

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

ANAHEIM CITY SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009100450 (primary)  
consolidated with CASE NO. 2009110308

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter at the Office of Administrative Hearings in Laguna Hills, California, commencing on November 9, 2009.

Laurie LaFoe, Esq., represented the Anaheim City School District (District). Sherry Blakely, Director of Special Education, attended the hearing on behalf of the District.

Maureen Graves, Esq., represented Student (Student). John Nolte, Esq., also sporadically attended the hearing on behalf of Student. Student's mother (Mother) attended the hearing each day on behalf of Student. Student's father (Father) also attended on most days. Mother testified and required the assistance of a Spanish language interpreter throughout the hearing.<sup>1</sup> Father testified in English and did not require interpreter services.

The District filed its request for due process complaint (complaint) on October 12, 2009, with hearing scheduled to commence on November 9, 2009. On November 9,

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<sup>1</sup> Mother indicated she knows basic, simple English. She communicates with Student's therapists in English, but cannot understand rapid speech or complex words.

2009, the District filed a subsequent request for due process complaint, Case No. 2009110308. Pursuant to the oral stipulation of the parties at hearing on November 9, 2009, the parties requested that (1) Case No. 2009110308 be consolidated with the primary Case No. 2009100450, (2) the consolidated cases proceed to hearing as scheduled on November 9, 2009, and (3) additional dates for hearing be added, specifically, November 10 and 12, 2009, December 14, 15, and 17, 2009, and January 11, 12, 13, and 14, 2010, for a total of 10 days of hearing. The parties further stipulated that the 45-day timeline for a decision would begin as of the November 9, 2009 filing date of the District's second complaint. The record closed on January 25, 2010, upon receipt of each party's closing brief,<sup>2</sup> thereby requiring issuance of this decision no later than March 1, 2010.

## ISSUES

The District's consolidated complaints present the following issues:

1. Is the District's Psychoeducational Assessment and Social Communication and Language Assessment, conducted by Dr. Lauren Franke in February, March and April 2009, and summarized in her April 3, 2009 report, an appropriate assessment?

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<sup>2</sup> Additionally, on November 30, 2009, the District filed three motions to quash subpoenas served on District witnesses. Student filed an opposition to the motion on December 2, 2009. The ALJ provided each party with the tentative rulings by telephone and allowed oral arguments at hearing on December 14, 2009. The rulings primarily granted the motion except for those documents maintained by the District in Student's educational file.

2. Did the District's individualized education program (IEP) dated September 16, 2009, offer Student a free appropriate public education (FAPE)?<sup>3</sup>

## CONTENTIONS

In a written notice to the District, Student asserted that Dr. Franke's assessment was not appropriate and requested an independent educational evaluation (IEE) at public expense. The District disagreed and contends in its complaint that Dr. Franke's assessment meets the criteria established in Education Code section 56320. Student contends that the District has not demonstrated the appropriateness of Dr. Franke's assessment. According to Student, Dr. Franke may have correctly scored technically acceptable instruments; however, the written assessment, interpretations and recommendations are just as vital, and in these areas, Student contends, she has failed.

In its second issue, the District contends that its offer of a FAPE complies with the IDEA's procedural and substantive requirements, is designed to meet Student's unique needs, and is reasonably calculated to provide some educational benefit to Student in the least restrictive environment (LRE). Student contends the District committed a myriad of procedural and substantive errors which have denied Student a FAPE. Student's contentions include allegations that (1) the District failed to adopt Parents' information and requests, thereby resulting in a predetermined IEP, in which Parents were denied meaningful participation; (2) the IEP team failed to adopt Parents' version of Student's present level of performance, which resulted in inaccurate baselines and inappropriate goals; (3) the goals were unmeasurable, and not based upon peer-reviewed research; (4) the school ABA program did not allot sufficient time to Student

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<sup>3</sup> For purposes of clarity and continuity, the District's issues are addressed in reverse order of their filing with OAH.

and would be inappropriately supervised by the District; and (5) the IEP failed to adequately address Student's behavioral problems and failed to adopt appropriate behavior reinforcement strategies and effective reinforcers.

## FACTUAL FINDINGS

### BACKGROUND

1. Student is an eight-year-old boy who resides within the District. He is currently in the third grade and attends a special day class (SDC) at Jefferson Elementary School (Jefferson) located within the District. The parties agree that Student is eligible for special education and related services due to autism/autistic-like behaviors.

2. Due to several circumstances, including prior dissatisfaction with the District, Parents removed Student from school and placed him in a home program for nearly a year. The home program consisted of an Applied Behavior Analysis (ABA) program provided through Footprints,<sup>4</sup> and a private ABA/Discrete Trial Training (DTT) program provided by Kayla Doyle. Student also interacted with typical peers for two hours, once a week in a daycare with aide support provided by the Regional Center. Although Student's family is bilingual (Spanish), Student's family speaks to Student in English, and his home program is conducted in English. Parents indicated that Student primarily speaks English.

3. Student returned to the District's Jefferson SDC in May 2009.

4. Beginning on June 2, 2009, the District convened the first of three IEP meetings to develop Student's IEP for the 2009-2010 school year. The IEP team met a second time for further discussions on September 9, 2009, and developed its completed

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<sup>4</sup> Footprints is a non-public agency which provided Student with non-academic ABA services obtained through the Regional Center of Orange County.

offer of special education and services for the 2009-2010 school year at the third IEP meeting on September 16, 2009.<sup>5</sup> Parents did not consent to the IEP. On October 26, 2009, Parents formally voiced their disagreement with Dr. Franke's assessment, and provided written notice to the District requesting an IEE at public expense. The District denied that request, leading to the District's first issue.

I. IS THE PSYCHOEDUCATIONAL ASSESSMENT AND SOCIAL COMMUNICATION AND LANGUAGE ASSESSMENT, CONDUCTED BY DR. LAUREN FRANKE, AN APPROPRIATE ASSESSMENT?

5. In anticipation of Student's return to school, the District requested that Dr. Lauren Franke assess Student to assist the District with determining his present levels of functioning and educational planning. Dr. Franke administered a Psychoeducational Assessment and Social Communication and Language Assessment (assessment)<sup>6</sup> to Student and provided the District with a written assessment report (report) dated April 3, 2009. Student did not agree with the assessment and requested an IEE.

6. Dr. Franke has a B.A. in speech and hearing, a M.A. in communicative disorders, and a Psy.D. in clinical psychology. She currently is in private practice with an emphasis on diagnosis and treatment of developmental disabilities, autism spectrum disorders, learning disorders, and ADHD. She has assessed over 1,000 children with autism, of which, 70 to 80 percent also displayed cognitive deficits. As part of her employment and consulting, Dr. Franke develops classroom programs for autistic children, and has assisted districts in modifying curriculum. She is also a consultant and

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<sup>5</sup> The three IEPs shall be collectively referred to as the "September 16 IEP."

<sup>6</sup> The assessment took place on various dates during February, March and April 2009.

trainer to school districts and the Orange County Department of Education. Dr. Franke has extensive experience and is highly qualified in the areas of speech and language disorders and the autism spectrum.

7. An appropriate reassessment of a special education student requires a school district to follow numerous and specific testing regulations. Testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and must be administered in the student's native language. The tests and assessment materials must be validated for the specific purpose for which they are used and must be administered by trained personnel in conformance with the instructions provided by the producers of the test and materials. A student must be assessed in all areas related to his/her suspected disability. Assessments must also include testing which is tailored to assess specific areas of educational need. Further, in California, tests of a student's intellectual or emotional functioning must be administered by a credentialed school psychologist.

8. The results of Dr. Franke's assessment, which took place over seven, non-consecutive days, were summarized in a written report dated April 3, 2009, and discussed the areas of Student's (1) cognition, (2) academic skills, (3) receptive and expressive language, (4) social competence, (5) behavior and emotional functioning, and (6) adaptive functioning. The assessment included a review of Student's background and educational records, the administration of standardized testing, interviews with Student's parents, and observations of Student at home on three separate occasions, as well as observations in Dr. Franke's office during testing.<sup>7</sup>

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<sup>7</sup> Dr. Franke did not observe Student at school, as he was not then attending school. She also did not observe Student in his daycare with typical peers.

9. Dr. Franke's report indicated that the testing and assessment materials and procedures used were selected and administered so as not to be racially, culturally or sexually discriminatory. The tests and other assessment materials were validated for the specific purpose for which they were used. The tests and materials included those tailored to assess specific areas of Student's educational needs. Tests used to assess Student were developed and standardized for use with his chronological age group. Dr. Franke administered all test and assessment materials in English.

10. Dr. Franke administered the following standardized tests:

- a. The Differential Abilities Scales, Second Edition (DAS-II), which measured Student's cognitive abilities through both verbal and non-verbal testing;
- b. The Kaufman Test of Educational Achievement, Second Edition (KTEA-II), which measured Student's math, reading and written language levels;
- c. The Peabody Picture Vocabulary Test, Fourth Edition, Form A (PPVT-4A), which measured Student's auditory comprehension of vocabulary at the one-word level;
- d. The Expressive Vocabulary Test, Second Edition, Form A (EVT-2A), which measured Student's expressive vocabulary and word retrieval; and
- e. The Action Picture Test which was used to obtain a sample of Student's spoken language.

11. Additionally, Dr. Franke used observations and informal tasks to assess and estimate Student's communication and social processing skills. These assessments reported on Student's receptive and expressive language communication skills, social/affective signaling abilities, speech and articulation, as well as Student's social processing and social skills.

12. With the exception of his copying abilities, Student scored below average or lower in all standardized assessments and their subcomponents. Cognitive testing

showed Student's overall level of cognitive functioning as Very Low. Dr. Franke concluded that Student's academic skills are delayed and are the result of cognitive and linguistic deficits, with reading, math and writing skills in the Lower Extreme range.

13. Student showed a significant mixed receptive and expressive language disorder that will have an impact on his learning. Dr. Franke noted that Student had developed some basic vocabulary and use of some phrases and simple sentence patterns that were scripted and mostly prompted. He was learning new words and concepts, but showed difficulty applying them outside of the learning context. Further, due to his autism, Student communicated primarily for behavior regulation, rather than for social interaction and joint attention.

14. Dr. Franke assessed Student's emotional and behavioral functioning by having Student's parents complete the PDD Behavioral Inventory (PDDBI) which is an instrument for assisting in the diagnosis for an autism spectrum disorder. The scores reflected that, overall, Student's behavior pattern was typical for a child with autism; however he presented with more learning problems and social pragmatic difficulties. Other than autism, input from Parents did not indicate any areas of social emotional concern.

15. Lastly, Dr. Franke administered the Adaptive Behavior Assessment System, Second Edition (ABAS-II), which is designed to evaluate whether an individual displays various functional skills necessary for daily living without the assistance of others. The test, which is a rating scale given to Student's Parents, scored Student as Extremely Low in his overall level of adaptive behaviors, as well as in all domains of functioning. Dr. Franke noted that Student would benefit from goals to engage with peers in activities, and from expanding his play routines and play with others.

16. Dr. Franke concluded that Student would benefit from a structured school program that provides one-to-one, small group and large group instruction that uses



ABA, proactive strategies to facilitate engagement, and opportunities that facilitate more natural and meaningful language. "An activity-based approach with meaningful and purposeful activities that utilizes ABA and discrete training procedures will allow Student to practice and use skills in settings where they are needed and applied. While principles of ABA are very appropriate teaching strategies for Student, rote drills that characterize DTT that are not meaningful and functional for him are not. Teaching Student individual skills outside of natural contexts seems to have promoted learned responses that do not have much meaning or application for him." Dr. Franke's recommendation utilizes narrative-based language intervention strategies, referred to by the parties as a narrative or naturalistic approach.

17. Dr. Pricilla Armstrong testified on behalf of Student.<sup>8</sup> At Parents' request, she conducted a Neuropsychological Assessment of Student on October 27, 2009, and completed a written report on October 30, 2009. Given the dates of this assessment, Dr. Armstrong's results and recommendations were not available for consideration by the

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<sup>8</sup> Dr. Armstrong is a bilingual Neuropsychologist. She is part of the Children's Hospital of Orange County medical staff where she conducts neuropsychological assessments and writes comprehensive reports for referred children and adolescents. She also assists in teaching interns and postdoctoral students neuropsychological assessment instruments. Dr. Armstrong also provides similar services with Kaiser Permanente Medical Center. Dr. Armstrong has Psy.D and M.S. degrees in Clinical Psychology, and also provides mental health services to outpatients through Fullerton Neurological Services, Inc.

September 16 IEP team. Nevertheless, Dr. Armstrong provided some relevant information regarding Student<sup>9</sup> and Dr. Franke's assessment of Student.

18. With regard to Student's IQ testing, Dr. Armstrong commented that Dr. Franke's choice of the DAS-II was not her test of choice. Dr. Armstrong is bilingual (Spanish), and believes it is best to test young children in both languages if they are exposed to both languages. This allows the neuropsychologist to best assess Student's current level of functioning by "testing the limits" in both English and Spanish. Student understands both English and Spanish. While English is Student's dominant language, Spanish presents as a confound or variable which may affect his IQ scores. Dr. Armstrong noted, however, that autism is Student's primary confound, and it also impacts Student's IQ testing. Dr. Armstrong did not include the results of the Spanish testing in her report. In her testimony, however, she indicated that there were no significant differences in the tests done in each language, and the test results were similar in both languages. Dr. Armstrong further concluded that it was more likely that Student's language deficits affected his IQ, rather than his IQ affected his language, and Student's autism played a large part in Student's deficits. While Dr. Armstrong had minor criticisms of Dr. Franke's report, she ultimately concluded that the results of her assessment were fairly similar to those of Dr. Franke; however, each of them interpreted those results differently.

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<sup>9</sup> Dr. Armstrong also assessed Student in September 2008, and presented result comparisons between the two assessments. While these assessments present a "before and after" picture of Student, they do not provide a "snapshot" of Student during the relevant period of April 2009 through September 16, 2009, and therefore are given less weight than the information considered by the September 16 IEP team.

19. Dr. Caroline Bailey,<sup>10</sup> who testified on Student's behalf, also found no errors in Dr. Franke's testing or protocols. However, she, like Dr. Armstrong, disagreed with Dr. Franke's interpretations. While Dr. Bailey "is fine" with some of Dr. Franke's findings, she specifically disagreed with Dr. Franke's source of deficits. Dr. Bailey believed there is more to be inferred due to Student's language delays and autism. Dr. Bailey opined that autism underlies Student's deficits, and it is therefore premature to determine etiology.

## II. DID THE DISTRICT'S INDIVIDUALIZED EDUCATION PROGRAM (IEP) DATED SEPTEMBER 16, 2009, OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)?

### THE IEP MEETINGS

20. Liz Peterson, the Program Specialist for the District,<sup>11</sup> has been involved with Student's IEP meetings since his kindergarten year. At hearing, Ms. Peterson provided the background for the District's offer of placement and services.

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<sup>10</sup> Dr. Caroline Bailey teaches at Cal State Fullerton in the Department of Social Work. She has a M.A. in psychology and Ph.D in clinical and developmental psychology. Dr. Bailey is a Post-Doctoral Fellow, having studied at the Mental Retardation Research Center, Department of Psychiatry and Behavioral Sciences at the UCLA School of Medicine. Among her current positions, Dr. Bailey is a staff psychologist at the UCLA Department of Pediatric Neurology. Although Dr. Bailey is highly and exceptionally qualified, she pointed out that she is not a licensed clinical psychologist, and her assessments, opinions and recommendations did not require such a license.

<sup>11</sup> Ms. Peterson is a credentialed school psychologist and Behavior Intervention Case Manager (BICM). Additionally, Ms. Peterson has received training in behavioral strategies for children with autism from Autism Partnership. Currently, Ms. Peterson's

21. Prior to Student's return to school in May 2009, Ms. Peterson and other staff members spent a significant amount of time preparing for Student's return and upcoming annual IEP meeting. Given that Student had been out of school and in a home program for nearly a year, Ms. Peterson observed Student in his home environment, as well as in his home ABA program provided by Footprints.<sup>12</sup> Ms. Peterson consulted with Lillian Phan, Student's ABA Supervisor at Footprints, regarding Student's ABA program and his transition back into school. Additionally, she spoke with Kayla Doyle, Student's private ABA provider.<sup>13</sup> As indicated above, Dr. Franke also provided an extensive assessment of Student.

22. The District staff members, who would later participate in Student's IEP, and Dr. Franke met in advance of the June 2009 IEP meeting to discuss Student's present levels of performance (PLOPS) and draft proposed goals. The District's proposed goals were primarily drafted by Holly Busta, the District's Autism Specialist, and Lillian Phan from Footprints. The District emailed their proposed goals to Parents prior to the June IEP meeting.

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duties include coordinating programs for students with autism, staff and parent trainings, and participating in IEP meetings.

<sup>12</sup> Footprints Behavioral Intervention is a non-public agency which provides one-to-one ABA services to children with autism.

<sup>13</sup> It appears the District had significant reservations regarding Ms. Doyle as a bona fide service provider. Ms. Doyle is the parent of a child with autism, and to a great extent has sought ABA training on her own rather than through an advanced degree program.

23. Parents also provided the District with proposed goals, which were discussed by the District members prior to the IEP meeting. Ms. Peterson indicated that Parents' proposed goals were not adopted in their entirety, but goal revisions were made based upon Parents' goal requests. Further, Parents' proposed goals were again discussed at both the September 9 and September 16 IEP meetings, and additional goal revisions were made at Parents' request.

24. Although Children's Learning Connection (CLC), Student's non-public speech and language provider, did not provide speech and language (S/L) goals prior to the June IEP meeting, its Speech and Language Pathologist (SLP) attended the September 9 IEP meeting, presented, and discussed proposed goals developed by CLC with the entire IEP team. Again, revisions to these goals were discussed, and revised goals were presented at the September 16 IEP meeting.

25. Parents contend that the composition of the IEP team was flawed. An IEP team is composed of the parents of the child with a disability; at least one of the child's regular education teachers if the student is or may be participating in the regular education environment; at least one of the child's special education teachers or, if appropriate, at least one of the child's special education providers; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the student's needs, and is knowledgeable about the general education curriculum and the availability of resources; a person who can interpret the instructional implications of evaluation results; other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, whenever appropriate. Further, the school district is responsible for determining which of its personnel will fill the roles for the district's required participants at an IEP team meeting. The regular education teacher who is a member of the IEP team need not be the child's current teacher.

26. The development of Student's annual IEP for the 2009-2010 school years took place over three separate IEP meetings. The June 2 IEP team consisted of: Liz Peterson, the District's Autism Program Specialist; Holly Busta, a District School Psychologist and ABA Supervisor; Newell Phelps, a District School Psychologist; Diana Newson, Student's SDC teacher; Jessica Peng, a District Occupational Therapist; Lillian Phan, the Footprints ABA Supervisor; Elizabeth Clark, Student's then Footprints ABA therapist; Dr. Lauren Franke, the District's consulting Evaluator-Psychologist/SLP; Lauri LaFoe, the District's attorney; Student's Parents; John Nolte, Student's attorney; and two Spanish language interpreters provided by the District to assist Parents. Tracy Rodriguez, the Jefferson Principal, attended as the District's regular education representative. Ms. Rodriguez has a multi-learning teaching credential and has taught the fourth through sixth grades, as well as eighth grade RSP.

27. The September 9 IEP meeting primarily included the same team members, but added Jessica Lee, Student's current SDC teacher; Alice Gervais, Student's Footprints ABA therapist; and Jennifer Amer and Kim Eissing from Children's Learning Connection, Student's non-public Speech and Language (S/L) specialists. Although Ms. Peterson spoke with Kayla Doyle prior to Student's return to school, the District did not invite Ms. Doyle to the IEP meeting, nor did Parents have her attend on their own.<sup>14</sup>

28. Ms. Eissing attended Student's September IEP meetings and recalled that the IEP team discussed Student's proposed S/L goals, as well as her input on those goals. The team also discussed her presentation of CLC's recommendations and

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<sup>14</sup> At the time of the IEP, Ms. Doyle was no longer tutoring Student, as she had become employed by Student's attorney, Maureen Graves. While it is understandable that the District might have issues with Ms. Doyle's qualifications and loyalties, at hearing, her testimony proved educated, informative, and unbiased.

proposed goals. Overall, Ms. Eissing believed the IEP meetings contained lots of active and healthy discussions among all in attendance.

29. The District made its formal offer of placement and services at the September 16, 2009 IEP meeting. The written IEP consists of a total of 41 pages, including nine pages of single-spaced IEP notes. The IEP team offered Student (1) placement in an SDC at Jefferson with an individual or one-to-one aide for the entire school day; (2) behavior intervention services consisting of two hours per day of individual ABA to be provided within the school setting, plus 30 minutes per week of ABA supervision and one hour per month of ABA clinic; (3) 25, 30-minute individual occupational therapy (OT) sessions per year, plus 25, 30-minute consultation sessions per year; and (4) 25, 30-minute group speech and language sessions per year, plus one hour per week of individual speech and language services to be provided by a non-public agency (NPA). Additionally, the IEP team developed 18 goals for Student intended to address his various areas of need. Parents did not consent to the IEP.

#### REPORTS, RECOMMENDATIONS, AND PRESENT LEVELS OF PERFORMANCE (PLOPS)

30. Student contends that by failing to adopt Parents' views of Student's PLOPS, the IEP team failed to obtain an accurate description of Student's PLOPS, which resulted in the creation of inappropriate goals for Student. An IEP must include a statement of the present performance of the student. In this matter, a significant amount of disagreement between the parties stemmed from their perceptions of Student's PLOPS in his areas of need. The IEP team, however, considered several different opinions in determining Student's abilities and needs.

31. Ms. Peng,<sup>15</sup> the District's OT, has provided Student with direct OT services for over a year. Ms. Peng prepared Student's 2009 OT Progress Summary, and attended

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<sup>15</sup> Ms. Peng has experience assessing and treating children with autism.

his IEP meetings. According to Ms. Peng, the District has provided Student with OT services aimed at improving his skills in the areas of attending behaviors, gross motor skills and fine motor skills. In describing Student's PLOPS, Ms. Peng noted that, although Student made substantial progress, he met only one of three OT related goals contained in his last IEP. Disruption in attention, shift in focus and the need for constant and repeated prompts largely prevented Student from mastering his unmet goals.

32. Ms. Peng assessed Student to determine the progress of OT as a related service to Student's educational program. She utilized a chart review, classroom and playground observations, and both standardized and non-standardized testing. Standardized testing included the Beery Buktenica Developmental Test of Visual Motor Integration (Beery VMI), Beery VMI Visual Perception Test, and Beery VMI Motor Coordination test. Ms. Peng also administered non-standardized testing of Student's handwriting skills after the Beery VMI tests.

33. Student demonstrated inconsistent attention during the Berry VMI tests. While he was able to perform and complete the Berry VMI and VMI Motor Coordination tests, he had difficulty understanding the standardized instruction, and failed to perform the Berry VMI Visual Perception test. Ms. Peng noted that, although Student stood up to scratch himself several times and required verbal prompts and constant reminders to pay attention, in general, he demonstrated good compliance through the testing, and appeared to be working to the best of his ability.

34. Based upon her assessments and observations, Ms. Peng concluded that Student has made notable progress and possessed the fundamental prevocational and motor skills needed to participate in educational related school activities and perform academic assignments. He followed directions in transitioning smoothly from one activity to another. He worked in the classroom along with classmates during group instructions. Student's work space in the classroom is free of visual distractions and



auditory distractions are minimized during his DTT sessions. She recommended movement breaks (such as stretching at his seat, jumping or hand push-ups) in the classroom during transitions between activities to help Student modulate his arousal level and achieve optimum attention to task and performance of activities.

35. Additionally, while Student writes fast and complies to perform the task at-hand, he often shifts his attention away from the designated task and requires frequent redirection and prompts to complete the task. He appears inattentive, mainly not distracted by the surrounding stimuli, but by his self-initiated disrupting behaviors, such as looking through the corners of his eyes, abrupt bilateral hand motions (clapping or flapping), giggling with no apparent reason, and self-talking or noise making (high pitched sounds or loud noises). Student also occasionally scratches himself during task engagements. These weaknesses, Ms. Peng concluded, need to be continuously facilitated and supported by the teaching staff in his SDC learning environment. Ms. Peng opined that the District's use of sensory strategies with Student were appropriate, as exercise and physical movement help redirect him. Further, movement breaks act as a positive reinforcer for Student.

36. Kim Eissing,<sup>16</sup> the Supervising Speech Therapist from CLC, provided additional information as Student participates in CLC's S/L Clinic, and is provided 60 minutes per week of individual S/L service. Overall, Ms. Eissing presented as a highly informative witness.

37. Ms. Eissing reported that when Student began working with CLC in June 2009, he presented with scripted language and was highly distractable. It was hard to see his language due to his behaviors. Ms. Eissing observed that it was challenging for

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<sup>16</sup> Ms. Eissing is a Speech and Language Pathologist and holds a CCC. Ms. Eissing is also qualified in ABA and previously worked with Autism Partnership.

Student to communicate more than his basic needs. Student was prompt-dependent and used scripted language to control his immediate environment.

38. Ms. Eissing reported that Student requires many natural breaks to handle his self-stimulatory (stimming) behaviors; however, he responds to sensory and physical breaks, to regain focus. Student is capable of sitting and attending for seven to 10 minutes on average, but never more than 20 minutes at a time. Student requires prompts and a token system to keep his attention on tasks. Verbal reminders will often agitate him.

39. Student attends S/L sessions Wednesdays after a full day of school. Ms. Eissing indicated that DTT is used in such sessions, along with visual strategies. Sensory breaks, such as walks, are allowed as reinforcements. She noted, however, that the SLP tries not to give Student a break when he misbehaves, as she doesn't want to reinforce bad behavior. Rather, the SLP generally utilizes a token system instead of tangible reinforcers. At the end of the session, however, Mother provides a larger reinforcer, usually food, which is selected ahead of time.

40. While Ms. Eissing did not observe Student at home, she did observe him with his Mother and during his CLC sessions. In each of those environments, Student presented as prompt-dependent. Ms. Eissing was quick to point out, however, that Student's prompt dependency is not indicative of failure. It is only indicative of a strategy being used with Student. Regardless, she feels it is now time to move on from prompt dependency, rote learning, and imitation. Student has made progress since June. He is more spontaneous, and needs less prompting. Ms. Eissing opined that Student now needs to make progress in developing independent speech and deductive reasoning.

41. Ms. Eissing indicated that the IEP team appeared to be open to input from CLC. While the team did not adopt CLC's proposed goals outright, many components of the CLC goals were embedded in the IEP team's goals.

42. Lillian Phan,<sup>17</sup> Student's ABA Supervisor for Footprints, has worked with Student since 2008, when Footprints took over Student's home program. Ms. Phan is currently providing NPA supervision for Student's school ABA program, and has provided ABA training to Student's one-to-one aide. Ms. Phan attended Student's IEP meetings, and consulted with the IEP team in drafting several of Student's goals.

43. Student's home program primarily dealt with increasing Student's self-help, behavior, socialization, and language skills. Part of Ms. Phan's supervision focused on thinning out Student's reinforcements, as reinforcements are not desirable for every action. Additionally, Ms. Phan expressed concern that Student's prior program was too rote and not functional for Student.

44. Ms. Phan indicated that her initial involvement with the District was to transition Student from his home-based program into the school program. She noted, however, that not all strategies or drills used in a home "behavior and life skills" program work in educational areas. Although she is not trained in teaching or creating educational goals, she felt qualified to comment and recommend functional aspects for the goals at the IEP meeting.

45. Ms. Phan reported that she does not think the proposed goals would create adverse behaviors. Student's educational program utilizes ABA methodology; however, not all of Student's one-to-one time is spent in DTT. Ms. Phan does not

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<sup>17</sup> Ms. Phan has been a case supervisor for Footprints for three years, and she previously worked with another NPA, CARDS for an additional year. Ms. Phan currently supervises 15 cases, and co-supervises an additional five.

recommend DTT as the sole method to be used with Student; further, the use of DTT depends upon the specific goal. Ms. Phan also introduced visual materials to Student's program last summer.

46. Ms. Phan noted that Student can memorize rote materials; however, he breaks down in generalization. As an example, she has not observed generalization with sight words. Student's rate of acquisition depends on whether the skill or activity is preferred. Again she observed Student is better at math, therefore he is willing to work on math. Reading and sight words, on the other hand, are not preferred activities.

47. Anne Marie Randall-Trejo is Student's one-to-one aide. Ms. Randall-Trejo has been trained by the District in ABA and DTT strategies. Given that Ms. Randall-Trejo utilizes an ABA program, she is constantly taking data. Ms. Randall-Trejo takes both personal notes, and prepares an "official" log which is provided to the clinic for Student's ABA collaboration. This information is then provided to the IEP team to assist in determining Student's PLOPS. Ms. Randall-Trejo did not attend Student's IEP meetings.<sup>18</sup>

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<sup>18</sup> Ms. Randall-Trejo presented as an unintentionally weak witness. This was largely due to a non-defined time frame in questioning, and the fact that the goals in question were not adopted until November 2009. Therefore, it remains unclear in some instances whether her responses described Student's PLOPS at the time of her testimony in January 2010, or as of the IEP in September 2009. As an example, Ms. Randall-Trejo noted that at the beginning of the school year, Student had difficulty sitting in a group. She then testified that Student is able to learn in any environment and is currently learning socialization, routines, and group participation with ease. Although the ALJ requested clarification in several instances, neither counsel made much effort to remediate the time frame defects.

48. Ms. Randall-Trajo indicated that Student is using the first grade reading curriculum, and is able to read on a first grade level. She also reported that Student understands math, and it appears to be his forte. She has never used TouchMath with Student.

49. Parents viewed Student's PLOPS much differently. Clearly, both Mother and Father, as well as their older son, are deeply involved with Student's education and therapies. The family reads books and plays games with Student. They utilize ABA in the home, attend clinics, and attend IEP meetings. The family emphasizes English at home, although Mother's English is limited, and the grandmother, who resides with the family, does not speak English at all. Student's Spanish language abilities are primarily receptive in nature.

50. Parents believe the District considers Student mentally retarded based upon his cognitive scores derived from Dr. Franke's assessment. Parents do not believe Student is mentally retarded, and feel that if the District does not push Student to learn, he won't. According to Father, Parents removed Student from school in 2008, because "the District was not doing good enough." At home, Student reached his goals quickly, which required them to create new goals for him. As an example, when Dr. Franke observed Student at home, Student did not understand sequencing as he had not been previously introduced to the concept. After the observation, Parents worked on sequencing with Student, and within two weeks he could do it successfully. Ultimately, Father believes that the District has failed to create an educational program with high expectations for Student. Regardless of how the District interpreted its home observations, Mother's data logging, and the use (or non-use) of food reinforcers, Student still made significant progress in his home program. Since his return to school, however, Father noted that Student had regressed in some areas, especially in attention, prompting, and self-stimulation. Ms. Doyle agreed with Parents. She was eager for

Student to return to school to generalize what he had learned at home. She felt Student had made great progress at home, and could work for 45 minutes, and had moved from food reinforcements to tokens or other non-edibles.

51. The District, on the other hand, observed Student at school differently. As stated by Ms. Peterson, "it was not a matter of disbelieving the parents." Often a child is able to perform better at home in a more structured environment, with one-to-one instruction. Further, Student had just returned to the classroom environment after nearly a year's absence. It would not be unusual for Student to behave differently in school at that time. Student may have advanced at home with less prompting. In determining his PLOPS, however, the District needed to deal with Student as he presented at school, not at home. This position was reinforced by Ms. Lee, Student's special education teacher, who informally tested Student at the beginning of the 2009-2010 school year. Ms. Lee observed that Student did not initiate language unless he was requesting something to fulfill a need. He had a difficult time with attention and staying on task, and was easily distracted. Ms. Lee also concurred with Dr. Armstrong in believing that Student needs visual support in order to learn, which, she added, she provides in her classroom.<sup>19</sup>

52. Ms. Peterson also correctly noted that a consensus of the IEP team members is not always 100 percent. In reviewing all of the assessments, obtaining reports and recommendations from two NPA service providers, and fully discussing Student's levels of need in all areas of disability, it is clear that the consensus of opinion more nearly resembled the District's perceptions of Student's PLOPS in an educational setting than did Parents' perceptions.

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<sup>19</sup> Ms. Lee has an expertise in visual strategies for students with autism.

## STUDENT'S GOALS

53. Parents contend that Student's goals, as a whole, are inaccurate, inappropriate, and immeasurable. An IEP must include a statement of measurable annual goals, including academic and functional goals, designed to meet the student's needs, resulting from the student's disability, to enable the student to be involved in and make progress in the general curriculum, and to meet each of the student's other educational needs resulting from his or her disability.

54. The September 16 IEP contains 18 individualized goals which were designed to address Student's areas of need. The IEP team created goals for reading comprehension, spelling, sight words, and phonics. The team created math goals for addition, subtraction, number recognition, number sense and time. There were goals for writing, expressive and receptive language, and social skills. Dr. Franke explained that the goals created for Student were crafted to be meaningful to Student. Some of the goals are functional and are embedded in Student's practical routines. Others are based upon routines in which Student is interested and motivated. Even others are designed to help Student tune into his environment and people with whom he must interact. None of the goals debased traditional ABA strategies, as the District agreed Student is still in need of skills best learned in a one-to-one ABA context. The IEP team, however, agreed with Dr. Franke, and decided to make the content of the goals and ABA sessions purposeful. The consensus of the IEP team saw a need to have what is learned in one-to-one spill over into Student's school day and classroom setting.

55. Generally speaking, Parents contend that the September 16 IEP proposes inadequate language and socialization goals which fail to aim for unprompted language, and which fail to move Student's communicative abilities forward. Parents believe that Dr. Franke's narrative approach is inappropriate for Student. By failing to rely on information available from Ms. Doyle, Parents, and Student's NPA providers, the District

created goals in which Student lacked many of the prerequisites necessary to benefit from these naturalistic techniques. Thus, they argue, Student's goals require the maintenance of substantial prompting, rather than the termination of prompting by the end of each goal.

56. Ms. Doyle and Parents are worried about Student's reliance on prompts. It is their belief that Student's goals should strive for independence. Therefore, prompts need to be reduced and ended. If Student is not independent, he has not fully mastered the skill. Further, without ending prompts, a child may consider the prompt as part of the activity; that is, a child will wait for the prompt before speaking.

57. Parents also complain that the use of Dr. Franke's methodology in relation to the District's goals, is not based upon peer-reviewed research. Ms. Doyle is highly critical of Dr. Franke's methodology on a practical level, and does not believe that the naturalistic approach is an appropriate means of teaching Student at this time. In general, Ms. Doyle believes that Student has no time to waste on approaches that have not been proved effective. Student needs a direct approach using research-based methodology. She does not believe in using lesser methods until the proven methods have been shown not to work with Student. Ms. Doyle indicates that ABA/DTT works with Student.

58. Parents also feel that the IEP team dismissed their proposed goals, consideration of their methods, and their reinforcement concerns. Ms. Doyle voiced their objections when she explained Parents' disagreement with the District in seeking spontaneous speech rather than accuracy. Prompted speech is reinforced. Ms. Doyle, on the other hand, uses errorless teaching where a child is reinforced for giving the right answer initially. This methodology is designed to use less prompting. Ms. Doyle further views Dr. Franke's approach as requiring double teaching: teach once to get any response, and teach twice to get the correct response.



59. The District believes that the IEP team incorporated portions of Parents' proposed goals and addressed the Parents' major concerns with Student's proposed educational program. The District acknowledges, however, that it cannot address each and every need of a student. As stated by Dr. Franke, in creating a program for a child with significant challenges and faced with a finite amount of time, it is not possible to create a goal to address *every* need. One needs to prioritize and not second guess the IEP team. Some goals may build upon others. Further, too many goals get watered down to where nothing gets done. The District believes it is more important to focus on core needs now, and then expand.

60. Dr. Franke's concerns with Parents' proposed goals focus on two areas. First, the goals, although common, are not functional for Student. She believes that Student needs more foundational components so, first, he can understand. Second, she believes Parents' goals are premature. She emphasized that Student still needs the basics, and agrees that "we need to make good use of his time." Parents' goals may be appropriate down the line, but there are other important things that Student needs to be taught now.

61. The parties belabored each goal. Student's areas of need are not significantly disputed. Again, the arguments stem from the perceived differences in Student's PLOPS, and the concerns about Dr. Franke's methodology.

62. Several witnesses viewed the goals as appropriate. While Ms. Phan did not comment on the educational structure of the goals, she did not believe any of the goals would create adverse behaviors. Ms. Eissing views speech and language and reading as intertwined. She considered the reading and language goals to be appropriate, addressing reasonable areas to be targeted. Although Ms. Eissing raised the same concern as Parents regarding excessive prompting, she indicated that maintaining a looser goal provided more flexibility in reducing the number of prompts. Further,

prompts regarding the lesson, are not necessarily prompts needed for attention. In general, she considered the goals a good place to start. Ms. Busta also supported the proposed goals.

63. Dr. Bailey, on the other hand, did not believe the goals to be sufficient, as a whole. Specifically, Dr. Bailey expressed concern that (1) she did not feel that all of Student's PLOPSs were accurate; (2) the goals maintained too much prompt dependence; and (3) the goals which were appropriate could be mastered in a much shorter time than allotted.

64. With the exception of needs in the area of attention/behavior, Student's goals each address an identified area of need. The goals provide a starting point baseline; provide a statement of a measurable goal; and provide a breakdown of the goal to measure progress over the year.

66. The September 16 IEP's consideration of Student's behavior as it relates to attention is more problematic. Goal 17, represents Student's primary if not sole behavior goal relating to inattentiveness. Behaviors that impede a child's learning or that of others require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. More serious behavioral problems will require a school district to develop a behavior intervention plan or BIP. Behavior intervention is designed to implement procedures to produce lasting positive changes in the student's behavior, and includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior. An IEP that does not appropriately address behavior which impedes a child's learning denies a student a FAPE. Student contends that the District did not adequately address his behaviors. The District responds that although Student's behavior impedes his learning and that of others, it could be appropriately addressed with a behavior goal.

67. The IEP notes, as well as testimony, reflect that Goal I7 most closely represents a behavior goal. The goal's baseline reports that "Student is able to follow a class routine and work on the task at-hand. However, he needs to be redirected and reminded to complete academic or non-preferred tasks **every one to two seconds**. (Emphasis added.) Student has a hard time staying focused and attending to academic or non-preferred tasks." The goal's final objective requires that with a maximum of one visual prompt, Student will attend to an academic or non-preferred task for **one minute** (emphasis added) in four out of five trials. Student's witness, Kayla Doyle, reflects that based upon a recent observation of Student, she was sad to report that the two-to-three-second attention span was closer to her observation than that of the child she worked with a year earlier. She was disheartened to see such regression, and further stated that "if one minute is all we can get out of Student in a year, then he will learn nothing this year." If it (Goal I7) is truly accurate, then this failure to deal with Student's attention behavior means that, no matter how good the other goals may be, the IEP cannot succeed.

68. Ms. Doyle further believes that Student's behavior will not be improved in his current ABA program, which she considers flawed. Ms. Doyle indicates that Student loves his classroom and teacher, but he cannot obtain benefit from class time because his behaviors have been overlooked, minimized, and do not have effective reinforcements.

69. Based more upon common sense than superior training, Ms. Doyle complained that when Student's behaviors increased, no one, not Busta nor Phan, did anything to intervene. "That's not what you do in ABA." As an example, Ms. Doyle points out that no one took data to determine whether Student's increased stimming was sensory-based in order to justify sensory reinforcers. The District failed to seek and heed

Parents' input regarding effective reinforcement for Student. Nor were there discussions of functional, appropriate or equivalent replacements for Student's negative behaviors.

70. While the IEP team acknowledged that the objective of Goal I7 should be revised to extend Student's focus to possibly five minutes, and include data collection, no revised goal was added to the IEP. Further, at the September 16 IEP meeting, Parents requested a behavior plan to address Student's off-task behaviors. The IEP team took no further action. The District did not revise Goal I7, and as currently written, Goal I7 is insufficient to provide Student access to his education. Further, the District's failure to create additional behavior goals or create a behavior plan which would have added additional support to the other goals is a denial of a FAPE.

## ABA

71. The IEP team offered Student of two hours per day of one-to-one ABA services, which included DTT. Student expressed disagreement and requested three hours per week of one-to-one ABA. Ms. Lee, Student's teacher, indicated that three hours of segregated one-to-one time each day is too much. Student would miss almost half a day of class instruction and interaction. While it is appropriate for Student to have some one-to-one teaching in a school setting, she feels Student needs more time to take what he learns in one-to-one and learn to generalize that information in a group setting. Dr. Franke and Ms. Phan both concurred, and pointed out that Student has difficulty transitioning one-to-one learning into generalizing what he has learned. Ms. Peterson also supported the District's position that Student had a valid need for two hours of one-to-one ABA, but he needed to present and generalize in a classroom setting.

72. Dr. Bailey points out that Student is not an incidental learner. He still needs DTT first, and *then* he can generalize information into a naturalistic setting. Dr. Bailey admits, however, there are a variety of ABA programs and methods other than DTT.

73. Additionally, Parents voiced an intense opinion that Student's ABA program could not be administered properly. Student's complaints are primarily aimed at Ms. Busta, one of the District's school psychologists. Ms. Busta has the required credentials, experience and knowledge to function in her employment with the District. Ms. Busta has experience administering assessments and functional analysis assessments. She has experience in ABA, having previously been employed as a behavior therapist with a well-known non-public agency ABA provider. Ms. Busta is the District ABA Supervisor, and provides ABA training to District staff and classroom aides. Currently 90 percent of her caseload involves children with autism. Ms. Busta is a Behavior Intervention Case Manager (BICM), and has completed her studies to become a Board Certified Behavior Analyst (BCBA).

74. As Student's case manager, Ms. Busta is charged with assisting in preparation of plans, analyzing data collected by Student's one-to-one aide, and consulting with teachers. Ms. Busta also participates in team meetings once a month, which includes Parents, Student, staff and service providers, NPAs, and home providers. Additionally, Student's ABA program is also being supervised by Footprints, the NPA, which provides Student's home program. Ms. Busta, as well as the consensus of the IEP team, do not believe it is necessary to maintain the home supervisor to supervise the school program. The IEP team proposed to terminate the NPA supervision, leaving the District to manage its own program. The District believes that Ms. Busta is qualified to provide necessary supervision for Student. Additionally, the September 16 IEP provides for 30 minutes per week of direct supervision of Student's ABA program. While Parents contend that this is an insufficient amount of time to adequately supervise Student's program, Ms. Busta indicated that her job also includes additional time each month for indirect supervision, such as preparing Student's programs. Parents desire to have Footprints continue supervising Student's school program. This issue also appears moot,

as Footprints appears to have been retained to supervise Student's program for the remainder of this school year.

75. It is abundantly clear that Parents do not consider Ms. Busta an appropriate case manager or supervisor for Student's school-based ABA program. Student's evidentiary emphasis in addressing this issue, however, is largely misplaced. Student's 2009-2010 educational progress (or lack thereof), or a shortfall in staffing, may be highly probative in determining implementation or compliance issues. Student, however, misses the mark in pursuing this type of evidence to invalidate a *proposed* IEP. Implementation is not the issue in this matter. In short, Parents cannot refuse consent to the IEP, and then argue that the District has ineffectively implemented it. Additionally, Student's primary objections to Ms. Busta arise from a past dispute, the facts of which are not relevant to the issue of the validity of the September 16 IEP. Suffice it to say, Ms. Busta's methods of logging data and implementing an ABA program do not meet the high standards sought by Parents, their attorney or Ms. Doyle.

76. Dr. Bailey knows Ms. Busta, and her overall opinion is fair, but dated. In general, Dr. Bailey reports that Ms. Busta has the training she needs and knows what to do. She is open and willing to consider and implement ideas. On the other hand, Dr. Bailey admits a concern that Ms. Busta does not have enough time to implement programs and supervise Student's ABA program. Dr. Bailey relies on a comment made by Ms. Busta in 2007, "I wish there were three of me." However, Dr. Bailey has not recently observed or spoken to Ms. Busta regarding Student's ABA program.

77. More telling are the opinions of those who work with Ms. Busta. Ms. Phan, who currently supervises Student's program, indicated that she and Ms. Busta worked on developing some of Student's goals. Ms. Phan provided no suggestion that Ms. Busta was unable to handle Student's case. Further, Footprints is Parents preferred NPA, and Ms. Phan's description of her own procedures appeared just as lax as Ms. Busta's. Ms.

Peterson, who also has extensive experience with ABA and interacts with Ms. Busta as part of her own employment, describes Ms. Busta as hard-working and good at her job.

78. Parents lastly argue that Ms. Busta has also deferred much of her duties to Dr. Franke, and in return, Dr. Franke has formulated goals which stress her narrative approach which is not supported by peer-reviewed research. Other than Parent's ongoing philosophic differences with Dr. Franke, no evidence was presented to support this contention.

79. Parents also voiced a lesser concern regarding Student's one-to-one aide, given she was trained, in part, by Ms. Busta. Ms. Randall-Trejo, Student's one-to-one aide, has been trained by the District in ABA and DTT strategies. She has also received 10 hours of training from Footprints. Ms. Randall-Trejo has received training in the classroom and Student's home, and has observed Mother and the Footprints therapist working with Student. Ms. Randall-Trejo is with Student throughout the school day, except for her breaks after recess and after lunch. During those times, another aide covers until her return. Generally, Ms. Randall-Trejo's teaching materials are provided to her, and have been prepared by others, usually Ms. Busta and Ms. Phan. Further, Ms. Randall-Trejo emphasizes that she receives constant supervision and instruction from her supervisors and she meets with Ms. Busta once a week. Although she primarily works on Student's goals, Ms. Randall-Trejo indicates that she also supports the teacher with some one-to-one teaching. The teacher, however, also provides one-to-one teaching directly with Student. Ms. Randall-Trejo is qualified to act as Student's one-to-one aide, and provide ABA services to Student under the supervision of Ms. Busta and Ms. Phan.

#### USE OF REINFORCEMENTS

80. By Student's return to school in September 2009, it was evident to all that Student's behaviors had regressed. Arguments have ensued between the parties as to

the source of this regression and its proper remediation. Parents acknowledge that this regression was to be expected to some degree, but contend it was aggravated by inappropriate tasks and inadequacy of reinforcements. What must also be remembered is that Student had only recently returned to the school environment, and he had had no consensually implemented goals for several years. Further, as Father pointed out, Student had significant health problems between June and September 2009, which he conceded may have affected Student's behavior and focus, and increased self-stimulation.

81. When Ms. Randall-Trejo noted Student's increased negative behaviors, she informed Ms. Busta. At that time, the District discussed sensory strategies with both Parents and the OT.

82. Parents disapprove of the sensory strategies used by the District staff, primarily by Student's aide. While all parties, including Parents, use sensory strategies with Student, their underlying philosophies of why and when to use such strategies are at odds. The District uses a sensory diet as a means to redirect Student to return attention to a task. Parents use sensory materials as a final reward for completion of a task. Further, Parents are concerned that the District's use of sensory rewards, may result in increased negative behaviors intended to obtain the sensory reward, that is, Student will act out in order to get his back rubbed or obtain an unscheduled break.

83. Ms. Phan, the Footprints supervisor, believes that reducing Student's stimming at school was needed. She believes the stimming developed over the summer, possibly related to Student's then health issues. Ms. Phan opined that Student self-stimulates as an escape or to avoid non-preferred tasks; however, he can be redirected. Dr. Bailey concurred and sees Student as an escape artist who tries to avoid as much work as possible. He also gets mad, especially when bored. As a result, Student needs to be motivated to work. Student finds motivation in reinforcements.



84. In order to motivate Student, the selected reinforcement must outweigh his desire to avoid the task. Dr. Bailey finds that Student likes sensory experiences as reinforcements. His stimming is not sensory-based; that is, engaged in for a calming effect, but rather is utilized as more of an escape. Great debate ensued throughout the hearing on the subject of edible versus non-edible reinforcers, and who, if anyone, was responsible for terminating food reinforcers at school. Ultimately, Ms. Phan and Dr. Bailey provided the most rational testimony. Ms. Phan indicates that she has never insisted on non-edible reinforcers. She has, however, provided the District with information regarding *effective* reinforcers, and she and the staff conduct reviews of the effectiveness of reinforcers on an ongoing basis.

85. Dr. Bailey's testimony reinforced that of Ms. Phan. Dr. Bailey believes that food reinforcers should be discontinued if food is no longer effective as a positive reinforcer. Further, what works at home is not necessarily what will work at school, and vice versa.

86. Although Ms. Phan did not believe that Student required a sensory diet, she did not find it inappropriate, given that the staff would collect data on Student's stimming to determine new strategies.

87. As indicated above in Factual Finding 35, Ms. Peng, the OT, indicated that the District's use of sensory strategies with Student were appropriate, as exercise and physical movement help redirect him. Further, movement breaks acted as a positive reinforcer for Student.

#### LEAST RESTRICTIVE ENVIRONMENT (LRE)

88. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. The IEP team determined, and Parents concurred, that Student needs focused, sometimes isolated instruction, as well as the assistance of a one-to-one aide. The District offered placement in Ms. Lee's SDC, which

is classified as learning handicapped – severe (LHS). There are 15 students in this SDC, five of whom are children with autism. Reading levels in the SDC range from kindergarten to third grade. Math levels range from kindergarten to first grade. Ms. Lee reported that Student ranks lower in spontaneity and interaction, and needs prompts and extra time to respond in class. Nonetheless, she believed Student fits in with the range of the other children in the class. Ms. Rodriguez, the Principal at Jefferson, indicated that Student is a good-sized third grader, and it would not be appropriate to place him in a younger, first grade general education classroom. Further, a general education setting for academics at any grade level would be too fast to meet Student's needs. Ultimately, the parties do not dispute that Student's placement in the SDC at Jefferson is appropriate. Student contends, however, that Student needs more access to his general education peers.

89. In describing Student's strengths, the September 16 IEP recorded that Student likes to participate in group activities and P.E. The IEP proposed mainstreaming Student during lunch and recess. Student's lunch period is with first and second grade typical peers. Although the District denies that the lunch period is restricted or segregated, all students initially eat at separate tables with their classmates. The remainder of the lunch period and two 15-minute recesses are spent with the first, second, and third grade general education population. Student's teacher and aide report that Student will interact and engage with others during recess, especially if the contact is initiated by the aide. Dr. Bailey indicated that Student needs to increase his social skills with access to typical peers who can act as social models. Although she reports there is no reason to limit Student's mainstreaming time to lunch and recess, she provided no information as to what additional time or class participation would be appropriate.

90. Although not specified in his IEP, Student also participates in a program where fifth and sixth grade typical peers provide one-to-one tutoring to special education students as part of his SDC activities. The District also indicated that Student would participate in non-academic and extracurricular activities; however, due to budget constraints, the District acknowledged that programs or activities, such as music and art, are nearly non-existent for *all* students.

91. Parents contend that Student needs *actual* contact with his typical peers. The argument is premature, and appears more related to a compliance complaint. The proposed September 16 IEP provides specific times and activities in which Student will interact with typical peers. The proposed IEP also provides goals directed towards socialization and joint activities. While Student's lunchtime is initially segregated at a SDC table, *all* students initially eat with their classmates, and then intermingle. Further, and unfortunately, there are few other opportunities for any student to participate in traditional extra-curricular or non-academic activities. However, when those opportunities arise, the District has offered to provide Student access to typical peers in all available non-academic venues. The District has provided a prima facie showing that Student's proposed placement is the LRE, and while more would be better, Student has not provided any evidence to suggest that more is available or that more is even necessary to provide Student appropriate access to education.

#### CURRICULUM AND STATE STANDARDS

92. Parents requested that Student be taught to state standards through an approved curriculum which could be modified appropriately to meet Student's needs. Parents contend that the Houghton-Mifflin (HM) curriculum for reading should not be utilized by the District as it is problematic for a child with autism. Further, it would be difficult, if not impossible, to appropriately modify the HM curriculum to work for Student. The District contends that it is not required to change the curriculum it uses for

all of its students, but instead can appropriately modify the HM curriculum for Student as needed.

93. Tracy Rodriguez, the Principal at Jefferson, attended Student's IEP meetings and commented on curriculum and state standards. The District uses the HM curriculum. This includes all parts of language arts and support materials. Ms. Lee, Student's current SDC teacher, uses the Language for Learning program which is curriculum-based. EnVision Math is being utilized for the first time in the District's SDCs. Further, all curriculum adopted by the District meet state standards, and District special education teachers are required to teach to state standards.

94. Student additionally contends that the September 16 IEP denies Student access to standards-based instruction in all areas of the curriculum, ignoring some areas entirely, and proposing inadequate goals and services in others. While the District does not provide specific class time set aside for social studies and science, both of those subjects are embedded in the language arts standards; for example, science may be the subject of a reading lesson.

95. District's witnesses confirmed that use of the HM curriculum is appropriate for Student, although admitting it is difficult to make the necessary modifications for him. As typified by Student's witnesses, Dr. Bailey indicated that the use of the HM curriculum could be acceptable, as long as Student had proper supports. Dr. Bailey, however, agreed with Parents, and questioned if Ms. Busta could provide those supports. Further, as both Dr. Bailey and Dr. Franke pointed out, many of the state standards are contained in everyday teaching, and the District is not required to write a goal for every standard in the curriculum. Ms. Eissing added that, although she would have used a different curriculum, the HM curriculum is functional and ties in with Student's speech and language. In theory, it is a good way to present the curriculum.

96. Student's residual curriculum concerns remained unsubstantiated by testimony. Parents adamantly rejected the District's TouchMath program, which is a multi-sensory method of teaching math facts through the use of manipulatives. At home, however, Student had already been taught a different style of manipulations for addition and subtraction. Dr. Bailey responded lukewarmly to TouchMath. She did not believe TouchMath to be necessary, as Student already used manipulatives; however, she opined that it might be useful if it was the teaching method being used in class. She also expressed concern that Student might be wasting time on a redundant skill. Nevertheless, Dr. Bailey found TouchMath to be a sequential math program which would allow Student to progress from simple addition and subtraction to more complex mathematical computations, such as multiplication and division. While TouchMath is an appropriate methodology for math, it appears to be a moot concern, as the District has discontinued its use pursuant to Parents' request.

97. In a significant amount of cross-examination, Student attempted to equate working on goals during one-to-one time as utilizing an alternative curriculum. This appears unfounded. Ms. Busta indicated that the curriculum is embedded in Student's ABA program; in lessons such as sight words. Further, Student's one-to-one time is spent working on goals which were developed within the District's curriculum. Additionally, Student has the benefit of his one-to-one aide the entire school day, and can utilize further ABA methods during group teaching. The IEP team also presented an IEP Objectives/Classroom Schedule Matrix which broadly indicated where Student's goals and curricula would be addressed. As Ms. Busta added, "just because there isn't a formal goal, doesn't mean it isn't an area addressed during class and the school day."

#### PEER-REVIEWED RESEARCH

98. Parents contend that Dr. Franke's naturalistic approach is embedded throughout the September 16 IEP. Further, they assert that narrative-based intervention

cannot be adopted by the District as it has not been proven by peer-reviewed research. The IDEA provides that the special education and related services provided to a student under an IEP should be "based on peer-reviewed research to the extent practicable."

99. Dr. Franke has extensive experience in both psychology and speech pathology. She has extensive experience working with children with autism and has assisted school districts in developing classroom programs for students with autism. The District hired Dr. Franke to assist in modifying their curriculum for Student. Dr. Franke understands that Student benefits from an ABA<sup>20</sup> approach to learning; however, she feels that Student needs to go down a different path to learn to read. While ABA methods of breaking things down into smaller components with positive consequences is good, the lessons being broken down need to be meaningful and beneficial to Student. In order to generalize, Student's lessons need to make sense to him. Student needs to be able to take what he learns in a story, and apply that information in other situations. Stated differently, Student can learn things in DTT, but what he is presented to learn, must be useful. The parties have referred to Dr. Franke's approach as narrative-based intervention or a naturalistic approach. None of Dr. Franke's proposals debase

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<sup>20</sup> ABA is an intensive behavioral intervention which employs behavior modification treatment. The component parts of ABA techniques include an intense program, primarily involving one-to-one repetitive drills or DTT, by a therapist trained in this methodology, and detailed daily data collection to monitor skill acquisition. ABA's scientific basis dates back to the work of Dr. Ivar Lovaas at the University of California, Los Angeles, in the 1960s and 1970s, as described in *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*. Since then, Dr. Lovaas' work has been examined by many peer-reviewed studies, some of which have confirmed his results.

traditional ABA strategies. She agrees that Student is still in need of skills best learned in one-to-one ABA. She strives, however, to make the content of the ABA sessions purposeful, and sees a need to have what is learned in one-to-one spill over into Student's school day and classroom setting. As an example, Dr. Franke considers Student's home DTT to be misguided as it does not utilize speech used in everyday relationships.

100. Dr. Bailey is uncomfortable with the District's program because she knows of no research specifically on Dr. Franke's narrative intervention theories. Although she would not adopt Dr. Franke's method herself, Dr. Bailey indicates that Dr. Franke's philosophies can be important; that is, in order to have a child read a story he can master and discuss, one needs to make that story developmentally appropriate so he can understand it. She indicated that there is evidence that the use of a naturalistic approach can be effective. Dr. Bailey concluded that there are a variety of ABA programs and methods available. Student has a long way to go, and lots of skills to obtain. A narrative approach would be appropriate for *part* of Student's educational program. Student, however, is not an incidental learner and still needs DTT, *then* work with him to generalize in a naturalistic setting.

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, the District has the burden of proof in both consolidated matters.

## OAH JURISDICTION

2. Under special education law, a parent or a public agency has the right to present an administrative complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education (FAPE). (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(2006); Ed. Code, § 56501, subd. (a)(1)-(4).) OAH has the authority to hear and decide both of the District's complaints because the pleadings in these consolidated matters request a determination that the District properly assessed Student and offered him a FAPE for the 2009-2010 school year.

## FRAMEWORK FOR DECISION IN CASES INVOLVING THE IDEA

3. This special education administrative due process proceeding is brought under the authority of the Individuals with Disabilities Education Act (IDEA). (See 20 U.S.C. § 1400 et seq.) The primary goal of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes public education and related services." (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1033.)

4. A "free appropriate public education," or FAPE, means special education and related services that a local educational agency provides at public expense, under public supervision and without charge, that meets the standards of the state educational agency, that includes an appropriate preschool, elementary school or secondary school, and that is provided in conformity with the disabled child's individualized education program. (20 U.S.C. § 1401(8); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

5. "Special education" means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006);



Ed. Code, § 56031, subd. (a).) "Specially designed instruction" means the adaptation, as appropriate to the needs of the disabled child, of the content, methodology or delivery of instruction to address the unique needs of the child that result from the child's disability. (34 C.F.R. § 300.39(b)(3)(2006).) In the context of the IDEA, "special education" refers to the highly individualized educational needs of the particular student. (*San Rafael Elementary v. California Education Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160.)

6. Under California law, "special education" is also defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of the child. (Ed. Code, § 56031.) "Related services," or DIS services in California, include transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. 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).)

7. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) The Court determined that, in the Act, Congress established procedures to guarantee disabled children access and opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the disabled child's IEP, then the assumption is that the child's program is appropriate. (*Id.* at p. 206.) As a result, the Court determined that a school district must provide the disabled child with a "basic floor of opportunity." (*Id.* at p. 200.) The Court further noted that an appropriate education under the Act does not mean a "potential-maximizing education." (*Id.* at p. 197, fn. 21.) Instead, a school district

must offer a program that “confers some educational benefit upon the handicapped child.” (*Id.* at p. 200.) De minimus benefit or trivial advancement is insufficient to satisfy the *Rowley* standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130.)

8. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892 (*Amanda J.*)). Therefore the *Rowley* Court established a two-part test to determine whether a school district has provided a FAPE for a disabled child. “First, has the school district complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive some educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the school district has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.) In other words, “(t)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals with that program.” (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

## ASSESSMENT AND REASSESSMENT STANDARDS

9. A school district determines whether a child is eligible for special education and related services beginning with the evaluation process. “Evaluation” means prescribed procedures “to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” (34

C.F.R. § 300.15 (2006).) California law uses the term “assessment” to describe such procedures. (Ed. Code, § 56302.5.)

10. Special education law references “initial evaluations” (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301 (2006); Ed. Code, § 56320), and “reevaluations.” (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303 (2006); Ed. Code, § 56381, subd. (a)(1).) “An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the Act, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of a child would constitute a reevaluation.” (71 Fed.Reg. 46640 (Aug. 14, 2006).)

11. In conducting a reassessment, a school district must follow the procedures for assessments set forth in Education Code sections 56320-56331. (Ed. Code, § 56381, subd. (e).) The student must be assessed in all areas related to the suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (f); see also 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4) (2006).) A school district must have trained and knowledgeable personnel administer tests and other assessment materials in accordance with any instructions provided by the producer of the assessments. (Ed. Code, §§ 56320, subd. (b)(3), 56322; see also 20 U.S.C. § 1414(b)(3)(A)(iv)-(v); 34 C.F.R. § 300.304(c)(1)(iv)-(v)(2006).) Further, in California, a credentialed school psychologist must administer individual tests of intellectual or emotional functioning. (Ed. Code, § 56320, subd. (b)(3).)

12. In conducting a reassessment, a school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and

academic information about the student, including information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii)(2006).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. §300.304(b)(2)(2006).)

13. In conducting a reassessment, a school district must use testing and assessment materials and procedures that are not racially, culturally or sexually discriminatory. (Ed. Code, § 56320, subd. (a); see also 20 U.S.C. § 1414(b)(3)(A); 34 C.F.R. § 300.304(c)(1)(i) (2006).) Further, in conducting a reassessment, a school district must provide and administer tests and other assessment materials in the language and form most likely to yield accurate information on what the student knows and can do academically, developmentally and functionally, unless not feasible. (Ed. Code, § 56320, subd. (b)(1); see also 20 U.S.C. § 1414(b)(3)(A)(ii); 34 C.F.R. § 300.304(c)(1)(ii)(2006).)

14. In performing a reassessment, a school district must include assessment materials that are tailored to assess specific areas of educational need and not merely assessment materials designed to provide a single intelligence quotient. (Ed. Code, § 56320, subd. (c); see also 34 C.F.R. § 300.304(c)(2)(2006).) Additionally, a school district must use tests and other assessment materials for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(2); see also 20 U.S.C. § 1414(b)(3)(A)(iii); 34 C.F.R. § 300.304(c)(1)(iii)(2006).)

15. In performing an assessment of a child with impaired sensory, manual or speaking skills, a school district must select and administer tests that best ensure that the test results accurately reflect the child's aptitude, achievement level or whatever other factor the test purports to measure, rather than reflecting the child's impaired

sensory, manual or speaking skills. (Ed. Code, § 56320, subd. (d); see also 34 C.F.R. § 300.304(c)(3)(2006).)

16. In performing a reassessment, a school district cannot use a single measure or assessment as the sole criterion for determining whether the student is a child with a disability or in preparing the appropriate educational plan for the student. (Ed. Code, § 56320, subd. (e); see also 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2)(2006).) As part of any reassessment, the IEP team, and other qualified professionals as appropriate, must review existing evaluation data on the student, including (1) evaluations and information provided by the parent of the child; (2) current classroom-based, local or state assessments, and classroom-based observations, and (3) observations by teachers and related service providers. (20 U.S.C. § 1414(c)(1)(A)(i)-(iii); 34 C.F.R. § 300.305(a)(1)(i)-(iii) (2006); Ed. Code, § 56381, subd. (b)(1).)

#### INDEPENDENT EDUCATIONAL EVALUATIONS

17. When a parent disagrees with an assessment obtained by a school district, the parent has the right to an independent educational evaluation (IEE) from a qualified specialist at public expense unless the school district demonstrates at a due process hearing that its assessment was appropriate. (Ed. Code, §§ 56329, subd. (b), (c), 56506, subd. (c); 34 C.F.R. § 300.502 (2006).) If a parent requests an IEE at public expense, a school district must, without unnecessary delay, either initiate a due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense, unless the school district demonstrates in a hearing that the assessment obtained by the parent did not meet educational agency criteria. (34 C.F.R. § 300.502(b)(2)(2006); *Pajaro Valley Unified School District v. J.S.* (N.D. Cal. 2006) 2006 U.S. Dist. Lexis 90840; *Norton v. Orinda Union School District* (9th Cir. 1999) 1999 U.S. App. Lexis 3121.) In this matter, Student provided the District with written notice requesting an IEE.

## IEP REQUIREMENTS

18. An IEP is a written document which includes a statement of the present performance of the student; a statement of measurable annual goals designed to meet the student's needs that result from the disability; a description of the manner in which progress of the student towards meeting the annual goals will be measured; the specific services to be provided; the extent to which the student can participate in regular educational programs; the projected initiation date and anticipated duration; and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(II), (III); 34 C.F.R. § 300.320(a)(2), (3)(2006); Ed. Code, § 56345, subd. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other non-academic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii)(2006); Ed. Code, § 56345, subd. (a)(4)(A), (B).)

19. An IEP team is composed of the parents of the child with a disability; at least one of the child's regular education teachers if the student is or may be participating in the regular education environment; at least one of the child's special education teachers or, if appropriate, at least one of the child's special education providers; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the student's needs, and is knowledgeable about the general education curriculum and the availability of resources; a person who can interpret the instructional implications of evaluation results; other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, whenever appropriate. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2006); Ed. Code, § 56341, subd. (b).)

20. A school district is responsible for determining which of its personnel will fill the roles for the district's required participants at an IEP team meeting. (71 Fed.Reg. 46674 (Aug. 14, 2006).) The regular education teacher who is a member of the IEP team need not be the child's current regular education teacher. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 939.) The requirement that the IEP team include a regular education teacher if the student is or may be participating in a regular education classroom is a mandatory, not discretionary, requirement. (*M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 643.)

21. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b)(2006); Ed. Code, § 56341.1, subds. (a), (d).)

22. A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*); *W.G. v. Board of Trustees of Target Range School Dist., No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) An IEP team meeting should include "a full discussion of the child's needs and the services to be provided to meet those needs." (71 Fed. Reg. 46678 (Aug. 14, 2006).) The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (64 Fed.Reg. 12473 (Mar. 12, 1999).) The IDEA's requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique

perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at p. 891.)

23. Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Amanda J.*, *supra*, 267 F.3d at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Target Range*, *supra*, 960 F.2d at p. 1484.) A school district cannot refuse to provide services requested by the parents without considering the child's unique needs or potential effectiveness of the program. (*Deal v. Hamilton County Bd. of Education* (6th Cir. 2004) 392 F.3d 840, 857.)

24. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*Target Range*, *supra*, 960 F. 2d at p. 1485.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F. 2d 1031,1036.) Stated another way, a parent has meaningfully participated in the development of an IEP when he/she is informed of his/her child's problems, attends the IEP meeting, expresses his/her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann*, *supra*, 993 F.2d at p. 1036 .)

25. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*) In resolving the



question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*)

## MEASURABLE GOALS

26. A statement of measurable annual goals must be crafted to meet the student's unique needs that result from his/her individual disability. These goals are designed to enable the student to be involved in and make progress in the general curriculum as well as meet each of the other educational needs resulting from student's disability. (Ed. Code, § 56345, subds. (a)(2)(A), (B); see also 34 C.F.R. § 300.320(a)(2006).) Annual goals are statements that describe what a special education student can reasonably be expected to accomplish within a 12-month period in his/her special education program.

27. A student's progress must be measured and reported to the parent. States must establish and maintain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*Target Range, supra*, 960 F.2d at p. 1483.) Citing *Rowley*, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p.1484.) While the required elements of the IEP's further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*Ibid.*).

## PEER-REVIEWED RESEARCH AND METHODOLOGY

28. Effective July 1, 2005, the IDEA provided that the special education and related services provided to a student under an IEP should be “based on peer-reviewed research to the extent practicable.” (20 U.S.C. § 1414(d)(1)(A)(4); 34 C.F.R. § 300.320 (2006); Ed. Code § 56345, subd. (a)(4).) However, prior to the implementation of this change in the IDEA, case law held that the choice regarding the methodology to be used to implement an IEP, even IEPs for children with autism, is left up to the school district’s discretion so long as it meets a student’s needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-1232; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

29. California administrative decisions that have applied the IDEA requirement that special education and related services should be “based on peer-reviewed research to the extent practicable” have determined that the lack of peer review for a particular methodology, or the fact that one methodology may have had more peer-review than others, is not determinative. (*Student v. Fremont Unified School Dist.* (2007) Cal.Ofc. Admin.Hrngs. Case No. 2006110101 [eclectic program including some ABA methods determined to have provided a FAPE]; *Rocklin Unified School Dist. v. Student* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2006110278, aff’d. *Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal. 2008) 2008 WL 906243; *Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 2009 WL 725157.) Instead, the ultimate test remains whether a particular methodology was reasonably calculated to meet the child’s unique needs. (*Ibid.*)

30. The IDEA’s requirement that an educational program be based on peer-reviewed research, to the extent practicable, does not mandate a specific program for autistic children, such as an ABA program. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. Lexis 27570, pp. 51- 57 [comprehensive summary of

decisions discussing this issue]; see also 20 U.S.C. § 1414(d)(1)(IV); 34 C.F.R. § 300.320(2006); Ed. Code, § 56345, subd. (a)(4).) A school district may provide services to an autistic student at school if the district designs the educational program to meet the student's individual needs. (*Student v. Pajaro Valley Unified School Dist.* (2007) Cal.Ofc.Admin.Hrngs. Case No. 2006110472.)

31. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires," citing *Rowley, supra*, 458 U.S. at p. 207].)

#### LEAST RESTRICTIVE ENVIRONMENT

32. 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) (2006); Ed. Code, § 56342.) 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).)

33. 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 effects 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. (*Vashon Island, supra*, 337 F.3d at pp. 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

## BEHAVIOR PLANS

34. There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149; *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; Cal. Codes Regs., tit. 5, § 3001, subd. (f).)

## DETERMINATION OF ISSUES

### I. IS THE PSYCHOEDUCATIONAL ASSESSMENT AND SOCIAL COMMUNICATION AND LANGUAGE ASSESSMENT, CONDUCTED BY DR. LAUREN FRANKE, AN APPROPRIATE ASSESSMENT?

35. Parents requested an IEE from the District, therefore, the District must either fund an independent assessment as requested or demonstrate through this due process hearing that its assessment was appropriate. In order to demonstrate the assessment's appropriateness, the District must show that the assessment complied with all relevant state and federal statutory requirements.

36. Dr. Franke possesses all required licenses and credentials to administer Student's assessment. Further, she is highly qualified and experienced in all areas addressed in the assessment. (Factual Finding 6, and Legal Conclusion 11.)

37. No evidence was presented to contradict the District's representations that Dr. Franke's testing and materials were not racially, culturally or sexually discriminatory; that the assessments were not validated for the specific purpose for which they were used; or that they were not conducted in conformance with the instructions provided by the producer of the tests. (Legal Conclusions 14 through 16.)

38. Dr. Franke administered the assessment in the English language. The law requires that a child's assessment be administered in his/her native language. Although Student is of Hispanic origins, given his severe speech delays and autism, it does not appear that Spanish is his primary language. While Parents speak Spanish, Father indicated that English is also spoken in the home. From all witnesses, it appears that Student is more proficient in English. All of Student's ABA, speech and language, and OT programs are conducted in English. When he speaks, Student speaks English at school. Student reads in English, both at home and at school. Additionally, Dr. Armstrong, who tested Student in both English and Spanish, found little difference in Spanish versus

English test scores; so little, that she did not report Student's Spanish scores in her written report. Further, Dr. Armstrong's assessment results were similar to those of Dr. Franke. Dr. Bailey, who also speaks Spanish, did not find fault in an English language assessment. While Dr. Bailey disagreed with Dr. Franke's conclusions regarding Student's cognitive level, the disagreement was based upon the confounds presented by Student's severe language delays and autism, not by the use of English. Therefore, Student was properly assessed in the English language. (Factual Findings 2, 8, 16 through 19, and Legal Conclusion 13.)

39. The assessment was tailored to assess specific areas of Student's educational needs, and specifically tested Student in the areas of cognition, academic skills, receptive and expressive language, social competence, behavior and emotional functioning, and adaptive functioning. Dr. Franke administered both verbal and non-verbal testing and performed multiple tests to determine cognitive ability and other areas of need. Dr. Franke also used a variety of assessment tools to gather information, including information provided by Parents. (Factual Findings 7 through 10, 13, and 14, and Legal Conclusions 11 through 16.)

40. Student concedes in his closing brief that the actual disagreement between the parties is not with the validity of the assessment itself, but rather with Dr. Franke's interpretation of the results and recommendations. The statutory validity of testing, however, does not require agreement on inference or conclusions resulting from the assessment. The District's assessment is appropriate.

## II. DID THE DISTRICT'S INDIVIDUALIZED EDUCATION PROGRAM (IEP) DATED SEPTEMBER 16, 2009, OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)?

41. Student contends that the District failed to have a regular education teacher attend Student's IEP meetings. An IEP team is required to have at least one of

the child's regular education teachers in attendance, if the student is or may be participating in the regular education environment. The requirement is designed to ensure the participation of a person who is knowledgeable about the regular education curriculum; is knowledgeable of available regular education resources; and can interpret the instructional implications of evaluation results. A district, however, has the responsibility for determining which of its personnel will participate at an IEP meeting on its behalf, and the regular education teacher selected to attend need not be the child's current regular education teacher. Student's educational history has not involved placement in a regular education classroom. Therefore, the District could not provide a regular education teacher with any "hands on" experience with Student. Further, based upon everything known about Student prior to the IEP, it was unlikely that Student would be placed in a regular education setting, and, in fact, there was no dispute regarding Student's proposed SDC placement. The District, therefore, had Ms. Rodriguez, the Principal of Student's school of attendance, attend the IEP meeting. Ms. Rodriguez, has a general education teaching credential, and as Principal, has extensive knowledge of the regular education opportunities available at Jefferson. The District did not fail to have a regular education teacher attend the IEP meeting. (Factual Findings 25 through 28, and 93, and Legal Conclusions 19 and 20.)

42. Student contends that the District failed to consider the information presented on his behalf, including information regarding Student's progress in his home program, present levels of performance, proposed goals, staff qualifications, and concerns about Dr. Franke's methodology. As a result, Student contends that the District's IEP presented a predetermined outcome, which did not provide Parents with meaningful participation in the IEP process. The evidence strongly suggests otherwise. Parents played a pivotal role in this IEP process from the beginning. Parents were provided a copy of the District's proposed goals prior to the first IEP meeting, and they

also provided their preferred goals for consideration as well. Ms. Peterson indicated that several components of Parents' goals were incorporated into the proposed IEP goals. Parents, with counsel and interpreters, attended three IEP meetings to create and discuss the IEP team's proposals. With Student's attorney present, there is no doubt that each of Parents' concerns was precisely and expertly debated in the lively discussions described by Ms. Eissing. While the IEP team is required to consider the concerns and information provided by the Parents, there is no requirement that the team adopt or acquiesce to parental requests. Further, the IDEA does not empower parents to make unilateral decisions about programs for their child, nor must an IEP conform to a parent's wishes in order to be sufficient and appropriate. As stated in *Rowley*, an IEP does not provide for an education designed according to the parents' desires.

A parent has meaningfully participated in the IEP process when he/she is informed of the child's problems, attends the IEP meeting, expresses his/her opinions and disagreements with the proposed IEP, and makes requests for revisions. As aptly stated by Ms. Peterson, an IEP team develops an IEP by consensus, and consensus is not always 100 percent. The District did not predetermine the IEP, nor were Parents denied meaningful participation in the IEP process. (Factual Findings 21 through 24, 26 through 28, 49 through 52, 56, 58, 59, 69, 73, 82, and Legal Conclusions 21 through 24, and 31.)

43. Parents made several contentions with regard to the appropriateness of the 18 goals created for Student. The parties do not disagree on the general areas of need addressed in the goals. Their primary differences are evident in two areas, which will be addressed individually.

44. First, Student contends that the District's determination of Student's present levels of performance, or PLOPS, is inaccurate. A PLOP is important as it determines the baseline for each goal. This in turn, acts as the starting point for measuring Student's progress in mastering the goal. Clearly, Parents and the District



view Student's abilities differently. Parents have a core belief that Student is not mentally retarded (MR), and if pushed to his limits with proven teaching strategies, Student is capable of learning what is presented to him. While Dr. Franke's assessment finds Student's cognitive abilities to fall in the Low to Very Low range, the District did not pursue an eligibility category of MR. Instead, the IEP team agreed that Student's cognitive scores were likely affected by his severe language deficits and autism. Nevertheless, the experts on both sides acknowledge that Student was functioning in the Low to Very Low range at the time of the IEP. Both parties agreed that Student had severe speech and language, and marginal oral communication skills at the time of the IEP, and both parties agree that Student's autism has seriously impacted his social and adaptive skills. The parties disagree on Student's adverse behaviors, specifically regarding self-stimulation, prompt dependency, and use of reinforcers.

Parents point out that prior to his return to school, Student was impressively progressing in his ABA home program. He could attend to a task for up to 45 minutes, and was requiring less prompting. Ms. Phan indicated that she was thinning out reinforcers. While the District may not have heavily relied on Student's PLOPS in his home program, there is no evidence that they outright rejected or failed to consider Parents' description of Student's PLOPS. Even Father observed that, upon his return to school in the fall of 2009, Student had somewhat regressed. The District's determination of Student's PLOPS was based upon Student's performance at school, not at home. Ms. Phan confirmed that Student's drills at home were based on adaptive skills rather than education. Further, many of the drills worked on at home would not translate well into a school setting. All of the professionals found Student to be prompt-dependent and unable to generalize. Further, the District acknowledges that Student's behavior problems, such as self-stimulation, task avoidance, and limited attention, were increasing. Lastly, it must be remembered that determination of Student's PLOPS is a

“snapshot” defining Student at the time of the IEP, and based upon what the IEP team knew at the time. Based upon the information provided at the time of the IEP, it is clear that the District’s determination of Student’s PLOPS more accurately describes Student for purposes of the IEP. (Factual Findings 11 through 14, 16, 17, 33 through 35, 37 through 40, 44, 46, and 49 through 51, and Legal Conclusions 18 and 25.)

45. Second, Parents strenuously object to Dr. Franke’s influence in creating Student’s goals. The District’s reliance on Dr. Franke’s narrative-based language intervention strategies, is at the core of Parent’s objections to Student’s language development goals. Parents assert Dr. Franke’s “theories” are not based in peer-reviewed research. While Dr. Franke’s approach has not been peer-reviewed in its entirety, most of its individual components have in fact been peer-reviewed. Dr. Franke’s naturalistic approach takes traditional ABA in a different direction. Very basically, the naturalistic approach still finds ABA methods of breaking things down into smaller components effective. The difference, however, is in the content of the drill. The lessons being broken down need to be meaningful and beneficial to Student. By all accounts, Student’s strength lies in rote memory. What little language he has appears scripted. What Student acutely lacks is the ability to generalize what he has learned in his DTT drills. That failure to generalize is the primary reason for the District’s adoption of a more naturalistic approach to Student’s education plan. The information learned in traditional ABA must be useful to Student in order for him to connect that information outside of his one-to-one session.

Research regarding the various methodologies to teach children with autism is still emerging and inconclusive at best. Certainly, Dr. Franke’s concepts modify Parents’ proposed mode of intervention; however, it also appears that there is considerable overlap between the methodologies. California law has interpreted the requirement for peer-reviewed research to be to “the extent practicable.” The ultimate test remains

whether a particular methodology is reasonably calculated to meet the child's needs. The District has established that Student has extreme difficulty with generalization, and in that sense, the traditional ABA/DTT has failed him. Both of Student's NPA providers concur and see the need to move Student away from rote learning. The District's use of a narrative-based intervention is based on peer-reviewed research to the extent practical and that methodology is intended to allow Student to make adequate educational progress. (Factual Findings 5, 37, 40, 45, 46, 55, 57, 60, 99 and 100, and Legal Conclusions 28 through 30.)

46. Parents also contend that the goals fail to extinguish prompts. This contention stems primarily from the Parents' disagreement with the District's determination of Student's PLOPS, as well as from a philosophic disagreement as to what constitutes goal progress and skill mastery. While Parents disagree, those who observed and assessed Student found him to be prompt-dependent in all areas. While it might have been expected or acceptable when Student returned to school in May 2009, it clearly concerned the professionals working with Student. Further, his dependence notably increased upon his return to school in fall 2009. Certainly, an ultimate goal for Student, whether formally written or not, includes obtaining independence and becoming prompt-free. It is not unreasonable, however, to provide the District some leeway in carrying out Student's goals. In short, let the teachers have the flexibility to actually teach Student. The IEP process provides ample room for flexibility and modification of goals, if and when needed. Further, not all goals have a drop-dead date of completion. Some goals build on others, and prompts may still be needed to transition to the next step. While the continuing use of prompts may not result in the level of progress Parents desire, the District is only required to provide goals which are based upon Student's areas of need, and which are *reasonably calculated* to provide *some* educational benefit to Student. As indicated above, the parties had no true

dispute as to Student's areas of need in creating the goals. Based upon a "snapshot" of Student as prompt-dependent, the use of prompts throughout or a slow reduction in prompts through an entire goal is reasonably calculated to allow Student to progress in his education and provide him with educational benefit. The District is not required to adopt Parents' preference for termination of prompting. (Factual Findings 37, 40, 56, and 58, and Legal Conclusions 26 and 27.)

47. Student contends that the goals, in general, are not measurable and lack precise definition. Measurable goals are required to ensure that a child with a disability receives the FAPE to which he/she is entitled, and to provide a parent with information regarding the student's progress on each goal. Each of the goals identifies a specific area of need and provides a goal baseline based upon Student's PLOPS. Each goal provides for a measurable annual goal, which includes three short-term objectives, which are also measurable. Further, the goals identify who is responsible for the goal, and broadly indicates how the goal will be measured. The professionals who work with Student generally found the goals to be appropriate, and did not relay any significant uncertainty as to how the goals would be implemented or measured.

The purpose of a written goal is to broadly identify the area of need and means by which it will be addressed. It is not intended to be a parental syllabus which defines every facet of proposed methodology, application of curriculum or daily teaching strategies. While adherence to procedural safeguards is important, a rigid adherence is not paramount. In this matter, Parents' expectations of the content requirements of each goal are clearly overreaching. One can debate semantics and grammar for hours, as the parties did in this case. At the end of the day, however, as long as the goals provide a reasonable interpretation of Student's needs at the time of the IEP, and are reasonably calculated to provide Student with some educational benefit, they are sufficient to constitute a FAPE. Disputes involving data collection methods or measurement

techniques will not in themselves invalidate a goal. With the exception of Student's behavior goal (Goal 17), which was not revised as agreed at the IEP meeting, all of the goals presented in the District's offer of a FAPE are appropriate and designed to provide Student with some educational benefit. (Factual Findings 54, 55, 59, 61, and 62, and Legal Conclusions 26, and 27.)

48. Student contends that the District's offer of two hours per day of one-to-one ABA time, is insufficient, and that Student requires three hours per day in order to obtain educational benefit. The evidence does not support this contention. Rather, the evidence indicates that although Student benefited from one-to-one ABA, he was unable to utilize what he learned and generalize it. Ms. Eissing indicated that Student needed to make progress in developing independent speech and deductive reasoning. Ms. Phan noted that Student broke down in generalization. Further, she did not recommend DTT as the sole method to be used with Student. Ms. Lee considered three hours of one-to-one ABA to be too much as it would encompass half of Student's school day. Student had other educational needs which required access to other people, both peers and adults, which could only be addressed in a classroom or group setting. Further, Student's one-to-one ABA aide is assigned to Student for the entire school day, and may utilize other ABA strategies with Student in the classroom setting. It is also noted that while Student exhibits adverse behaviors, Parents do not believe they are truly sensory related. Student can learn in any environment. It is understandable that Parents desire to obtain maximum services for Student, and it is undisputed that Student makes good progress with expanded one-to-one ABA/DTT services. The program, however, is producing rote responses, and Student has other equally important learning skills to obtain, which are provided in a classroom setting. Two hours per day of one-to-one ABA presents a solid basis for addressing Student's unique needs and is calculated to provide Student with more than de minimis benefit. As such, the

District's offer of two hours of one-to-one ABA services per day is appropriate. (Factual Findings 1, 34, 35, 45, and 71, and Legal Conclusions 7 and 8.)

49. Student contends that the Houghton-Mifflin curriculum should not be used by the District. The District uses the HM curriculum for all of its students. While the witnesses generally agreed that it might be difficult to modify the curriculum for Student, there was no disagreement that it could be done. Further, effective utilization of the curriculum was not limited to the goals in the IEP. The curriculum adopted by the District complies with state standards, and Student's teachers are required to teach to state standards. As the District correctly points out, the principles of *Rowley* still prevail. Therefore, Student may not as a matter of law, ask an ALJ to mandate the District's selection of a particular educational method among many available to it, as long as the one selected by the District is otherwise sufficient. The same applies to selection of a curriculum. As long as the HM curriculum meets state standards, and can be modified to meet Student's needs, Parents may not insist on an alternate curriculum, even if it would produce superior results for Student. The use of the HM curriculum is appropriate. (Factual Findings 92 through 97, and Legal Conclusions 7 and 31.)

50. Student contends that the IEP fails to provide Student with adequate contact with typical peers and therefore denies him placement in the least restrictive environment. Parents are not in disagreement with Student's placement in the SDC, nor do they contend that Student would benefit from any academic time in a general education classroom. Therefore, a traditional discussion of the LRE pursuant to *Rachel H.* is unnecessary.<sup>21</sup> Instead, Student contends that the District's offer of the LRE does not

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<sup>21</sup> If anything, Parents have actually requested that Student's contact with other students be reduced, due to their request for an additional hour of one-to-one ABA time.

offer *actual* time with typical peers. Due to budget cutbacks, the only non-academic time available for Student to intermingle with typical peers is during lunch and recess. The District has also placed Student in a program providing tutoring by somewhat older typical students, and has agreed to include Student in non-academic and extracurricular activities as they occur. In essence, the District has provided all appropriate mainstreaming time available to Student during the school day. Student accurately points out that a portion of his lunchtime is spent segregated with his class while eating. In fact, all students initially eat with their classroom, before mingling with others. Ironically, the District would be required to disrupt the lunchtime program of all other students in order to maximize Student's time with them. Further, if non-academic time has not been provided to the general education students, then the District is not required to create it in order to provide Student with more mainstreaming opportunities. (Factual Findings 88 through 91, and Legal Conclusions 32 and 33.)

51. Student contends that Student's educational program, especially the ABA and behavior components, are destined to fail if Holly Busta remains as Student's case manager. Student contends that, qualitatively, Ms. Busta could not be relied upon to supervise Student's program no matter how much time was allocated for her involvement. Very simply, Parents do not want Ms. Busta to be associated with Student's educational program in any way. Their adamant dissatisfaction is derived from past disagreements, coupled with fundamental differences in how Student's program should be crafted and monitored. Parents feel Ms. Busta sees Student as a child who has limited cognitive abilities, unworthy of her attention and proper methodology. Parents, on the other hand, possess the belief that if "you merely teach him as we want, he will learn." A recurring theme intertwined in all of Student's objections to the IEP focused on the professional abilities of Ms. Busta. To the extent this testimony can be considered, the evidence instead supports a finding that Ms. Busta has the professional qualifications

and experience to supervise the District's ABA programs. This finding is supported by District witnesses, as well as Dr. Bailey. It must be emphasized again, as it was at hearing, that the legal issue to be determined in this due process hearing is the appropriateness of the District's proposed IEP, not Student's personal dissatisfaction with Ms. Busta or her potential ability to supervise an IEP which has yet to be implemented. Further, regardless of how valid Student's concerns may or may not be, consideration of the District's internal or non-statutory employment practices is clearly beyond the jurisdiction of the OAH. (Factual Findings 73 through 79, and Legal Conclusion 2.)

52. Student contends that the District failed to sufficiently or appropriately address Student's adverse behaviors. The consensus of opinions found that Student exhibited self-stimulatory behaviors, and had difficulties attending to task and maintaining focus on non-preferred activities. It is also undisputed that upon Student's return to school in fall 2009, Student's behaviors in these areas had increased since June 2009, and were continuing to increase. Causation of the behaviors has yet to be determined. Although both Parents and the District use reinforcers to assist in handling Student's behaviors, they fundamentally disagree as to what types of reinforcers are appropriate. Parents do not want a sensory diet utilized. The District approves of sensory related reinforcers for Student. The witnesses are equally divided in their opinions as to the source of Student's behaviors. Ms. Peng, the OT, believes there is a sensory base to Student's behaviors, and believes that sensory reinforcers benefit Student. Student's one-to-one aide also believes that he responds well to sensory reinforcers. Ms. Phan and Dr. Bailey, on the other hand, question whether Student's behaviors result from internally driven sensory issues, or whether Student is merely an escape artist who seeks pleasurable sensory reinforcements. Regardless, Ms. Phan and Dr. Bailey agree that reinforcers can change depending upon Student's motivation. A reinforcer should be changed when it is no longer effective as a positive reinforcer. Further, not everything



that worked at home would work at school. The evidence supports a finding that the District's use of sensory reinforcers is currently effective as a means of providing positive reinforcement to Student. It should be noted, however, that although sensory reinforcements are appropriate for Student, they do not represent the only reinforcers which may be deemed effective, edible, non-edible or otherwise. (Factual Findings 34, 35, 38, 38, 43, and 80 through 87.)

53. While the District's choice of reinforcers may be appropriate, they are only tools used to address Student's behavioral needs. While the District acknowledged that Student had significant deficits in attention and focus, it contends that they could be appropriately addressed with a behavior goal. Student contends that Goal 17 is insufficient to address Student's problems with attention and focus. The evidence supports Student's contention. The District argues that Student's behaviors were not apparent at the time of the September 16 IEP. To the contrary, the District had ample information from their own professionals which consistently emphasized Student's increasing behaviors and inability to attend to task. Ms. Peng, the OT, reported that disruption in attention prevented Student from mastering his prior goals. Ms. Eissing reported Student was so highly distractable, it was difficult to see his language due to his behaviors. Most telling is Goal 17's baseline, which was determined by the IEP team itself, and reported that Student needed to be redirected and reminded to complete academic or non-preferred tasks **every one to two seconds**. (Emphasis added.) To conclude that Student has a hard time staying focused and attending to academic or non-preferred tasks is most definitely understated. The goal's final objective which required Student to attend to an academic or non-preferred task for **one minute** (emphasis added) in four out of five trials, also emphasizes the severity of Student's lack of attention, even assuming a successful year of working on this goal. Further, while the IEP team did not adopt Parents' version of Student's PLOPS, the team was nonetheless

aware that Parents reported that Student could previously attend to tasks 20 minutes or longer. Kayla Doyle's comments are spot-on in stating that "if one minute is all we can get out of Student in a year, then he will learn nothing this year." If it (Goal I7) is truly accurate, then this failure to deal with Student's behavior means that, no matter how good the other goals may be, the IEP cannot succeed.

Additionally, it is clear from the IEP notes that Student's attorney requested that the IEP address a behavior plan for Student, and that the IEP team agreed that Goal I7 needed to be expanded. Unfortunately, there was no further discussion of a behavior plan, and Goal I7 was never revised. Given that the District failed to follow up on needed changes to Student's sole behavior goal, Goal 17 is insufficient and not reasonably calculated to provide Student with some benefit from his education. Further, and just as fatal, the IEP team, at best, paid only lip service to the creation of a behavior plan, which would have supported Student's goals and addressed Student's inattentive behaviors. Clearly, Student cannot obtain benefit from his class time where the IEP team has minimized the impact of his behavior. As such, the District has denied Student a FAPE. (Factual Findings 31, 37, and 66 through 70, and Legal Conclusion 34).

## ORDER

1. The District's request for a finding that the Psychoeducational Assessment and Social Communication and Language Assessment conducted by Dr. Lauren Franke is appropriate is granted.

2. The District's request for a finding that its IEP dated September 16, 2009, offered Student a free appropriate public education (FAPE) is granted in part. The September 16 IEP constitutes a FAPE with the exception of District's failure to revise Goal I7, and adequately address Student's inattentive behaviors.

## PREVAILING PARTY

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

1. The District has prevailed on Issue One.
2. The District prevailed on a majority of sub-issues contained in Issue Two.
3. Student prevailed on one sub-issue contained in Issue Two.

## RIGHT TO APPEAL THIS DECISION

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

Dated: March 1, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
JUDITH PASEWARK  
Administrative Law Judge  
Office of Administrative Hearings