in his Language! Book B workbook and on assessments were as erratic as they had been in Book A. While he sometimes would score 70 percent correct, more often, especially in spelling, Student's scores were under one third correct answers. He had significant difficulty with answering questions on sentence structure and on answering questions based upon his comprehension of short reading passages. For example, on one comprehension test Student was simply not able to answer any of the questions about the reading selection, which was comprised of 11 lines of text. On one of the spelling posttests late in the workbook for Book B, Student was unable to spell any of the 15 spelling words. Ms. Dunaway did not re-teach or reinforce the concepts where Student scored less than 60 or 80 percent. The pacing of Ms. Dunaway's instruction for Student in Book B, as she had done for Book A, was identical to that of his fellow RSP students. There was no individual instruction provided to Student to address his lack of mastery in any of the concepts taught.

108. Student's score in spelling at the end of Book B was six words out of 30 spelled correctly. His DRP score only rose from a grade level equivalency of under grade 2.5 to grade level equivalency 2.7. Student's reading fluency however increased substantially: he scored at grade level equivalency 4.2 on the TOSWRF, up from grade level equivalency 2.4 at the end of Book A. Student's summative score was 60 percent, still far below the mastery level of 80 percent he should have had in order to proceed

directly to Book C. However, Ms. Dunaway did not re-teach or reinforce Book B before starting Student, along with his RSP classmates, on Book C.

109. Student's teacher for fifth grade was Kathleen Kearney-Porter, who has worked for the District for 32 years. Although she has not had specific classes in working with special education students, Ms. Kearney-Porter has taught other autistic children in the past. She also generally has three or four children in her class each year that have specific learning disabilities. During the year Student was in her class she had aide support for those students receiving special education. The aide came in specifically to support Student during writing instruction. When Ms. Kearney-Porter taught math, either the aide or the RSP teacher came to the classroom to assist Student as needed. Student left her classroom for 90 minutes a day during the English language arts instruction block to go to Ms. Dunaway's RSP class but he returned for the writing instruction block. Additionally, he also received 30 minutes per day of ELD instruction.

110. The writing instruction Ms. Kearney-Porter gave was based only in part on the Houghton-Mifflin reading textbook her general education students used for ELA. She augmented the Houghton-Mifflin themes with narrative stories, essays, research reports, and persuasive letters. She taught the genres, gave writing prompts, and helped all her pupils, including Student, through their writing instruction and assignments. She recalled that Student required assistance from her or from the aide with developing ideas and following the instructions for the writing prompts. Student had good ideas but could not translate those ideas to paper. He was creative and liked to tell stories but had difficulty with spelling and other mechanics of writing. Student's writing was difficult to read. His written sentences had grammar, spelling, and punctuation errors. Although Ms. Kearney-Porter and the aide were able to read what he wrote, others would not have been able to do so. Student was the weakest writer in her class during the 2007 – 2008 school year.

111. Student did fairly well in math the year he was in Ms. Kearney-Porter's class. Either the aide or Ms. Dunaway was present during math instruction and tests and read the word problems out loud to him. He was also doing grade level in science with accommodations such as having questions read or explained to him.

112. Ms. Kearney-Porter taught math, science and social science to Student in addition to writing and all subjects had textbooks. Student was able to read most words in the textbooks but could not always read them with comprehension. Student would volunteer to read out loud along with the other students, but did so when they were reading something with which he was more comfortable. In reading fluency, Student was at a level of "2" the entire school year, meaning he was approaching fifth grade fluency standards. He never moved from a "2" during the school year.

113. Ms. Kearney-Porter did not notice any specific disability in Student during her year with him other than his problems speaking too fast. He lacked motivation sometimes, but not often. Although he would sometimes mumble his words together, she was able to understand him as did his classmates. He had a couple of friends in the class but would also play with other children at recess. Ms. Kearney-Porter did not notice any indications that Student was on the autism spectrum although she knew from his IEP that he had the diagnosis. He socially got along with other students, looked people in the eyes, played with other children, and had no difficulty speaking to her. He enjoyed talking and at times really enjoyed working in groups. He was not repetitive in his speech and did not persevere on one topic. The only mannerism which Ms. Kearney-Porter noticed was that Student liked to tap his pencil; however, other students of hers not on the autism spectrum would also do that at times. Student appeared very much the same as a typical fifth grade boy in terms of his socialization and maturity level, the latter of which progressed during the school year.

114. Student was very good at oral skills, even with his speech deficits. His vocabulary was at fifth grade level. The difference between his oral expression capability and his written expression capability was substantial. Student could orally narrate multiple sentences but could not write them. If he was in a hurry to relate something his speech was less intelligible. Ms. Kearney-Porter spoke with Student's speech language pathologist about this problem. The pathologist gave her strategies to use with Student to help him slow down his speech. One of the strategies she instructed Ms. Kearney-Porter to use was a visual prompt that indicated to him that he was speaking too rapidly and needed to repeat what he had just said. Student was generally successful when directed to slow down. His speech improved during the course of the school year.

115. Lecturing was not a standard method of teaching for Ms. Kearney-Porter. Rather, she spent most of her lesson time writing on the board so that the students could copy what she had written. Student benefitted from her teaching style as she would go slowly and he was able to copy all the necessary information. Additionally, Student continued to use the Alphasmart to type some of his lessons. He only used it about 50 percent of the time although he had continual access to it. At first, Student brought the Alphasmart every day to Ms. Kearney-Porter's class but he stopped doing that during the school year preferring to keep it in his RSP class and use it there. He never explained why he did this. Other accommodations and modification in her class included reducing the number of problems Student had to complete for assignments, and the use of graph paper for math.

116. Student made considerable efforts in science, which he really enjoyed. He also seemed to enjoy math. However, he demonstrated considerably less effort and enthusiasm in writing. He often would say he did not like to write and did not want to do it because it took too long for him. Student did not have significant difficulty with accessing the curriculum in science or social studies. The fifth grade textbooks were

actually written at a lower instructional level in order to be used by all students in the class who were never at the same level of ability. Ms. Kearney-Porter read many of the questions aloud to Student in different subjects so that he could understand them. Since most of her instruction is oral and hands-on, Student did not miss learning concepts because of his reading deficits.

117. Two times a year Ms. Kearney-Porter prepared a goal setting plan for her students in conjunction with them and their parents. She set goals for Student in the fall of 2007 to improve his reading, literature, written and oral language, and math skills.

118. Ms. Kearney-Porter prepared progress reports in the middle of the 2007 – 2008 school year for those students who were either producing work below grade level standards or whose performance in an area had significantly declined. She prepared a report for Student that indicated that he continued to be below grade level in all aspects of reading and literature and most aspects of written language. With regard to the area denoted “responsibility for learning” Ms. Kearney-Porter noted that Student was not making effective use of his time and was not turning in homework on time. However, she also indicated that Student was showing improvement in math and writing.

119. Ms. Dunaway began teaching from Book C of the Language! program in approximately November 2007, and finished instruction in the book in early June 2008. Each of the RSP pupils in Student’s class went at the same pace through the book. There is no evidence that pacing or instruction was individualized for Student or for any other child using Language! during the 2007 – 2008 school year. As with Books A and B, Ms. Dunaway did not explicitly follow the format of the program, again using her own instructional materials instead of some of the Language! materials.

120. Student did not do well in Book C. Spelling continued to be a challenge for him. Although he scored above 70 percent on one unit spelling test and a 60 percent on another, the remainder of his scores did not rise above 33 percent correct. Student’s

scores on other subject matters, which included testing on areas such as syllable awareness, morphology, word relationships, and parts of speech, were more erratic. Although Student would occasionally score above 75 percent correct in these areas, a review of his scores indicates that most often he scored under 40 percent correct in these areas.

121. In early June 2008, after completing Book C, Ms. Dunaway administered the Language! assessment tests to Student. On the TOSWRF, Student's area of strength with regard to reading, he scored at a grade level equivalency of 4.4, only two tenths of a grade improvement over his score after Book B. On the DRP, Student scored a grade level equivalency of less than third grade, placing him approximately where he had been at the end of book B when he scored at a 2.7 grade level equivalency. In spelling, Student was only able to spell six out of 30 words correctly, the same score he had received at the end of Book B. Student's overall summative assessment score was 44 percent. In other words, Student's individual assessment scores showed little or no progress from Book B and his summative assessment showed a significant decline from his progress on the previous book. Significantly, Student's individual assessment scores on the TOSWRF, DRP and spelling inventory indicated that as a pupil just about to enter sixth grade he was still performing at a level appropriate for instruction at the Book A level. In order to have been placed in Book C as a sixth grader, Student's scores on the DRP should have been above a grade level equivalency of 3.5 (Student scored at less than grade three). His scores on the TOSWRF should have been at grade level equivalency of above 4.7 (Student's score placed him at grade 4.4). And, on the spelling inventory, Student should have scored 25 words correct (he scored 6). Student's scores indicated that he had not yet mastered the materials covered in Book A even though he had completed Book C.

122. Student's general education writing scores also continued to demonstrate a lack of improvement. For example, on his spring 2008 writing prompt, which Ms. Kearney-Porter administered in approximately May 2008, Student failed to follow directions to write an essay on what lesson could be learned from the narrative he was directed to read. Student's diagram to outline the parts of his response is almost illegible. Instead of writing about lessons learned from the story, Student attempted to write a summary of it. However, even discounting for having misread the instructions, Student's one paragraph response was extremely inadequate. The words in the paragraph are almost all misspelled; most are spelled using Student's phonetic spelling code and are thus almost incomprehensible to someone who was not familiar with Student's writing. The grammar and punctuation are equally deficient. Student scored a "1" on this writing prompt, indicating that he was below grade level standards. The writing sample is extremely troublesome given that Student was finishing fifth grade and had had two full school years of instruction in an evidence-based reading intervention program. Yet the paragraph is almost unintelligible. The following is exactly what Student wrote:

Of the binging of the story Hannah was sowe skare she shok
her leges wend they got to mrs.Johnsonmare back stage
Hannah was paling tingting lettill star on peyanow but Mary
was not plaing the song she ded not pratet the song sow
Hannah help Mary by taping the note and she was paling the
nathes and evey one of the odeons calp for Hannah and
Mary.

123. Student's report card for the end of fifth grade indicated that he only improved in one sub-area of reading and literature: in identifying and analyzing

characteristics of various forms of literature, where he went from a "1" (below grade level standards) to a "3" (met grade level standards). In reading fluency, Student remained at a "2" (approaching grade level standards) the entire year. In his ability to analyze literature, Student remained at a level of "1" the entire school year. In the ability to use words to find meaning and his ability to use strategies to read and understand fifth grade materials, Student regressed from a "2" the second trimester to a "1" by the end of the school year.

124. In written and oral language, Student only demonstrated progress in the area of using reference materials, where he went from a "1" to a "2" by the end of the school year. In all other areas of writing strategies and applications, Student demonstrated no progress, remaining at a level of "1" in the area of his ability to use revising and editing strategies the entire school year, and at a level of "2" the entire school year in the areas of knowledge of content and genre and his ability to write paragraphs. In written and oral English language conventions, Student showed no progress in the areas of using sentence structures and grammar concepts, where he remained at a level of "1." Student regressed in the areas of capitalization and punctuation and spelling, where he went from a level of "2" during the school year to a level of "1" by the end of the school year.

125. As discussed below, Student's IEP team in March 2008 determined that Student would take the California Modified Assessment (CMA) in the areas of ELA and science. The CMA is a version of the STAR assessment that was used for the first time in spring 2008. The CMA is a modified version of the STAR that still measures a child's progress in meeting California content standards in the subject matter assessed. It is designed to assess students with disabilities who need modifications in order to demonstrate their knowledge of California academic content standards. The modifications include fewer answer choices per question, shortened passage lengths,

larger font size if needed by the student, one column format for most test questions, and use of a calculator on the math and science CMA for fifth graders. Unlike the California Alternate Performance Assessment (CAPA), which was designed to test the academic achievement of students with cognitive impairments as an alternative to the STAR,⁸ the CMA is a standards-based test. On the CMA for science, Student attained a score of 71 percent, which placed him in the proficient range. However, for English language arts, Student only scored 46 percent, placing him in the basic level even with all the modifications implemented as part of the test.

126. The only indicator of any progress for Student in his areas of deficit was on the results of internal informal assessments given by the District based on the Houghton-Mifflin reading assessment. Student had scored at a first grade instructional reading level the year before. By the time of his annual IEP review on March 19, 2008, he had scored at the second grade level on that assessment. However, taken in conjunction with all other progress indicators, a review of Student's scores from his Language! program, his scores on assessments given by his general education teacher such as writing prompts, Student's grades at the end of the school year, and the results of his CMA for ELA, indicates that Student made little or no progress in the area of English language arts (including reading, writing, and spelling) during the 2007 – 2008 school year. Even taking into account the progress on the Houghton-Mifflin instructional level reading assessment, Student was operating on a level far below late fifth grade in anything that encompasses reading, writing, spelling, and comprehension of written language.

⁸ *Los Angeles Unified School District v. Student* (2009) Cal.Offc.Admin.Hrngs Case No. 2009040365, at p. 3.

127. Student's progress in math remained steady throughout the school year. He was approaching grade level in all aspects of math, understood the concepts, and scored a 338 on his unmodified STAR test, which placed him at the high end of the basic range. Student also demonstrated progress in ELD. His CELDT score for the 2007 – 2008 school year was 489, up 65 points from his previous CELDT score of 424. The score of 489 placed Student at the intermediate level for an English Language Learner.

Parents' Request for an Independent Educational Evaluation

128. Student contends that the District must either reimburse him for the cost of an assessment done by Dr. Bailey or provide him with an IEE because Parents requested the District to provide one and the District failed to either provide the IEE or request a due process hearing to show that its assessment was appropriate.

129. At hearing, Student provided no testimony whatsoever on the issue of Parents' request for an IEE. Both Mother and Father testified at hearing but were not asked any questions involving this allegation. Nor did Student question any of the District witnesses, including Dr. Lewis, regarding the circumstances of Parents' request for an IEE.

130. After testimony of all witnesses had been presented, Student, through counsel, attempted to move into evidence a letter written by Parents to Dr. Lewis dated February 11, 2008, which ostensibly contains a reference to a request for an IEE, in order to support this allegation. The District objected to the admission of the letter (District's Exhibit 51) because there had been no testimony regarding the contents of the letter and therefore there was no foundation for it. The ALJ sustained the objection based on the lack of foundation and the lack of testimony concerning the issue. Since Student did not address the issue at all during the presentation of his case (or during the presentation of the District's case), the District did not have any reason or opportunity

to defend the allegation that it was required to provide an IEE to Student. Student did not move to re-open the hearing to take testimony on the issue.

131. However, even had the ALJ admitted the document, it fails to persuasively support Student's contention that Parents concretely requested an IEE, thereby creating an obligation for the District to either provide the IEE or file for due process to uphold its own assessment. First, the letter informs the District that Parents were already in the process of obtaining an assessment from Dr. Bailey. Therefore, Parents did not give the District the opportunity to review their request and offer to fund an IEE from the District's list of approved assessors.

132. More significant, however, is the fact that the letter is exceedingly vague as to which of the District's assessments Parents disputed. The last District assessments for Student had been conducted in February and March of 2006, a full two years before Parents wrote the letter to Dr. Lewis. The District had conducted a psycho-educational assessment, an OT assessment, and a speech and language assessment of Student, using a different assessor for each. Parents' letter fails to identify which of the three assessments they disputed. Rather, it gives generalizations about conclusions and recommendations concerning Student from unidentified sources in the District. The letter therefore fails to put the District on notice that Parents were disputing specific assessments making it unclear on what grounds and with regard to which assessments the District should have filed a due process complaint, or which assessment it should have agreed to fund. Moreover, although at Student's March 19, 2008 IEP meeting Parents informed the District IEP team members they were obtaining an IEE, they did not ask for the District to fund it at any time during the meeting.

133. Additionally, although Dr. Bailey did some type of assessment during spring 2008, it is unclear what she did because her data was lost due to computer error. She therefore never completed an assessment report.

134. Parents are therefore not entitled to an IEE at public expense.

Student's March 19, 2008 IEP

135. Student's IEP team convened on March 19, 2008, for his annual IEP review. The meeting concluded on June 2, 2008. An interim meeting also took place on April 22, 2008, for the sole purpose of discussing Student's participation in the CMA testing for ELA and science. At that time, the team approved Student's participation in the modified assessments.

136. Present at the first meeting were Mother and Father, Ms. Kearney-Porter, Ms. Dunaway, Nicole McLaughlin (Student's speech and language pathologist), a District administrative representative, two representatives from the Regional Center, a Spanish language interpreter, and Student's attorney. At the second meeting, Ms. Chinn was also present, as was another of Student's attorneys, an attorney for the District, and Dr. Bailey.

137. The IEP team reviewed Student's present levels of performance. The IEP accurately notes that Student was at a second grade instructional level in reading and that his writing was difficult to read due to spelling errors. Student continued to have some difficulty focusing on his work and completing assignments; his teachers were addressing this issue through a contract with Student that provided him with rewards for finishing his assignments and homework. Student needed the incentive of the reward at times; at other times he was more independent and would do the work even with the motivation of receiving a reward. The IEP also accurately noted that Student was successfully participating at grade level in math.

138. With regard to communication development, the IEP correctly noted that Student continued to drop word endings when speaking, reading and writing. Student was noted to be able to self-correct his speech when talking to classmates, but was not doing so when speaking with adults. However, he did correct himself when given a non-

verbal cue. Student did not demonstrate any deficits with regard to language pragmatics. He was able to correctly identify all emotions pictured on cards and to act out all emotions when asked to do so. Student was also able to verbally identify an emotion on a listener's face 80 percent of the time.

139. There is no evidence that Student had any unique needs in the area of social and emotional development at school that the District failed to address. Student's IEP correctly noted that in addition to not having difficulties identifying emotions, Student appeared himself to be a happy young man. He was respectful and considerate to his peers and to adults. He had friends, was liked by his classmates, had a good sense of humor, and loved to play jokes on people. Student acted appropriately at school recess and participated in a variety of activities. He did not exhibit any behavior or mannerism at school that should have indicated to the District that Student had social or emotional needs that needed to be addressed through an IEP. Dr. Bailey had observed Student at school and felt that he needed more opportunity to interact with his peers, but she did not give specifics about how that would work either at the IEP meeting or during testimony at hearing. However, since Dr. Bailey had indicated to the IEP team that Student himself felt that he had no friends, the District offered to ensure that Student be accepted to an after-school program at his home school and arrange for another student to orient him to the program the day he started. Parents agreed to this proposal.

140. Student's attorney, however, wanted to add a social conversation goal to the IEP. Since school staff did not believe Student had a need in this area based on their observations of Student, the IEP team determined that a baseline would have to be established before a goal could be developed. Student's attorney also felt that Student required a social skills group and a social skills goal to immediately address what he felt were Student's needs in that area. He believed that no assessment was necessary.

However, Student presented no persuasive evidence at hearing in support of this position. Student's teachers were unanimous that their observations of Student's interactions with his peers and adults, as well as his appropriate behavior in the classroom, indicated that he had no unique needs in this area. Ms. Dunaway and Ms. Kearney-Porter were knowledgeable about Student and based their opinion on having seen him on a day-to-day basis in school. Ms. Dunaway had worked with Student for approximately five years. In light of those facts, the weight of the evidence supports the District's contention that Student did not have a unique need for a social skills goal or a social skills class.

141. Student's IEP team reviewed the goals proposed by his speech and language pathologist, Ms. McLaughlin. The one pragmatic language issue she felt Student needed to perfect was identifying a "confused look" on people's faces when they did not understand him. Once Student could properly identify the confused look, he would use it as a cue to self-correct his speech. Ms. McLaughlin wrote the first goal in the IEP to address this need. Unlike the previous IEP's goal which put full responsibility on Student to self-correct his speech without cues, this goal focused on teaching Student to recognize that he was not being understood so that he could think about his speech and correct it. The goal was appropriate, was not vague, and was measurable.

142. The second goal Ms. McLaughlin developed was designed to address Student's receptive and expressive language needs. The goal's objective was for Student to be able to verbally give synonyms for 10 words presented to him with 80 percent accuracy. Student was able to do so when given the words in written form where he only had to identify the synonym from a list of words, but could only do so with 50 percent accuracy when not given a visual model. Dr. Bailey testified that 10 words was not a sufficient objective for Student because he had a capacity for greater progress than that. However, the District is not legally obligated to maximize a student's progress. Rather, it

is only tasked with ensuring that a student is able to make meaningful progress. Dr. Bailey's criticism of the goal as not meeting Student's potential was thus not well-taken. Additionally, her criticism of the goal was undermined by the fact that although she was present at the IEP meeting on June 2, 2008, and therefore had an opportunity to voice her concerns about the entire proposed IEP, Dr. Bailey did not voice an objection to this goal at the time. Dr. Bailey's criticism of this goal was therefore not persuasive.

143. Parents requested that the District increase Student's individual speech and language sessions from 20 minutes a session to 30 minutes a session. Ms. McLaughlin agreed that an increase was appropriate particularly since Student had begun to feel that speech was important.

144. Ms. Dunaway proposed four goals for Student at the IEP meeting held March 19, 2008. The first goal, which is numbered goal three in this IEP, was for reading and decoding. The goal's baseline noted that Student was reading two syllable words with 42 percent accuracy. The goal's objective was for Student to read two syllable words with 80 percent accuracy by the end of 12 months. Student's attorney objected to the goal as inappropriate. At the reconvened meeting on June 2, with Ms. Chinn and Dr. Bailey present, the team had further discussions about this goal as it related to the belief of Student's attorney and Dr. Bailey that Student needed another spelling goal. Ms. Dunaway had proposed a spelling goal for Student in her goal addressing the area of writing conventions. Spelling was an acknowledged deficit for Student. He had difficulty finding the correct spelling for words up to 43 times in paragraphs he was writing. The goal's objective was for Student to spell correctly by using the spell check program on a computer, using his textbooks, using a dictionary, or other means so that he would have no more than seven spelling errors per page or long paragraph on writing samples he produced. At the second IEP meeting the IEP team discussed different strategies Student could use for spelling and self-correcting of speech. Student's attorney requested that

the team develop an additional spelling goal for him. Although the District team members believed that the reading and decoding goal addressed issues with Student's spelling, the team ultimately concurred with Dr. Bailey's suggestion that a spelling baseline would be established through an assessment and that a spelling goal would be added at a future date. With that agreement, the entire IEP team accepted the reading and decoding goal and the writing conventions/spelling goal.

145. Dr. Bailey also suggested that Student needed a reading fluency goal added to the IEP. After discussions, the IEP team determined that an assessment would be conducted to determine a baseline for Student's reading fluency.

146. Goal four was a reading comprehension goal with the objective of increasing Student's ability to outline his ideas after reading an expository passage. At the time of the IEP, Student was able to outline his ideas with 50 percent accuracy. The goal proposed increasing Student's accuracy to 70 percent after 12 months. At the first meeting, Parents expressed concern that outlining was not an important skill for Student, but a District representative explained how the skill was important to Student's future academics. Ultimately, the IEP team, including Parents, accepted the goal.

147. Ms. Dunaway also proposed an ELD vocabulary goal for Student whose objective was to increase Student's knowledge of prefixes and suffixes from 30 percent accuracy to 80 percent accuracy. Parents, Dr. Bailey, and Student's attorney failed to comment on or object to this goal at either IEP meeting. It was accepted by the IEP team.

148. The District team members also proposed a task completion goal for Student whose objective was getting Student to complete his general education homework assignments 95 percent of the time with 70 percent accuracy. Student's attorney believed that a functional analysis assessment (FAA) needed to be conducted so that a plan could be developed to address the roots of Student's off-task behavior. In

conjunction with the IEP team's determination that additional goals in spelling and fluency would be added by Ms. Dunaway at a later date, the IEP team discussed when it would be more appropriate to assess Student. Since his triennial assessment was due the following year, the team discussed doing it earlier in the 2008 – 2009 school year rather than doing several sub-tests prior to the triennial. Student's attorney suggested that the assessment plan for the triennial testing, which would encompass all the outstanding issues, be provided to Parents at the beginning of the following school year in autumn 2008 to permit Student to become acclimated to his new classroom. All members of the IEP team concurred that it was more appropriate to wait until after Student had begun sixth grade before the District assessed Student.

149. The IEP team therefore agreed to all proposed goals as written and agreed that future goals for spelling, reading fluency, social conversation, and task completion would be addressed at a future date.

150. The goals as written and approved by the team, with Student's attorney and Dr. Bailey present and with their consent, were not vague, were measurable, were appropriate, and addressed all of Student's needs known to the IEP team at that time. It was reasonable for the team to adopt the position of Student's attorney that baselines for the newly requested goals needed to be determined before the additional goals were written.

151. There was also considerable discussion at the June 2, 2008 IEP meeting concerning Student's participation in the Language! program. Parents, Student's attorneys, and Dr. Bailey felt that Student was not finding success in the program and that he needed more intervention in order to improve his reading. Mother again asked about giving Student Lindamood-Bell instruction, but the District IEP team members continued emphasizing that the Language! program was meeting Student's needs.

152. Parents and Student's attorney requested that the District provide him with an intensive reading intervention program during the summer, such as LMB. However, in spite of Student's low grades, his low scores on the Language! program, his low scores on state-wide testing, and his continued poor reading and writing skills, the District did not offer Student either a special education ESY program or funding for a private reading intervention program. Rather, as it had done the prior year, the District only offered Student placement in a general education reading program.

153. The District's final offer of FAPE was continued placement in RSP for 90 minutes a day in the RSP classroom and 30 minutes a day of "push-in" RSP services in the general education classroom, and 60 minutes a week of individual and 30 minutes per week of group speech and language services. In addition, based upon discussions during the IEP meetings, the team agreed that Student would go to the RSP classroom in the afternoon after school to receive supplemental support in the Language! program if he needed it based upon his assessment scores. Parents, with their attorney present, consented to the IEP.

154. The full evidence of Student's failure to progress on anything but the Houghton-Mifflin informal assessments became most apparent after the March 19, 2008 IEP meeting but before the 2007 – 2008 school year had ended. By early June 2008, Student had completed Book C of the Language! program with little success or progress demonstrated, as indicated in paragraphs 120 and 121 above. By the end of the school year it was evident that his reading comprehension and written expression had not progressed, as demonstrated by his very low score on the spring writing prompt, as indicated in paragraph 122 above. By the end of the year it was also evident that he had made little progress in the reading and writing curriculum, and had regressed in some areas, as indicated in his third trimester report card, discussed above in paragraphs 123 and 124. Additionally, Student's CMA score in ELA showed little progress, as indicated in

paragraph 125 above. However, in spite of these indicators of lack of progress, the District did not convene an IEP meeting for Student at the end of the school year and did not reconsider his request for special education reading intervention for the summer of 2008.

LINDAMOOD-BELL INTERVENTION DURING SUMMER 2008

155. Parents continued to have significant concerns about Student's lack of progress in reading, writing, and comprehension. After the District IEP team rejected their request for reading intervention for the summer of 2008, they decided to privately fund Lindamood Bell services for Student. Although LMB ultimately recommended that Student complete a 240 hour program based on his low reading and vocabulary skills, Parents' finances only permitted them to fund 100 hours, which Student completed in five weeks starting in July 2008. Student went to LMB four hours a day, five days a week.

156. LMB administers assessments to each student as part of its placement process. LMB uses standardized assessments and its own proprietary tests. For Student, the standardized assessments used were the Peabody Picture Vocabulary Test, Fourth Edition, Form A (Peabody-4); the Detroit Test of Learning Aptitude (DTLA) (from three different editions); the Woodcock Reading Mastery Test (Woodcock); the Slosson Oral Reading Test (SORT); the Wide Range Achievement Test, Fourth Edition (WRAT-4); the Gray Oral Reading Test, Form A (GORT) and the GORT-4. The LMB proprietary assessments consisted of the Lindamood Auditory Conceptualization Test -3 (LMB-3); the Informal Test of Writing (ITW); and the Orthographic and Phonological Awareness for Literacy (OPWL). Some test results gave standard scores, percentile scores, mental age scores, and grade level scores. Other results were only given in one format. For example, the original GORT assessment only produced a grade level equivalency score.

157. Prior to receiving his LMB instruction, Student scored at the following grade level equivalencies on the indicated assessments:

Peabody-4:	3.2
Woodcock:	2.2
SORT:	2.6
WRAT-4 (spelling):	1.7
WRAT-4 (math)	5.6
GORT (paragraph reading):	2.1
GORT-4 (rate):	3.0
GORT-4(accuracy):	2.0
GORT-4 (fluency):	2.4
GORT-4 (comprehension):	3.2
LMB-3:	2.7

There were no grade equivalencies for the DTLA, the ITW, or the OPWL.

158. Cayce Korhonen is presently an Associate Center Director for LMB who worked with Student while he attended the Center. She explained that LMB now requires its instructors to have at least a bachelor's degree in order to enter the training program to become an instructor. LMB first screens applicants, gives them an aptitude test, has them do role-playing scenarios, and interviews them before accepting the applicant into the training program. The instructors are first given 80 hours of training in the LMB programs, and then given hands-on training with students. The instructors are evaluated in role-playing exercises. They then have a three-month probationary period. The training includes the rationale, theory and background of each component of the LMB program. LMB has a research department and sponsors conferences about the program. LMB works with universities who research the program and looks for areas in which to improve.

159. During the five weeks Student attended LMB, his instructors focused on reading, phonemic awareness, reading in context and on some spelling. LMB did not

focus on spelling because the Center wanted to address other areas of reading where Student had severe deficits. Had Student remained in the program to complete the recommended 240 hours, spelling would have been addressed more fully as his reading skills improved. LMB's course of action was to focus on basic reading skills before addressing Student's spelling deficits.

160. Ms. Korhonen estimated that during the 10 years she has worked for LMB, approximately 20 percent of the students who attended class there have been high-functioning autistic children. However, she stated that autism did not stand out in Student. LMB did not have to use special behavioral interventions with him; rather, the reward system used with all students was sufficient to motivate Student. Nor did Student have any difficulty transitioning between the four clinicians who provided him instruction each day.

161. At the end of the 100 hours of instruction at LMB that Parents were able to finance for Student, LMB administered the same battery of assessments to Student. At hearing, the District queried Ms. Korhonen as to whether the second set of scores would be questionable based on practice effect since Student was given the same assessments barely eight weeks after the first administration. Ms. Korhonen stated that the publishers of the assessments permit re-administration of the tests and that the scores would remain the same unless there had been some remediation of the student's deficits. No one at hearing challenged Ms. Korhonen's statement as to the propriety of administering the same tests in such a short period of time.

162. Student demonstrated progress in most of the areas assessed. His second set of grade equivalency assessment scores from LMB were as follows:

Peabody-4:	3.2
Woodcock:	4.6
SORT:	3.3

WRAT-4 (spelling):	2.3
WRAT-4 (math)	5.2
GORT (paragraph reading):	3.5
GORT-4 (rate):	4.2
GORT-4(accuracy):	4.0
GORT-4 (fluency):	3.7
GORT-4 (comprehension):	10.4
LMB-3:	3.7

At hearing, Parents provided receipts showing that their out-of-pocket costs for the 100 hours of LMB instruction and related assessments totaled \$9449. Parents also had to transport Student from their home to the LMB Center in Newport Beach, California every day he received instruction. Parents were very happy with the progress Student made at LMB and felt that it was well worth the cost.

THE 2008 – 2009 SCHOOL YEAR: SIXTH GRADE

163. Student was assigned to Sean Sailors' general education class for sixth grade. Mr. Sailors has a bachelor's degree in business and is working to complete his master's degree in education. He is a credentialed teacher who has been teaching for six years, the last four of which have been in a sixth grade classroom.

164. Mr. Sailors, as did Student's other teachers, generally follows a set class schedule for instruction each day. After the students arrive in class, he spends some time checking homework and presenting the schedule for the day. The English language arts component of his schedule is in the morning right after school begins. Many of the students, like Student, go to another classroom for reading instruction. After recess, those students receiving ELD instruction leave for another class. Mr. Sailors teaches writing in the time period between recess and math using the Houghton-Mifflin

textbook. After writing instruction, he teaches math until the lunch break. After lunch, Mr. Sailors teaches social studies, science and physical education.

165. Mr. Sailors was aware that Student had an IEP, that he received RSP intervention from Ms. Dunaway using the Language! program, and that he had accommodations based on his IEP. Mr. Sailors implemented those accommodations to the best of his ability. Student sat in the front of the classroom and had testing accommodations. He was permitted to have manipulatives, such as a ball for squeezing, if he needed it. Student also had the Alphasmart to help him with his writing.

166. Student never had behavior concerns in Mr. Sailors' class. The issues Mr. Sailors had with him stemmed from Student's lack of focus and failure to complete homework. During the course of the school year, Mr. Sailors spent a considerable amount of time working with Student and Parents on strategies to get Student to complete homework assignments. Student did not like to write down his homework assignments at the end of the school day. One of the strategies Mr. Sailors implemented for all students in his class as a "path to success" was the use of a binder for homework assignments. The students also were given a planner to write down the assignments. The problem with Student appeared to be a matter of wills. Student simply did not want to write down his assignments, insisting that he would remember them. Student would then forget the assignment. Mr. Sailors collaborated with Parents and Student improved considerably from September to June when the school year ended. For example, when Student was not having Parents sign the planner each day as he was supposed to, Mr. Sailors spoke with Parents who then worked with Student to make sure they were shown the planner each day. When Mr. Sailors spoke with Parents they expressed approval at the progress Student was making. They seemed happy with the improvement in Student's organization and motivation.

167. Student also participated in sports activities through Mr. Sailors, who runs a sports league at lunch time for students. The sports included football, basketball, baseball and soccer. Student participated most often in soccer and was selected for one of the teams by the team's captain. He also played on the baseball team. Student had no difficulty interacting with the other children. Nor did Student have difficulty interacting with the other students in the classroom. He was not ostracized in any way. When Student spoke too fast in class, Mr. Sailors or the other children would just ask him to slow down. Student successfully participated in all class discussions and projects, including having to give oral presentations in front of the class on projects he had done such as one for the science fair.

168. An RSP aide came into the classroom each day to assist Student during writing instruction. She would sit or stand beside Student and help him with his work. Ms. Dunaway would also come into Mr. Sailors' classroom to assist Student. Student was definitely not at grade level in writing.

169. Mr. Sailors did not give much homework. Although he had textbooks for science and social studies, he rarely gave reading assignments in the books as homework. The books were used primarily as resource sources for the students to get answers to questions they might have about what Mr. Sailors was teaching on the subject. Mr. Sailors generally used what is called the reciprocal teaching method. He placed the students into groups. The groups would then read together or do group lessons which Mr. Sailors taught using the overhead projector as a visual teaching method. He grouped the students based upon how he felt they would interact with each other rather than at what level of instruction or ability the student might be at. There was very little independent reading for science or social studies instruction. Because there were quite a few English Language Learners in Mr. Sailors' class he used a lot of visual supports and oral explanations to teach the subject matter material rather than

relying on textbooks. There were few if any tests in social studies or science. Student was working at a satisfactory level in both areas based on his effort and participation.

170. Pursuant to the accommodations and modifications indicated in Student's IEP, Mr. Sailors modified Student's workload. He reduced the amount of writing he required of him. Student was going to a different classroom for math so Mr. Sailors spoke with that teacher to ensure that Student's math workload was reduced as well. Student also continued to have access to the Alphasmart but did not want to use it. The problem was that Student had begun to feel out of place using the Alphasmart in front of the general education children. He did not want to be different from them, so he chose not to use the device in Mr. Sailors' class.

171. The most dramatic positive change that Mr. Sailors saw in Student with regard to his motivation and effort was from the second to the third school trimester.

172. Student had finished Book C of the Language! program the previous school year. As stated above, he did not approach mastery of the Book's concepts. There were other pupils in Student's RSP class who also had not mastered the basic concepts. Ms. Dunaway therefore decided to have a group of some six of her RSP students, including Student, who had not done well in Book C basically re-do the entire book. The small group of six started again through Book C in September 2008 and finished it around the beginning of December. Re-teaching an entire book is not part of the protocols for the Language! program. Ms. Chinn, the District's Language! trainer had never instructed teachers to re-teach an entire book and was not aware that Ms. Dunaway had decided to do so.

173. Student's scores throughout the assessment workbook the second time he did Book C are dramatically higher than from the first time he was taught the book. He scored higher in every concept taught, including spelling, usually scoring over 80 percent correct in each area. On the summative test at the end of the second time Ms.

Dunaway taught book C, Student scored a 73 percent. Although not at the 80 percent mastery level, it was considerably higher than the 44 percent he scored the first time he was given the summative test for Book C the previous June. There are only two explanations for this dramatic increase in scores. First, the fact that the entire book was re-taught, and second, that Student had received 100 hours of intensive, one-on-one reading intervention from LMB immediately prior to beginning instruction for the second time on Book C.

The November 24, 2008 Triennial Assessment

174. Pursuant to the decision of Student's IEP team at the annual IEP team meetings held March 19, 2008, and June 2, 2008, the District moved the date of Student's triennial assessment from spring 2009 to fall 2008. The team, including Parents (with general agreement from Student's attorneys and Dr. Bailey) had determined that it was appropriate to assess Student before developing additional goals for him.

175. The triennial assessment took place in October and November 2008. School psychologist Stephen Stickler conducted the psycho-educational portion of the assessment. Speech and language pathologist Nicole McLaughlin conducted the speech and language assessment. Neither the District nor Student called either assessor to testify at the hearing in this case. Although Student states in his written closing argument that Parents had indicated to the District that they disagreed with the results of this assessment, they did not offer any testimony or documentary evidence at hearing to support that statement.

176. For his psycho-educational assessment, Mr. Stickler reviewed Student's records and reports from his teachers, gave Parents rating scales to fill out and interviewed them, and conducted observations of Student. He also administered the following assessment instruments: The Beery Visual Motor Integration Test (VMI); the

Woodcock Johnson Tests of Cognitive Ability (WJ-III-COG); the Comprehensive Test of Nonverbal Intelligence (CTONI); the Test of Auditory Processing, Third Edition (TAPS-III); the Woodcock Johnson III Tests of Academic Achievement (WJ-III-ACH); the Stroop Color and Word Test (Stroop); the Attention-Deficit Hyperactivity Disorder Test (ADHDT); and the Curriculum Based Measure (CBM).

177. Mr. Stickler observed Student in class during math instruction in his general education classroom, at recess, and at lunch. During the classroom observation, Student was actively engaged in the academic instruction 48 percent of the time and was passively engaged in the instruction 32 percent of the time. He was off-task 20 percent of the time. After the formal observation period of 25 minutes, Mr. Stickler noted that Student had to be re-directed by the teacher to begin work on the next math assignment.

178. During the observation at recess, Mr. Stickler noted that Student played games, walked around the playground, and interacted with other students. At lunch, Student joined the other students to stand in line to get lunch, interacting with them both in line and at the lunch table. He spoke with children sitting next to him and across the table from him. After lunch, Student continued to interact with other children on the playground by talking and playing with them.

179. During the formal testing process, Student exhibited some avoidance behavior, but Mr. Stickler was able to re-direct him to the assessment tasks.

180. Mr. Stickler administered the WJ-III-COG, the CTONI, and the TAPS-III in order to estimate Student's cognitive level of functioning. As with testing in previous years, Student's scores on these assessments indicated a discrepancy between his verbal and non-verbal processing abilities. Student's ability to think and reason without words, and to analyze, manipulate and use visual information such as puzzles, designs, and pictures in order to solve problems are relative strengths in comparison with his ability

to think with words or verbally respond to questions or to solve problems that involve knowledge of events, objects, or things within Student's environment. For example, Student's thinking abilities, long-term retrieval, visual-spatial thinking, and processing speed scores on the WJ-III-COG were all between 108 and 116, in the high average range. His verbal ability, comprehension knowledge, and short-term memory scores were all between 77 and 84, in the below average range. On the CTONI, which specifically measures non-verbal intelligence, Student's scores were between 104 and 113, from the mid to high average range. Student's overall score on the TAPS-III, which assesses a child's ability to comprehend auditory information, was below average, with particular difficulty in the subtest that measured phonemic awareness and decoding.

181. Overall, the results of the cognitive testing indicated that Student possesses average intellectual functioning.

182. The VMI measures psychomotor ability. Student's scores on the test indicated that he has adequate fine and gross motor skills.

183. Student's scores on the WJ-III-ACH were commensurate with the scores he had received on his previous triennial assessments. He achieved standard scores between 70 and 77 on all reading, writing, and comprehension test clusters, placing him in the below average range on all, and received standard scores between 98 and 110 on all the math clusters, placing him in the average range for his overall math ability.

184. Testing on the CBM consisted of having Student read lists of sight words and read narratives. Student, who had been in sixth grade for a few months at the time he was tested, was only able to read 44 percent of the words from a fourth grade list. His reading fluency on a third grade level narrative passage was 87 words per minute without mistakes. When Mr. Stickler asked Student questions about the third grade level passage he had read, Student was only able to answer three of six questions correctly. The questions he was able to answer addressed more overt information from the

passages. Student was not able to answer questions where he needed to infer information from what he had read. His performance on the CBM indicated that Student was below average for a student his age and fell within the frustration level⁹ of reading instruction at the time.

185. With regard to social adaption, the reports from Student's teachers indicated that he was interacting well with classmates, was happy and talkative, and had no difficulty stating his wants and needs. Although the results of the rating scales Mr. Stickler gave to Parents indicated that there was an average probability of ADHD at home, the rating scores from Ms. Dunaway and Mr. Sailor indicated a below average possibility of ADHD at school. Although Student was inattentive and fidgety in class at times, it was within the average for boys his age.

186. For the speech and language portion of the assessment, Ms. McLaughlin informally observed Student and administered the following assessment instruments: the Goldman Fristoe Test of Articulation – 2 (GFTA-2); the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4); and the Comprehensive Test of Spoken Language (CASL). The test results indicated that Student had adequate articulation, fluency, and voice. However, the results also indicated deficits in expression and receptive language abilities, with a particular delay in core language, expressive language, and language memory. Although the assessments indicated that Student demonstrated a delay in pragmatic judgment, Ms. McLaughlin noted that Student did not have any difficulties in the areas of social communication or creating and maintaining peer relationships.

⁹ A frustration level is the level at which the reading material is too difficult for a student to comprehend even with support from the teacher.

(<http://www.naperville203.org/assets/literacydictionary.pdf>)

The November 24, 2008 and January 16, 2009 IEPs

187. Student's IEP team met on November 24, 2008, with the meeting continuing on January 16, 2009, to review the results of the newest triennial assessment and to determine if Student's March 19, 2008 IEP needed to be modified. Present at the meeting on November 24 were Parents; a Spanish language interpreter; Student's attorney; an LMB Center representative invited by Parents; the school principal; Susan McClellan and Richard Cochrane, who are both program supervisors for the District; Mr. Sailors; Ms. Dunaway; school psychologist Mr. Stickler; and the District's attorney.

188. Ms. Dunaway had administered a CLA assessment to Student in the fall when he started sixth grade. Although he had a reading fluency the previous spring that placed him at the third grade level, on the CLA administered in the fall Student's fluency placed him at a second grade level although he was reading faster. Mother felt the low score was due to the fact that the family was in the middle of a move at the time and their living situation was not optimal, causing Student to lose focus at school. In light of how well Student did on subsequent tests, this score appears to have not been an accurate assessment of Student's abilities subsequent to the 100 hours of LMB instruction.

189. There was confusion at the IEP meeting and at hearing about whether the references to Student's reading level in the IEP are to his instructional reading level or to his independent reading level. The confusion was not clarified at the IEP meeting and none of the District witnesses were able to concretely state at hearing to what the level referred. Adding to the confusion is the fact that the IEP in one place states that Student was at a second grade level in reading (be it independent or instructional) and, in another place, states that he was at a third grade level.

190. In response to questions from Student's attorney, Ms. Chinn explained that Language! contained the same type of sensory motor components that are contained in

the LMB program. Mother again requested that the District provide Student with LMB instruction. Her concern was that Student required the one-on-one instruction he received through LMB that he was not receiving through the Language! program instruction in the RSP class.

191. Ms. Dunaway informed the other team members that Student was meeting his goals, with the exception of the homework goal, which she proposed modifying. The team discussed the changes that Mr. Sailor was making to address Student's difficulty completing homework and asking Parents to sign his planner.

192. The team re-convened on January 16, 2009. The only difference in attendees was that neither Ms. Chinn nor the LMB Center representative attended the meeting but in attendance was speech language pathologist Nicole McLaughlin to review her assessment. Additionally, Parents brought two attorneys with them to this meeting.

193. Ms. McLaughlin reviewed her assessment and her recommendation that Student continued to be eligible for speech and language services to address his deficits. She indicated to the team that Student benefitted more from group sessions than he did from individual sessions. The entire team including Parents decided to eliminate the individual speech sessions in favor of two sessions of group speech and language therapy a week. To address the concerns broached by Parents and their attorneys at the March 19, 2008 IEP meeting and pursuant to her assessment results for Student, Ms. McLaughlin had written an additional speech goal for Student. Although Student had many friends, he had mentioned to Ms. McLaughlin that he felt intimidated approaching large groups of people he did not know. The new goal therefore addressed Student's social conversation needs and focused on helping learn to approach larger groups of classmates and join in their conversation. The IEP team, including Parents with their attorneys present, discussed the goal and agreed to it. The team also agreed to

continue the previous two speech and language goals developed at the March 19, 2008 IEP.

194. The IEP team also discussed the new reading fluency goal written by Ms. Dunaway in response to Student having met the previous fluency goal. After discussion, the team revised the goal to reflect natural speech patterns. In response to the request from Parents' attorney, the goal was also modified to include reading speed goals. Student's attorney agreed that the goal as modified was appropriate and therefore the entire IEP team accepted it. In response to previous requests from Parents, Student's attorneys, and Dr. Bailey, the team also added a spelling goal for Student. Ultimately, the team developed and accepted 11 goals for Student to address his needs in the areas of speech, reading, writing, and task completion. The goals were based on accurate present levels of performance for Student, were clear and measurable, and adequately addressed all of his unique areas of need.

195. Parents again requested the District provide Student with LMB instruction. They specifically requested 150 hours initially, with more if indicated necessary through assessments. The District did not agree to the request but suggested that Student return to the afterschool Boys and Girls homework club that he had participated in the previous spring. Parents indicated that they would re-enroll Student in the program.

196. The offer of FAPE after the January 16, 2009 IEP meeting was to continue Student in RSP for 120 minutes a day and to provide him with two 30-minute group speech and language sessions a week. Parents, with their attorneys present, consented to the IEP.

The Assistive Technology Exchange Center Assessment

197. The District, through program supervisor Richard Cochrane, referred Student to the Assistive Technology Exchange Center (ATEC) for an AT assessment in February 2009. It is unclear from the record why the referral was made at that time.

ATEC is a division of Goodwill of Orange County. No one from ATEC testified at the hearing in this case.

198. An ATEC technology specialist named Stanley Tom first met with Ms. Dunaway and Mr. Sailors who informed him that Student spelled incorrectly in good part due to rushing through assignments and that he would sometimes be unfocused and go off on tangents in class. They also discussed Student's tendency to rush through speaking, resulting in him dropping ending phonemes. Mr. Tom then observed Student in his math class. Mr. Tom noted that Student was quiet in the class, responded appropriately to direction, and answered questioned when asked.

199. Mr. Tom noted that Student had access to an Alphasmart but did not always like using it. Mr. Tom also noted that Student was familiar with and able to use a keyboard and mouse although he did not use 10-finger typing with the keyboard, instead using the index finger from each hand to type. He recommended that Student have typing or keyboarding practice to address this issue.

200. To address Student's tendency to write very lightly making it difficult to see what he had written, Mr. Tom suggested that he use a pencil with softer lead.

201. To address Student's difficulty with spelling, Mr. Tom suggested that he use word prediction software. The software program predicts a word by listing possible words based upon the first letters typed. If the user is unsure of the spelling, he or she can move the mouse curser over the words in the prediction box and hear the words spoken aloud by the computer. Mr. Tom noted that the auditory feedback often will help the user select the correct word and reduce the barrier of spelling in written expression.

202. Mr. Tom gave Student an opportunity to try a word prediction software program called *WordQ* which can be configured to echo back individual letters as they are typed as well as echoing words that are completed. The program also will read back

sentences and passages. ATEC provided Student with a 30-day trial of the program to see if it would benefit him.

203. Given Student's reading difficulties, Mr. Tom also demonstrated to Student and Parents a text-to-speech program called *WYNN Wizard*. It is used in conjunction with a Windows-based computer and a scanner which allows printed materials to be scanned into the computer. The text is displayed on the computer and can be read aloud with a computer synthesized voice. The user can highlight a word and have the program read it to him, say the letters individually, and repeat the word as well as speak individual syllables.

The March 16, 2009 and April 14, 2009 IEPs

204. Student's IEP team met on March 16, 2009. The purpose of the meeting was for his annual review and also as a transition IEP since Student would be attending intermediate school the following school year. Present at the meeting were Parents; one of Student's attorneys; a Spanish language interpreter; Mr. Cochrane and a second District program supervisor; the school principal; Ms. Chinn; Ms. Dunaway; Mr. Sailors; Mr. Stickler; Mr. Tom from ATEC; and two District legal representatives.

205. Mr. Tom presented his assessment findings to the IEP team. By the time of the meeting, Student had been using the *WordQ* software at school and at home. He did not use it successfully. Student's teacher and Parents believed that it was not beneficial to him since he rushed through what the program provided as he tended to do with all assignments. The IEP team then discussed the benefits of the reading support software ATEC had recommended. The school principal informed the team that the District would be piloting the use of a new software program in the intermediate schools called *Kurzweil 3000*¹⁰ that was very similar to the *WYNN Wizard* program

¹⁰ Kurzweil is misspelled as "Kurzwell" in the IEP meeting notes.

recommended by ATEC. The program supervisor told the team that *Kurzweil 3000* had both word prediction and text-to-speech capabilities. The District team members discussed how *Kurzweil 3000* would be able to be implemented in Student's instructional setting at the intermediate school. The District felt that it was more appropriate for Student to use the *Kurzweil* program than to use the *WYNN Wizard* program since the other students in school who needed that type of software would be using *Kurzweil*. The District offered to do a 30-day trial of the program during the current school year. The IEP team members also agreed to ATEC's suggestion that it conduct a follow-up assessment of Student after he had spent a couple of months at intermediate school so that he could be assessed in his new school setting. ATEC did not make any recommendation that Student be provided with books on tape. No one on the IEP team, including Parents and their advisors, suggested at this or any other IEP meeting that books on tape be provided as assistive technology for Student.

206. Parents and Student's attorney again requested District funding of more LMB instruction. The District again declined to fund the program, emphasizing that Language! was a state-approved, multisensory approach to language development and that Student was demonstrating progress. As of the time of this IEP meeting, District informal assessments indicated that Student was reading at a late third grade reading level, an approximately one year's progress from the year before, and an increase from the assessment done at the beginning of the school year. Student's reading comprehension had also improved over the course of the school year.

207. The IEP team reviewed the modifications and accommodations for Student and agreed to retain the ones already in his IEP. The team adjourned the meeting, agreeing to continue when the intermediate school staff could be present to discuss Student's transition to intermediate school.

208. The IEP team reconvened on April 14, 2009. Present were Parents, one of Student's attorneys, a Spanish language interpreter, Ms. Dunaway, Mr. Cochrane, Ms. Chinn, the Lawrence principal, Mr. Sailors, William Gates, the principal from Alamitos Intermediate School, Dean Jacobs, an RSP teacher from Alamitos, a District school psychologist, and an attorney for the District.

209. The team reviewed Student's present levels of performance. Student was performing at grade level in math. His spelling skills had increased substantially, and he was generally scoring 80 percent correct or better on spelling assessments. He was reading at a late third grade level based on the informal Houghton-Mifflin reading assessment. However, Student continued to leave off word endings when reading and continued to misread words. Based on other informal assessments, he was able to read all one and two-syllable words from a list of words, but only three out of eight three-syllable words. In writing, Student still had very poor grammar and spelling, but his ideas were good as were his transitions. Effectively using a spell check program and proof reading his work had resulted in the elimination of many spelling errors in Student's writing. Student continued to refuse to use the Alphasmart since he did not want to call attention to himself. However, since his entire class was able to use a computer in the computer lab, Student would type and print out final drafts of assignments there.

210. In the area of ELD, Student was overall at an intermediate level. He had shown progress in the area, moving from a beginning level to the intermediate level in English in a year.

211. With regard to expressive speech, Student had learned to self-correct speech errors when speaking with his peers but was not generalizing that skill to situations where he was speaking with adults. With regard to speech pragmatics, Student was successfully identifying emotions and was able to act them out as well.

Student had also met his goal of being able to verbally identify the emotion on a communication partner's face eight out of 10 times.

212. Student's social/emotional development continued to be appropriate and therefore not an area of unique need for him. He was a happy young man, had been observed in acts of kindness on several occasions, and was a good friend to his classmates. He was respectful to peers and adults, had a sense of humor, and liked to play little jokes on people.

213. The District IEP team proposed that Student have a number of accommodations and modifications in the classroom and to his curriculum. These included having math problems and writing prompts read to him when necessary, front row seating in the classroom, having his teacher check his planner, sensory strategies such as fidget items like an eraser if he needed one, rewards for on-task behavior, and visual cues where he was off-task. The District also proposed that Student be assessed using the CMA for ELA and writing, but that he be assessed in math using the standard CST with testing accommodations.

214. The District proposed six goals for Student whose implementation would start in the sixth grade elementary school class and carry over to the seventh grade intermediate school classes. The first goal was for reading comprehension. Its objective was to have Student be able to analyze character traits through the character's thoughts and actions. For ELD, the goal focused on vocabulary and required Student to use his knowledge of Greek, Latin, and Anglo-Saxon roots, prefixes, and suffixes to be able to understand classroom vocabulary.

215. Goal three was addressed at increasing Student's reading fluency from 94 words per minute to 120 words per minute. Dr. Schneider-Zioga criticized this goal because she felt that Student also needed a goal to address his spoken language fluency. Her criticism was not persuasive because she failed to address how Student's

education was impacted by the lack of the goal she proposed. The District proposed a speech goal (unnumbered goal 6 in the IEP) to address Student's speech deficits. Additionally, the IEP proposed providing Student with 60 minutes per week of group speech and language sessions to address his speech deficits. Therefore, the lack of a speech fluency goal did not deprive Student of a FAPE.

216. Goal four addressed Student's writing deficits. Its objective was for Student, by the end of a year, to be able to write a summary of a passage he had read indicating the main ideas of the passage and details or a character analysis with 80 percent accuracy in content and word endings. Unnumbered goal five addressed Student's issues in tending at times to monopolize conversations. The goal called for Student to learn to engage in more reciprocal type of conversation or activities with peers.

217. The proposed goals were not vague, were measurable, and appropriately addressed Student's areas of unique needs.

218. The District's offer of FAPE for the remainder of the 2008 – 2009 school year continued to be 120 minutes of RSP services a day, with extra Language! support after school to be provided by Ms. Dunaway. For the 2009 – 2010 school year, when Student would be in seventh grade at intermediate school, the District proposed that he have two 50-minute periods of RSP for ELA each day.

219. At the IEP meeting the District indicated that the Language! program was no longer used at the intermediate school level. Rather, the District was using interventions based on the ELA curriculum it used from the Holt publishing company. Alamitos principal William Gates explained that Holt was used in the general education ELA classrooms as well as in the RSP rooms. All seventh grade students received two periods of ELA a day. Special education students who needed more intervention were

given two periods of ELA in an RSP classroom if they needed it. This is what was proposed for Student.

220. At some time after the IEP meeting and before the start of the 2009 – 2010 school year, the District decided to pilot two other reading intervention programs for students deficient in ELA. One program was called Gateways. The other program was called Portals. At hearing, Mr. Gates explained that had Student enrolled at Alamitos, he would have been assigned to one or other of these intervention programs. Both programs were state approved. By the time the hearing in this matter reconvened in March 2010, the District had reviewed both reading programs and had chosen Gateways as the reading intervention program it would use for intermediate school students.

221. Dr. Gabriela Mafi testified at hearing on behalf of the District. She is an Assistant Superintendent for secondary schools in the District. She has a doctorate degree from the University of Southern California (USC) in urban educational leadership. She is presently an adjunct associate professor at USC. She has worked in education since 1994, first as a teacher, then as a program coordinator, a school principal, and a director of instruction. Dr. Mafi has worked with the District since 2002.

222. Dr. Mafi explained that Gateways was approved by the state in the 2008 – 2009 school year as an intensive reading intervention program. It is similar to Language! It has four levels beginning with pre-kindergarten. It is designed for students reading below sixth grade level. The pilot program for Gateways and Portals terminated at the end of the fall semester for the 2009 – 2010 school year, with the District choosing Gateways as the program it would use in the future. The teachers were trained on the program in May and June of 2009 before the pilot began. There was also training provided over the summer of 2009 with follow up training provided by District teachers on special assignment. Gateways was being implemented fully at Alamitos as intervention for students with reading deficits.

223. Dr. Bailey criticized the Gateways program because she had not been able to find much information about it on the internet. However, she is not an educator. Her opinion of the program was not given much weight in light of the testimony of Mr. Gates and Dr. Mafi addressing the specifics of the program, what it was designed to do, the fact that it is state-approved specifically for reading intervention for students with reading deficits, and the lack of any specifics as to why Gateways, at least on its face, would not be an appropriate reading intervention to use with Student. Additionally, although Dr. Bailey believes that the Slingerland approach would be better for Student, that is not the criteria for determining whether a district has offered a FAPE to a student. The District was required to provide Student with an education that addressed his unique needs and permitted him to progress in the curriculum. It was not required to provide him with the best program that would be able to do that.

224. In addition to offering RSP services for both sixth and seventh grade, the District offered to continue the 60 minutes per week of group speech and language services that Student was already receiving. Student presented no evidence at hearing that the offer of 60 minutes was not adequate to address his needs. The District offer of FAPE also indicated that Student would take two periods of math at intermediate school. The team discussed that Student's performance in math would be reviewed once school started in the fall. If Student did not require two periods of math, he would be offered an elective in place of one of the periods. This is the format the District used with many general education students as well.

225. Additionally, the District offered the *Kurzweil* program for Student to assist him with accessing curricular materials through a method other than reading. There was evidence at hearing that no student at Alamitos required the program during the 2009 – 2010 school year so it was not in use. However, there was no evidence presented that

the District would not have been able to provide it to Student had he enrolled at Alamitos.

226. The District did not offer Student ESY for the summer of 2009 because it believed he was progressing sufficiently in the curriculum and would not regress during summer. Parents did not consent to the District's offer of FAPE.

227. Student continued to show progress in the sixth grade curriculum. He continued to receive additional support in Language! from Ms. Dunaway after school. At the end of the school year, Student's score on the TOSWRF for Book D was at a 6.7 grade level equivalency, almost two-and-a-half grade levels above his score on Book C. His DRP score was at a grade level equivalency of 3.7, indicating almost a full grade level of improvement from his score on Book C. Student's score on the spelling inventory was only nine out of 30 words correct, but as low as that score was, it was 50 percent higher than his score had been after Book C.

228. On his year end report card, Student's progress remained steady in many areas. He progressed from a level of "1" to a level of "2" by the end of the school year in the areas of using word origins, using editing strategies, using sentence structures, and presenting information in a clear and organized manner. The only area in which Student showed regression was in his use of reference materials. Additionally, Dr. Bailey assessed Student again in the fall of 2009. She administered the TOSWRF and the CTOPP to him. Both are assessments that had previously been administered to Student. He scored in the 42 percentile on the TOSWRF, far higher than he had on the same assessments given to him as part of the Language! assessment process. On the CTOPP, Student's scores were generally higher than those he had obtained when Dr. Keller administered it to him in 2006. Dr. Bailey found that Student had made more progress than he had in previous years.

229. The weight of the evidence therefore demonstrates that Student showed meaningful progress in the curriculum during sixth grade.

230. Student argues that his poor behaviors were not being addressed by the District. However, Student's primary issues with behavior during sixth grade were exhibited at home, not at school. He demonstrated oppositional behaviors such as refusing to do homework, refusing to stop playing videos when Parents asked him to stop, and leaving the house without permission. In April 2009, upon recommendation from Dr. Steinberg-Epstein, Parents began taking Student to a counselor named Jessica St. Claire. Ms. St. Claire is presently enrolled in a doctorate program in clinical psychology. In her career she has been a credentialed school teacher, a social worker, and a provider of services for autistic children through the Regional Center. At the time of the hearing she had provided approximately 30 counseling sessions to Student. She originally felt that he had oppositional defiant disorder but later changed her diagnosis to that of an adjustment disorder.

231. Ms. St. Claire explained that Student was going through a period when he was experiencing a need to exert his independence. He wanted to be in control of his life and felt that he was not. As a result, he was agitated, angry, and frustrated, and could not control his temper. Student also was frustrated with his lack of progress at school because he felt that he was able to read and could not understand why he still could not do all the work at school. Initially, Student was closed down in her sessions with him, giving monosyllabic answers, but he has opened up more over her sessions with him.

232. Student was having significant arguments with his Parents about doing homework. Ms. St. Claire advised Parents to give Student more choice at home. Another major problem was the fact that Student had left the house without permission a couple of times at night and had gone to a local park because he wanted to interact with other

people. Parents had no idea where he had gone and had to go find him. After a few months of counseling sessions with Ms. St. Claire, Student's oppositional symptoms subsided. However, they have not been extinguished and, at the time Ms. St. Claire testified in March 2009, Student was still having behavior issues at home because Student continued to want to exert his independence. Student was not having any behavior issues at the private school he was attending at the time of the hearing.

233. At school in sixth grade Student did not engage in any of the extreme oppositional issues that Parents were confronting at home. He never left school or any of his classes without permission. He was not disrespectful to his teachers. He did not appear angry, frustrated, or agitated. The primary type of oppositional problem Mr. Sailors and Ms. Dunaway had with him during the school year was Student's failure to complete homework assignments. Mr. Sailors addressed the problem through discussions with Student and Parents and with the strategies indicated above. By the end of sixth grade, the issues with homework had generally been resolved.

234. Dr. Steinberg-Epstein and Ms. St. Claire both felt that Student would do better in a private placement. They recommended that he attend Prentice, a private school. Prentice primarily serves students with specific learning disabilities. It uses the Slingerland method of instruction, which has a history of success with students who have reading and writing deficits. Parents followed the recommendation and enrolled Student at Prentice for seventh grade in the 2009 – 2010 school year. Prentice was initially a California certified non-public school (NPS) but lost the certification in approximately February or March 2010 when it failed to ensure that all its teachers had California special education teaching credentials, a new requirement by the California Department of Education for schools wishing to be certified as an NPS. During their testimony Parents were not asked whether they had given notice to the District of their intent to enroll Student in an NPS. Parents did not seek to enter into evidence any

documentation indicating they had given such notice to the District. Nor do the IEP meeting notes for either March 16, 2009, or April 14, 2009, indicate that Parents informed the District of their intent to enroll Student at Prentice or any other NPS. To the contrary, Parents agreed to have the District implement the IEP goals even though they were not in agreement with them.

235. No one from Prentice testified at the hearing in this case. Dr. Mafi explained that Prentice has a policy of not participating in IEP meetings and wishes to avoid participating in due process hearings as well. Prentice does not prepare IEPs for its Students. It does not have an ELD program for English Language Learners. There was no evidence presented that it provides related services to students in the area of speech and language. The student population is primarily students with specific learning disabilities; Prentice has only accepted a couple of very high-functioning autistic children. There was no evidence presented that it had staff who could provide services in the areas of speech fluency or conversational deficits which the District was addressing for Student through his IEPs.

COMPENSATORY EDUCATION

236. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. The purpose of compensatory education is to ensure that the student is appropriately educated within the meaning of the law. Where the actions of parents are unreasonable, equitable relief may be reduced or denied.

237. As stated more fully below, this decision finds that the District failed to offer Student a FAPE by continuing to use the Language! program to address Student's deficits in ELA even after he showed little or no progress in the program. By the time

Student had finished Book C of the program, the District should have noted his lack of progress, convened an IEP meeting, and discussed another intervention with Parents. The failure to offer special education in ESY 2008 also denied Student a FAPE based on his lack of progress in the curriculum during fifth grade and his potential for regression.

238. In his closing brief, Student requests 196 hours of compensatory speech and language therapy not based on any testimony or documentary evidence of any need Student has but rather based upon inferences. Student implies that the District was somehow remiss for failing to have its speech language pathologist testify. Student's implication is entirely misplaced. Since he brought this case, it was his burden to prove any FAPE violations he alleged as well as any need for compensatory education and any amounts that he believed he required. Student failed to put on any evidence that the amount of speech and language services the District offered and provided at all times during the applicable time period did not provide Student with the opportunity to make meaningful progress. Student is therefore not entitled to any compensatory speech and language services.

239. Student also request of 970 hours of compensatory education from LMB or from some other appropriate and qualified educational provider, as compensatory education. It is unclear how Student arrived at the amount of hours requested. He states that it is based upon his belief that half the time spent in Language! was wasted and that he should be compensated for that loss on an hour for hour basis. Student offered no evidence at hearing to support his theories of compensation, which he raised for the first time in his closing brief.

240. The only evidence Student offered at hearing was through the testimony of Ms. Korhonen, the LMB associate director. She testified that a full course of instruction for Student had been determined to be 240 hours. Although Student completed 100 hours in the summer of 2008, Ms. Korhonen stated that given the

passage of almost two years since he received instruction, Student would have to start the program anew if he were to re-enroll in order to benefit from it. The District did not offer any evidence, testimonial or otherwise, that contradicted or countered Ms. Korhonen's testimony. Therefore, this decision finds that 240 hours of LMB instruction is an appropriate amount to compensate Student for his loss of FAPE. The District will also be ordered to reimburse Parents for the costs they will incur in transporting Student to and from the LMB Center.

REIMBURSEMENT OF EXPENSES

241. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Student requests reimbursement for the cost of his IEE. However, since he failed to prove that Parents made a proper request for an IEE, Parents are not entitled to reimbursement for an IEE nor entitled to have one funded by the District in the future.

242. Student also requests reimbursement to Parents for the 100 hours of LMB instruction they self-funded. Since this decision finds that the District denied Student a FAPE by failing to offer a program in lieu of Language! by the end of Student's fifth grade, and failed to offer appropriate special education ESY classes the summer of 2008, Parents are entitled to reimbursement for the LMB services they paid for.

243. Additionally, Student requests an order that his Parents be reimbursed for the cost of his tuition at Prentice during the 2009 – 2010 school year and that the District be order to pay for his prospective placement at Prentice for the 2010 – 2011 school year. However, since this decision finds that the District did not fail to provide Student with a FAPE during the 2008 – 2009 school year when he was in sixth grade, and did not fail to provide him with a FAPE in the March and April 2009 IEPs that would

cover Student into seventh grade, Parents are not entitled to reimbursement for Prentice and Student is not entitled to prospective placement there.

244. Student has failed to prove an entitlement to any of the other relief he requested in his complaint, at hearing, or in his closing brief.

LEGAL CONCLUSIONS

APPLICABLE LAW

BURDEN OF PERSUASION

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion for all issues raised in his complaint.

ELEMENTS OF A FREE APPROPRIATE EDUCATION (FAPE)

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)¹¹ A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to

¹¹ All statutory citations to the Education Code are to California law, unless otherwise noted.

a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) The Ninth Circuit has referred to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (hereafter *Adams*).) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or "at least meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

4. The Ninth Circuit recently reaffirmed the validity of the *Rowley* standard in analyzing FAPE in the context of the 1997 version of the IDEA. In *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938 (hereafter *Mercer Island*), the Ninth Circuit overturned the district court's finding that *Rowley's* educational benefit standard had been superseded by Congress when it revised the IDEA in 1997. The court found that for all intents and purposes, Congress had retained the same definition of a free appropriate public education when it reenacted the IDEA in 1997 and that it had not

indicated any disapproval of *Rowley*. The court further found that Congress did not express any clear intent to change the *Rowley* FAPE standard. The court thus found that the proper standard to determine whether a disabled child has received a FAPE is the “educational benefit” standard set forth by the Supreme Court in *Rowley*. (*Id.* at pp. 949 - 951) A review of the 2004 reauthorization of the IDEA does not indicate any substantive changes in the definition of FAPE or anything in the legislative history that would support a finding that Congress intended to change or modify the educational benefit standard enunciated in *Rowley* when it reauthorized the IDEA in 2004. The Ninth Circuit’s discussion regarding the lack of congressional intent to modify the *Rowley* standard is therefore equally applicable to IDEA 2004.

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207. See also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006), 455 F.Supp.2d 1286, 1307-1309; *aff’d on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232) (hereafter *Miller*.)

THE IEP

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

7. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

8. Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*).) The relevance of a student's subsequent performance to the adequacy of his IEP is limited. In *Adams*, parents who had supplemented their child's education with

private tutoring challenged the adequacy of an Individual Family Service Plan (IFSP) (the equivalent of an IEP for infants and toddlers) on the ground that the child's subsequent lack of progress in school demonstrated the inadequacy of the IFSP. The District Court found it impossible to sort out the progress the child made. The Ninth Circuit, however, rejected that approach. It stated that instead of asking whether the IFSP was adequate in light of the student's progress, the district court should have asked the more pertinent question of whether the IFSP was appropriately designed and implemented so as to convey a meaningful benefit to the student. The court rejected the process of measuring an IFSP (and, by analogy, an IEP) retroactively by its results. Instead of judging the IFSP in hindsight, the proper analysis was to look at the IFSP's goals, placement and services at the time the plan was developed and ask whether the methods were reasonably calculated to confer the student with a meaningful benefit. The court stated that the IFSP was a snapshot, not a retrospective, and had to take into account what was and what was not objectively reasonable when the snapshot was taken. (*Ibid.*) Although this analysis is generally applied to a student's argument that an IEP did not provide him or her with a FAPE because there is later evidence that the student did not make adequate progress, the argument is equally applicable to cases where a District seeks to convince a tribunal that it offered a FAPE by pointing to the fact that the Student later made progress irrespective of whether the IEP itself was appropriate at the time it was developed.

9. The law requires an IEP team to meet at least annually "to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate...." (Ed. Code, § 56341.1, subd. (d).) An IEP meeting must

be called when the “pupil demonstrates a lack of anticipated progress.” (Ed. Code, § 56343, subd. (b).)

LEAST RESTRICTIVE ENVIRONMENT

10. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2);¹² Ed. Code, § 56342.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A child with a disability shall not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).) In determining the program placement of the student, a school district shall ensure that the placement decisions and the placement are made in accordance with federal requirements regarding placing the child in the LRE. (Ed. Code, § 56342, subd.(b).)

11. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: the educational benefits of full-time placement in a regular classroom; the non-academic benefits of full-time placement in a regular classroom; the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

¹² All references to the Code of Federal Regulations are to the 2006 version.

PROCEDURAL ASPECTS OF FAPE

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

PREDETERMINATION OF IEP OFFERS

13. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.)

INSTRUCTIONAL METHODOLOGY

14. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, *supra*, 458 U.S. at pp. 207-208.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams*, *supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 207-208).)

15. The reauthorized IDEA does not mandate that a district use a particular methodology. For example, courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. Lexis 27570, pp. 51-57; 46 IDELR 45, 106 LRP 29290, [which provides a comprehensive summary of decisions discussing the matter].) Rather, courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Id.* at pp. 65-68.)

16. Recently, the Ninth Circuit Court of Appeals, in *Mercer Island*, *supra*, 592 F.3d at p. 952, reiterated its position that a district is not necessarily required to disclose its methodologies. The Court found that it is not always necessary for a school district to

specify a methodology for each student with an IEP if specificity is not necessary to enable the student to receive an appropriate education. In finding that the district had not committed a procedural violation of the Act by failing to specify the teaching methodologies it intended to use, the court stated, "We accord deference to the District's determination and the ALJ's finding that K.L.'s teachers needed flexibility in teaching methodologies because there was not a single methodology that would always be effective." (*Ibid.*)

17. However, a District's ability to determine methodology is not absolute. If the District chooses a methodology and then fails to implement it correctly, a tribunal may find that it denied a student a FAPE if the Student failed to progress. For example, in *Miller, supra*, 455 F.Supp.2d at p. 1309, the Albuquerque Public Schools had selected particular reading intervention programs for use in its schools. It used one of the programs for the student who filed the case. The student's parents wanted the district to use a different program. When the district declined to use it, the parents self-funded their choice of program. The administrative decision, which was affirmed by the district court, found that the district's original decision to use its choice of program was proper. However, the following year the student was moved to a different teacher who did not use consistent, properly implemented reading instruction in any of the school's programs. As a result, the Student failed to progress. The administrative decision, as affirmed by the district court, therefore found that the student's parents were entitled to reimbursement for the costs of funding their choice of program for the period after the student stopped receiving appropriate instruction in the District's program and stopped progressing.

RELATED SERVICES

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

may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) English Language Development is a state-mandated program (Ed. Code, § 52160, *et seq.*) available to both general education and special education services that may be a related service when necessary for a special education student to access his or her education.

EXTENDED SCHOOL YEAR (ESY)

19. ESY services shall be included in a student's IEP if the IEP team determines that the services are necessary to provide a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); Cal. Code Regs., tit. 5, § 3043, subd. (f).) ESY services shall be provided to a student who has unique needs and requires special education and related services in excess of the regular academic year. (Cal. Code Regs., tit. 5, § 3043.) A school district may not unilaterally limit the type, amount, or duration of ESY services. (34 C.F.R. §300.106(a)(3)(ii).)

ASSISTIVE TECHNOLOGY

20. A school district is required to provide any AT device that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) An IEP team must consider whether a child requires AT devices or services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324 (a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) An AT device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

TRANSITION PLANS

21. Beginning at age 16 or younger, the IEP must include a statement of needed transitions services for the child. (Ed. Code, § 56043, subd. (h).) The IEP in effect when a student reaches 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills, and the transition services needed to assist the student in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8).)

22. Transition services are a coordinated set of activities that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation; is based on the student's needs, taking into consideration the student's strengths, preferences and interests; and includes instruction, related services community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocation evaluation. (20 U.S.C. § 1401(34); Ed. Code, § 56345.1, subd. (a).)

DETERMINING WHETHER AN ASSESSMENT IS APPROPRIATE AND THE REQUIREMENTS FOR OBTAINING AN INDEPENDENT EDUCATIONAL EVALUATION

23. In order for an assessment to be considered appropriate, the assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student's native language or mode of communication unless it is not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also meet the following requirements: 1) are provided and administered in the language and form most likely to yield accurate information on

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

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

25. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R.

§ 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].)

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

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

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

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

COMPENSATORY EDUCATION

27. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a

"day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

REIMBURSEMENT

28. 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.)

PROSPECTIVE PLACEMENTS

29. An Administrative Law Judge may not render a decision that results in the placement of a student in a nonpublic, nonsectarian school or that results in services provided by a nonpublic, nonsectarian agency if the school or agency has not been certified under Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).)

DETERMINATION OF ISSUES

Issue I: Did the District deny Student a FAPE by failing to provide appropriate goals and failing to provide adequate services or an appropriate placement capable of meeting Student's needs in the following areas:

a. Reading and Written Language

30. Based upon Factual Findings 11-50 and 65-82, and Legal Conclusions 1-9, and 30, the District's IEP and goals offered Student a FAPE in the area of reading and written language during the 2006 – 2007 school year. The District based its IEP offer on a full and appropriate triennial assessment conducted by Dr. Keller. Based upon his assessment, the IEP team in April 2006 appropriately determined Student's PLOPS from which it developed sufficient and measurable goals to address Student's deficits. The District also appropriately determined that the Language! program, third edition was suitable to meet Student's needs. As stated in Factual Findings 51-64, Language! was specifically designed to meet the needs of children like Student who had been diagnosed with dyslexia and other types of reading and processing disorders. It is a direct instruction program using multisensory teaching methods that scaffolds learning concepts and addresses all facets of reading, writing and comprehension deficits. There is full agreement between the District's witnesses and Student's witnesses, supported by the evidence-based research done on the program throughout the United States, that Language! is a solid reading intervention program warranting its state-approved status.

31. However, the District failed to recognize that Student ultimately was not progressing in the program. Student contends, with support from his expert Dr. Caroline Bailey, that RSP teacher Susan Dunaway failed to implement the program with fidelity which resulted in Student's lack of progress. The evidence supports Student's contention that Ms. Dunaway did not follow the program exactly as scripted. The District recognizes that she may not have been entirely faithful to the program's materials, but argues that

her failure amounted to a choice of methodology which remains within the purview of the District. As discussed in Legal Conclusions 14-17, the District is correct that the choice of an instructional methodology is at a district's discretion. However, once a methodology has been shown to no longer be effective, it is the District's obligation to consider others.

32. As stated in Factual Findings 51-64 and 73-77, Student demonstrated a lack of progress in the Language! program from the beginning. Although mastery in the program is defined as scoring at least 80 percent on the assessment tests and the end of book summative test, Student only scored 22 percent at the end of Book A. While it is reasonable for the District to have believed that the program's positive reputation warranted trying it longer with Student, by the end of Student's fifth grade, the District was under more than sufficient notice that Student had failed to progress meaningfully in the program. His standard test scores were low, his grades were low, he was not making progress in Language! and he was unable to write an intelligible paragraph as evidenced by his spring 2008 writing prompt. As indicated in Legal Conclusion 9, by the end of the 2007 – 2008 school year, the District should have acknowledged Student's lack of progress and either convened an IEP meeting to determine what would be an appropriate future course of action or attempted to use a different instructional methodology to address Student's need for intensive reading intervention. The District did neither. Although the District maintains that Student was progressing in the Language! curriculum, it constructively acknowledged that he was not when Ms. Dunaway decided to re-teach Book C in its entirety rather than advance Student to Book D in the fall of 2008.

33. Dr. Bailey's was very convincing when she testified that Student's failure to progress was due to the lack of fidelity in the delivery of the Language! program. However, it remains speculative as to whether his lack of progress was based on failures

to faithfully follow the program or was based on the fact that Language! might not have been the proper program for him. What the evidence does show, however, is that Student failed to progress, the District should have addressed the issue but did not, and that there was no individualized teaching provided to Student during instruction in Books A and B and during the first time Ms. Dunaway taught Book C. It was not until the District effectively acknowledged that Student was not progressing in Language! and decided to have him completely repeat Book C along with a few other students who also were failing to progress that the District began providing somewhat more individualized instruction to Student. As demonstrated in Factual Findings 83-126 and 135-154, and Legal Conclusions 1-9, and 31-33, Student has thus met his burden of persuasion that the District failed to provide him with a FAPE by the end of the 2007 – 2008 school year.

34. However, Student has not met his burden with regard to the 2008 – 2009 or 2009 – 2010 school years. During the 2008 – 2009 school year, when he was in sixth grade, the evidence indicates that Student meaningfully progressed in the curriculum. His scores the second time Ms. Dunaway taught Book C and his scores on Book D were significantly higher than in the previous Language! books. His reading ability increased a full grade level, his grades were better, and he was producing more coherent written work. The IEP goals developed for this school year adequately met his unique needs. Based upon Factual Findings 163-229 and Legal Conclusions 1-9, and 34, the District provided Student with a FAPE for sixth grade.

35. Likewise, the goals and program proposed in Student's March and April 2009 IEPs would have offered Student a FAPE in intermediate school. The District proposed providing Student with two periods of ELA in an RSP classroom to address his reading deficits. As stated in Legal Conclusions 5, 14-16, and 35-36, the fact that Parents were not familiar with the reading program the District proposed using and the fact that

the District changed programs subsequent to the IEP offer is not dispositive of a finding of FAPE. The District has the discretion to select the instructional programs it uses with its students. Barring evidence that a particular program is simply inappropriate for a student – and no such evidence was provided in this case – the District has full discretion to select, modify, or change its instructional programs. The District’s reading program provided a FAPE to Student in the 2008 – 2009 school year as did the proposed program for the 2009 – 2010 school year when Student would be at middle school. As stated in Factual Finding 223, the fact that Dr. Bailey was unfamiliar with the District’s new programs or believed that another program, such as Slingerland, might provide a greater benefit to Student is not the appropriate inquiry. Rather, the standard is whether a particular program will provide meaningful benefit to a student. There is no evidence that the District’s reading programs at the intermediate level would not.

36. Since the District’s IEPs provided Student with a FAPE for the 2008 – 2009 and 2009 – 2010 school years, Student has not met his burden of proof as to this issue. Parents are therefore not entitled to reimbursement for the cost of Student’s tuition at Prentice and Student is not entitled to an order either placing him prospectively at Prentice or at another NPS.

Social Interaction, Behavior, and Functional/Adaptive/Self-Help Skill

37. As determined by Factual Findings 5, 23, 24, 30, 38, 46-48, 68, 69, 88, 89, 113, 139, 140, 148, 166, 167, 177, 178, 185, 212, and 230-233, and Legal Conclusions 1-9, and 37, there is no persuasive evidence that Student had any social interaction or behavior needs that were not addressed by the District. All of Student’s teachers credibly and persuasively testified that Student was not a behavior problem in class and that his only significant classroom behavior issue was homework completion which the teachers addressed through IEP goals and behavior contracts. Although Parents were having substantial behavior issues with Student at home, particularly during sixth grade,

the problems were not evident at school. None of the oppositional behaviors Student demonstrated at home, which were the impetus for Parents' decision to have Student receive counseling, were exhibited at school. He did not leave class or school without permission, was not disrespectful, oppositional, angry, or defiant with his teachers. The District is not responsible for addressing a student's behaviors that are only exhibited at home and that do not impede his ability to access his education.

38. Nor did Student require social interaction goals or services. Student was an active participant in his classes and on the playground. He interacted appropriately with adults and peers, was not ostracized, and engaged in appropriate activities on the playground. He had no problem working with other students at school, joining in play at recess, or participating in oral presentation in class. When Dr. Bailey became involved with Student's education and expressed concerns in spring of 2008 that Student needed a social conversation goal, the District agreed to conduct his triennial assessment months earlier than scheduled. Based on the results of that assessment and the concerns expressed by Dr. Bailey, Parents, and Student's attorneys, the District IEP team helped to develop a social conversation goal for Student. There is no evidence that the District should have been aware prior to that time that District needed a goal in that area.

39. Although Student contends that he required goals and/or services to address his functional/adaptive/self-help skills, he presented no testimonial or documentary evidence of any type in support of his position. The IEPs themselves indicated that the issue was reviewed at each IEP meeting with a decision by the IEP team that Student had no unique needs in this area. Neither Parents nor Dr. Bailey ever raised the issue with the IEP team or otherwise brought to the District's attention that Student had unique needs in this area that had not been addressed.

Speech, Language, and Communication

40. Student contends that the District failed to develop proper speech, language and communication goals for him and that the amount and type of speech and language services were inadequate. Based upon Factual Findings 34, 35, 44, 68, 86, 94-97, 113, 114, 138, 141, 142, 186, 193, and 211, and Legal Conclusions 1-9, 18, and 40-42, Student has failed to meet his burden of persuasion on these issues.

41. The evidence presented at hearing indicates that the District addressed all of Student's language needs. Student presented no evidence that the amount of services provided through the IEPs did not adequately address Student's needs. The District engaged in a constant discourse with Parents and their advisors about the amount and type of goals Student needed in order to progress with his speech. Goals were discussed, modified, and added based upon input from all IEP team members, including Parents and their advisors. Although Student's experts believed that it was inappropriate to have a goal requiring Student to self-regulate his speech, as stated in Factual Findings 94-97, even if true, there was no substantive impact on Student's ability to benefit from his education because the District provided him with adequate and appropriate speech therapy sessions where a qualified speech and language pathologist would assist Student to recognize speech errors and correct them. Later speech goals provided appropriate emphasis on teaching Student to recognize cues from his peers that they were not able to understand his speech.

42. Additionally, as indicated in Factual Findings 143 and 193, the District modified Student's speech and language services to meet his needs by increasing the amount of services and/or changing the format in which the services were delivered each time Parents requested it. The speech and language goals developed by Student's IEP team and the amount of services the team determined to be appropriate for Student provided him a FAPE at all times during the time period covered by his complaint.

Math, Social Sciences, and Natural Sciences

43. Student contends that he should have had goals in the areas of math, social sciences and natural sciences. It is unclear why Student makes these allegations. Student's standardized assessments, California state testing, and class work product all indicate that Student was generally at grade level in math. He participated in a general education environment without difficulty. Math was an acknowledged strength for Student. Along with science, it was one of the academic subjects that he enjoyed the most and one of the areas to which he gave the most effort. Nor did Student present any evidence that he required goals in social science or natural science. Although his IEP determined that he would take the CMA in science rather than the standard CST, the decision was not based on Student's inability to comprehend scientific concepts. The CMA tests the same concepts as does the CST. Rather, the decision to have Student assessed in science using the CMA was based on the difficulties Student had with reading, writing and comprehending what he read. The CMA was modified as to format of testing not areas of concepts tested. Based on Factual Findings 17, 18, 37, 49, 50, 66, 67, 78, 79, 81, 85, 90, 98, 11, 112, 116, 125, 127, 169, 170, 177, 183, and 209, and Legal Conclusions 1-9, Student has failed to meet his burden of persuasion that the District's failure to develop goals in these areas denied him a FAPE.

Issue II: Restriction on access to electives

44. Student contends that the District's March and April 2009 IEPs failed to offer him a FAPE for his upcoming transition to intermediate school in the fall of 2009 because the proposed placement and programming would not have permitted him to take any elective courses. His IEP proposed having Student take two class periods of ELA and, potentially, two class periods of math, which would have not left him with a free period to select an elective. Student points to his need to learn keyboarding and ATEC's recommendation that he take such a course as support for his argument. Student

acknowledge in his closing brief that there is no case law supporting his contention that a school district is required to provide a special education student with an educational placement or related services after the regular school day so that the student can take an elective class.

45. In addition to the lack of legal authority for his position, Student's argument fails on two other grounds. First, Student was not being treated differently or singled out because of his status as a special education pupil. The District regularly placed general education students who had deficiencies in math in an additional period to ensure that they would not fall behind in math instruction. Additionally, not all special education students were given the additional period. The double math periods were based on a student's need, not whether they were identified as special education or general education students. Secondly, it was unclear whether Student would need the additional period. The intermediate school staff reviewed the records, including grades and test scores, of each student entering middle school before making a final decision on whether the Student needed the double periods of math instruction. Based on Student's grades and test scores, it is possible he would not have needed the extra periods of math. Based upon Factual Findings 204-229, and Legal Conclusions 1-9, 18, 44, and 45, Student has failed to meet his burden of persuasion that the District's failure to guarantee he had an elective period in seventh grade denied him a FAPE.

Issue III: Provision of an education in the least restrictive environment

46. It is unclear what the thrust of Student's contention is with regard to the District's obligation to educate him in the least restrictive environment. Student appears to be saying that because a general education classroom is the LRE unless there is evidence that a child needs a more restrictive placement, a district is not permitted to provide special education or related services on a pull-out basis to a pupil who, like Student, should be spending as much time as possible in a general education classroom.

In effect, Student is making a parallel argument to his contention that the District is required to provide him with services after regular school hours so that he does not have to sacrifice an elective period. Student thus appears to argue that instead of pull-out services, the District must provide him with services and special education programming after school so that he will not miss any of the general education school day. Student offers no authority for this theory. He has therefore failed to meet his burden of persuasion that the District denied him a FAPE by offering special education and/or related services during the school day instead of after regular school hours. (Legal Conclusions 10 and 11.)

Issue IV: Provision of adequate supports in the general education environment/ failure to appropriately assess or address Student's needs for assistive technology

47. Student contends that the District did not provide him with adequate supports to allow him to make progress in the general education environment. Student first argues that assistive technology accommodations were not adequate. However, the weight of the evidence does not support his contention. As indicated in Factual Findings 19, 74, 101, 115, 144, 165, 170, 199, and 209, the District provided Student with access to varying degrees of assistive technology as he grew older and as his needs changed. The District first provided Student with an Alphasmart, a word processing device that had a memory and that could be connected to a computer so that Student could print his written work. It was Student's choice to discontinue use of the device because he felt self-conscious using it in front of his classmates. However, Student also had access to a computer on a daily basis in his RSP classroom and, in later elementary school, at the school computer lab.

48. Student also asserts that the District did not properly assess him in the area of AT. Student provided no evidence in support of this contention. The District

recognized that Student's AT needs would increase in intermediate school due to the higher level of difficulty in academics. As stated in Factual Findings 197-205, 209, and 225, to address those anticipated needs, the District referred Student to ATEC, a private agency, for an AT assessment. Mr. Tom, the ATEC assessor, observed Student at school, spoke with Student's teachers, and interviewed Student and Parents in order to determine Student's AT needs. He recommended two types of software programs for Student: a word prediction program and a text to speech program. The latter program would enable Student to access texts and other written materials by auditory methods rather than through reading. ATEC then provided a trial period in one of the programs to see if Student would benefit from it. Student provided no witness who contested the appropriateness of the ATEC assessment. The argument he makes in his brief that the assessment was inappropriate is therefore unsupported.

49. Additionally, in recognition of the increased academic demands of intermediate school and in light of Student's deficits in reading, the District offered Student the *Kurzweil* program as AT support in seventh grade. *Kurzweil* is also a text-to-speech program with specific vocabulary directed at students in intermediate school. Like the *WYNN Wizard* program recommended by ATEC, *Kurzweil* would address any difficulties Student might have had with reading textbooks or other written materials he needed to access for his academic classes. Student would also continue to have access to a computer or word-processor to address any deficits in his handwriting.

50. At hearing, Student elicited testimony from a number of witnesses as to the availability of books on tape for Student. Student contended that books on tape should have been offered as an accommodation or support in order for him to access academic subject matter that he was unable to read due to his reading deficits. However, Student failed to provide persuasive evidence that he required such support in elementary school. To address his reading deficits, the District provided him with

accommodations such as having math problems read aloud, having words explained to him, and placement of an aide in the classroom to assist Student with work. There is no evidence that Student was unable to access the social science, math, or natural science curriculum. To the contrary, Student performed at grade level in math and generally received "Ss" in science, history and social studies, indicating that he was performing satisfactorily in those subjects. Furthermore, as discussed above, the District recognized Student's need for AT support in intermediate school and offered the *Kurzweil* program to address those needs.

51. Based upon the Factual Findings mentioned above, and supported by Legal Conclusions 1-9, 20, 23-24, and 47-51, Student has failed to meet his burden of persuasion that the District denied him a FAPE by failing to appropriately assess his needs for AT or by failing to provide adequate AT support in the classroom.

Issue V: Information regarding District staff incapacity or unwillingness to provide Student with a FAPE

52. Student's arguments with regard to this issue are vague. In his brief, Student asserts that the District was withholding critical information from Parents. It is unclear what information Student contends was withheld. He references information concerning his autistic-like behaviors, but there is no evidence the District withheld anything in that regard. Student's own independent medical providers made contrary findings as to whether Student was on the autism scale. Neither his therapist Jessica St. Claire, or Cayce Korhonen from LMB noted any autistic-like behaviors in Student. However, the most significant detail that contradicts Student's contention is the fact that the District continued to determine Student eligible for special education under the secondary classification of autism. Nor is there any evidence to support Student's assertion that Student's teachers lied when they stated that they did not note characteristics of autism in the classroom.

53. Student also contends that the District concealed information from Parents concerning Student's lack of progress in Language!. However, there is no evidence of active concealment by the District. The District merely had a different perspective with regard to whether Student was making adequate progress in the program. They believed that he was making progress. Parents believed that he was not. That this Decision ultimately validates Parents position that Student did not make meaningful progress and rejects the District's view that he did does not result in a concurrent finding that the District concealed information from Parents. It was Student's burden to support this allegation with more than supposition and conjecture. This he has failed to do.

Issue VI: Predetermination of IEP offers and refusal to consider the continuum of available services

54. As stated in Legal Conclusion 12 and 13, a school district commits a procedural violation of the Individuals with Disabilities Education Act by predetermining its IEP offer. Student alleges that the District did just that when it decided to utilize the Language! program to address Student's need for intensive reading intervention. Student contends that the District had predetermined that it would never agree to fund LMB services as requested by Parents. Student however has failed to present persuasive evidence to support this contention.

55. Initially, it is noted that Student's argument conflates the concept of predetermination of placement with the concept of instructional methodology. Districts are prohibited from unilaterally determining a student's placement. However, as stated in Legal Conclusions 14-17, it is within their discretion to determine the instructional methodologies it will use in its classrooms. A district is not required to discuss with parents the methodologies it is considering or obtain the consent from parents before choosing a particular program. If such a requirement existed, the end result would be

absurd: districts would be required to discuss methodology for each of its special education students and would potentially need to purchase a different program for every child. Student provides no support for this proposition. As stated in Legal Conclusions 14-17, a district's only obligation is to provide an instructional methodology that meets a student's unique needs.

56. To the extent that Student contends that the District predetermined that it would not fund LMB, Student has also failed to meet his burden of persuasion. He presented no evidence that the District team members decided prior to Student's IEP meetings that they would never consider the program. The pros and cons of both programs were discussed at all of Student's IEP meetings. Parents, Dr. Bailey, and Student's attorneys were permitted to voice their opinion and advocate for LMB. Nor is there evidence that the District has a policy of refusing to fund LMB. The only evidence presented on the issue was through Dr. Lewis' testimony; he testified that the District has funded LMB in the past. There is no evidence to the contrary. The District believed that the highly regarded Language! program would meet Student's needs. That this Decision finds that those needs were not ultimately met does not result in a finding that the District predetermined that it would never consider LMB as a possible reading intervention for Student.

Issue VII: Failure to adequately assess Student

57. Student contends that the District failed to adequately assess him. Student did not specifically identify which of the District's assessments was inappropriate before arguing the issue in his closing brief. None of Student's witnesses at hearing identified the inadequacies of any of the District assessments.

58. As stated in Legal Conclusion 24, for assessments to be appropriate, personnel who administer them must be qualified to do so. Student presented no evidence that the District staff who assessed Student during his academic career at the

District did not meet the necessary requirements. Additionally, the assessment itself must meet certain requirements, as discussed in Legal Conclusion 23. Student presented no persuasive evidence that the District failed to use a variety of assessment instruments or failed to use assessments consistent with Student's history of autism and with his history of deficits in written language and reading comprehension. Student presented no evidence that the assessments administered were racially, sexually, or culturally biased, that they were not administered in an appropriate language, or that they were not valid for the purpose for which they were used. Based on the description of the assessments as described in Factual Findings 11-30, 174-186, and 197-205, Student has not met his burden of persuasion that the District failed to appropriately assess him.

Issue VIII: Failure to fund an IEE or file for due process to defend District assessments

59. Student contends that Parents requested that the District fund an independent educational evaluation for him in February 2008 and again in November 2008. Student states that the District did not respond to the request by either funding the IEE or filing for a due process hearing to determine the validity of its own assessments, as required by law.

60. As indicated in Factual Findings 128-134, Student presented no evidence that Parents ever made the request to the District for an IEE. Both Mother and Father testified at the hearing in this matter but did not address the issue of IEEs during their testimony. Nor did counsel for Student ask any District employee who testified to confirm that such requests were made. It was only after the taking of all testimony had concluded, when the ALJ was reviewing documents with counsel that Student attempted to move into evidence a letter which purported to contain a request by Parents for an IEE. As discussed in Factual Finding 130-131, the ALJ sustained the District's objection to admission of the letter into evidence since no one had referenced the letter in their

testimony and because no foundation had been laid for its admission. Since Student failed to address the issue of a request for an IEE during the hearing, the District had not presented a defense to the allegation. It would therefore have been significantly prejudiced by the admission of the letter.

61. Moreover, as indicated in Factual Findings 132-133, and as supported by Legal Conclusions 25 and 26, even had the letter been admitted, it would not have supported Student's contention that Parents made a valid request for an IEE. The letter does not reference which of the IEES Parents contended were not appropriate and does not specifically state what type of IEE it was requesting the District to fund. The District therefore did not have adequate notice of an IEE request that would have permitted it to make a meaningful decision as to whether it would fund the IEE or file for due process. It had no way of knowing which of its IEES it needed to defend in a due process hearing. Nor is there any reference in any of Student's IEPs subsequent to February 2008 of a request by Parents for an IEE. Student has failed to meet his burden of persuasion on this issue. He is not entitled to a District-funded IEE.

Issue IX: Failure to provide adequate extended school year program

62. Student contends that the District should have offered him a special education extended school year program during the summers of 2008 and 2009. He asserts that he required it in order to prevent further regression in reading. The District did not address this issue in its closing brief.

63. As stated in Legal Conclusions 1-9, and 19, an IEP must include extended school year services if they are necessary for provision of FAPE to the Student. The evidence at hearing was ambiguous as to whether an ESY program for special education students was available in the District. In any case, the District offered general education summer school to Student most years based upon its view that he was progressing in the curriculum. However, as indicated in Factual Findings 106-127, and 154, and as

supported by Legal Conclusions 1-9, 19, 62, and 63, the weight of the evidence demonstrates that Student was not making more than minimal progress by the end of fifth grade. Even if the District was unaware of his lack of progress by the time Student's annual IEP was developed in March 2008, it had sufficient notice by the end of the 2007 – 2008 school year that Student's progress was minimal at best. He had only scored a 44 percent on his Book C summative test, and his other Language! assessments indicated that his abilities still were in the range of the material covered by Book A. His grades had declined in a variety of areas in reading and written language skills. And, his spring 2008 writing prompt indicated that he could not comprehend written directions, could not spell, and could not write a coherent paragraph. With all of this information, and the knowledge that Student was reading many years below grade level, the District should have known that a general education placement for summer school in ELA would have not met Student's needs. The failure to offer him ESY for the summer of 2008, in conjunction with the District's failure to either hold an IEP meeting to address Student's lack of progress and/or to attempt another intensive reading intervention with Student, denied him a FAPE.

64. However, as indicated in Factual Findings 163-173, 206, and 227-229, and as supported by Legal Conclusions 1-9, 19, and 64, Student has not met his burden of proof that he required ESY in the summer of 2009. As he acknowledged in his written closing argument, the evidence supports a finding that he demonstrated progress during sixth grade. He progressed in reading and writing, in the Language! program, in his standardized assessments, in his informal assessments, and in the general education curriculum. Student did not prove by a preponderance of the evidence that the District should have known that he required ESY after sixth grade. The District thus did not deny Student a FAPE when it failed to offer ESY for summer 2009.

Issue X: Failure to meet Student's needs related to transition to postsecondary outcomes

65. Student asserts that the District denied him a FAPE because it failed to begin planning for his transition from high school while he was still in elementary school. As stated in Legal Conclusions 21 and 22, school districts must develop a transition plan for special education students who will turn 16 during the year covered by an existing IEP. Student's radical and unsupported theory implies that school districts must start post-secondary planning for its special education students when they are still in elementary school. Student offers no authority for this proposition. To the contrary, the history of the Individuals with Disabilities Education Act belies Student's argument. Prior to the re-authorization of the Act in 2004, school districts were required to provide transition plans and services for students who would turn age 14 during the period covered by an existing IEP. The age at which a transition plan is required was increased to 16 in the reauthorized Act. This increase in age supports an inference that Congress acknowledged that attempting to plan post high school goals at an early age did not benefit special education students. Moreover, Student failed to present any evidence that he had unique and singular needs that required transition planning earlier than age 16. No denial of FAPE occurred due to the District's failure to begin transition planning for Student during elementary school.

Issue XI: Student's Needs as an English Language Learner

66. As stated in Factual Finding 1, Student is designated an English Language Learner based upon his scores on the CELDT. As stated in Legal Conclusion 18, he is entitled to English Language Development whether he was a general education or special education student. As a special education student with continuing ELD needs, the District provided Student with 30 minutes a day of ELD instruction and appropriately included an ELD goal in Student's IEPs. Student, however, contends that the District

denied him a FAPE with regard the provision of ELD because his IEP teams did not address ELD, the ELD program the District used was not disclosed to Parents, and his response to the program was not disclosed.

67. The evidence does not support Student's contentions. As stated in Factual Findings 1, 13, 41, 65, 82, 89, 91, 127, 147, 164, and 210, the District administered the CELDT to Student every school year. His scores on that test for the last three years it was administered to him demonstrate that Student's scores on the test increased each year. He was in the beginning range when tested in school year 2006 – 2007. For the test administered in school year 2008 – 2009, Student had progressed to the intermediate range. Additionally, the weight of the evidence indicates that the IEP team discussed Student's CELDT scores, discussed his need for ELD, and developed ELD goals for him throughout his elementary school years. Additionally, as indicated in Legal Conclusions 14-16, the instructional methodology used in the classroom is at the discretion of the District. Although it was not under an obligation to disclose the program, there is no evidence that it failed to do so, or would have failed to do so if asked. Finally, although Student contends that the ELD portion of the Language! program was superior to the English Now program used by the District, the District was not required to maximize or optimize Student's potential. The weight of the evidence thus fails to support Student's contention that the District did not address his needs as an English Language Learner. There was no denial of FAPE in this regard.

DETERMINATION OF RELIEF

68. As stated in Legal Conclusions 27 and 28, the courts have recognized that equitable factors may be considered when fashioning relief for violations of the IDEA. Any relief ordered must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. As discussed in Legal Conclusions 27, 28, and 68, a school district may be

required to reimburse a student's parents for the costs of self-funded private school tuition or other services if the district failed to provide a FAPE to the student.

Reimbursement may be reduced or denied based upon equitable considerations.

Additionally, as stated in Legal Conclusion 29, California statute prohibits an ALJ from ordering that a school district place a student in a non-public school or provide the student with services from a non-public agency that has not been certified by the State.

69. As determined in Factual Findings 92-94, this Decision finds that the District denied Student a FAPE in his March 2007 IEP by failing to write an appropriate reading goal for him. Additionally, as determined in Factual Findings 106-126, and 154, this Decision finds that by the end of the 2007 – 2008 school year, the District's reliance on the Language! program to provide intensive reading intervention for Student denied him a FAPE because it caused a loss of educational opportunity to Student.

70. Based upon Factual Findings 92-94, 106-126, and 154, and Legal Conclusions 1-9, 27, 28, and 68-70, and after weighing all the evidence and considering the equities, this Decision finds that Parents are entitled to reimbursement in the amount of \$9449 (nine thousand four hundred and forty-nine dollars) for the cost of the LMB program they self-funded for Student in the summer of 2008. Additionally, Parents are entitled to reimbursement for the cost of transporting Student for one round-trip a day from their home to the LMB Center in Newport Beach, California at the District's standard rate for reimbursement of mileage. The District shall base the transportation reimbursement on the distance from Student's home (whose address in part of the District's records) to LMB. The District shall be ordered to provide the reimbursement within 45 days of receipt of this order. Parents have already submitted as evidence copies of the LMB invoices indicating the amounts they paid for the LMB services.

71. Based upon Factual Findings 92-94, 106-126, 154, 155-162, 173, 206, and 227-229, and Legal Conclusions 1-9, 27, 28, and 71, Student has proven that he is

entitled to compensatory education in the form of 240 hours of LMB services to compensate him for the loss of educational benefit occasioned by the District's denial to him of a FAPE for the 2007 – 2008 school year. The District will be ordered to contract with LMB and fund the 240 hours of services. Student will be ordered to use the 240 hours within the twelve month period following issuance of this decision or forfeit any hours not used. Additionally, the District will be ordered to reimburse Parents for the cost of one round trip from their home to the LMB Center based upon the District's standard rate for reimbursement of mileage.

72. As stated in Factual Findings 163-173, 206, and 227-229, and as supported by Legal Conclusions 1-9, 27, 28, and 72, Student has not proven by a preponderance of the evidence that the District failed to provide him a FAPE during the 2008 – 2009 school year or that its offer of FAPE for the 2009 – 2010 school year was legally deficient. Parents are therefore not entitled to reimbursement of the cost of Student's tuition at Prentice. Nor is Student entitled to an order of prospective placement at Prentice or any other non-public school. In any case, Prentice is no longer certified by the California Department of Education and OAH has no authority to order Student to receive services from an uncertified NPS.

73. Student has failed to offer evidence to support all other relief he has requested and therefore those requests not addressed above are denied.

ORDER

1. Within 45 days of receipt of this Decision the District shall reimburse Parents in the amount of \$9449 for their costs of funding the LMB program.

2. Within 45 days of receipt of this Decision, the District shall reimburse Parents for the cost of transporting Student from their residence to the LMB Center in summer of 2008. The District shall reimburse Parents for the cost of 25 round trips based upon the 25 days Student attended sessions at the Center.

3. Within 60 days of receipt of this Decision, the District shall contract with the LMB Center in Newport Beach, California for the provision of 240 hours of LMB services for Student. The District will immediately notify Parents when the contract with LMB is executed. Within 45 days of submission by Parents to the District of reasonable proof of the mileage Parents incurred, the District shall reimburse Parents for the cost of one round-trip between their residence and the LMB Center in Newport Beach for every LMB session Student attends. Student shall have 12 months to complete the 240 hours. Student shall forfeit any hours not used within 12 months from the date the District notifies Parents that the contract with LMB is in effect.

4. All other requests for relief by Student and Parents are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed substantially on Issues I(a) and IX. The District prevailed fully on all remaining issues.

RIGHT TO APPEAL

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

Dated: June 1, 2010

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings