

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2010080811

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DECISION

Administrative Law Judge Rebecca P. Freie (ALJ), Office of Administrative Hearings, State of California (OAH), heard this matter in San Francisco, California on January 24-27, and February 14, 2011.

Evan Goldsen, Attorney at Law, and Carly Christopher, Advocate, appeared on behalf of Student. Student's mother (Mother) was present throughout the hearing. Student's father (Father) was present for only part of the first day of hearing, but was present for the remainder of the hearing.<sup>1</sup>

Tara Doss, Attorney at Law, appeared on behalf of the District. Sophronia Brown-Bess, Special Education Supervisor for Elementary Programs attended the hearing as the District representative, and was absent for only a few minutes of the hearing.

On August 23, 2010, Student filed a Request for Due Process Hearing (complaint). On October 13, 2010, the hearing was continued. Testimony concluded on February 14, 2010. The parties asked to submit written closing arguments, and the matter was

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<sup>1</sup> Mother and Father shall be referred to collectively as Parents.

continued to March 14, 2011, for them to do so. The record was closed on March 14, 2011, upon submission of closing briefs, and the matter was taken under submission.<sup>2</sup>

## ISSUES<sup>3</sup>

- a) Did the District deny Student a free appropriate public education (FAPE) by failing to timely complete a requested assistive technology assessment, on or after August 23, 2008?
- b) Did the District deny Student a FAPE at the Individualized Education Program (IEP) team meeting of November 19, 2008, when it failed to:
  - 1) Develop measurable goals for Student;

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<sup>2</sup> For the record, Student's closing argument is identified as Exhibit S-38, and the District's closing argument is identified as Exhibit D-51. At the request of the ALJ at the conclusion of the hearing, the District also filed with OAH copies of school calendars for the 2007-2008, 2008-2009, and 2009-2010 school years (SY), and classroom schedules for the special day class (SDC), which the District offered as placement for Student for the 2009-2010 and 2010-2011 SYs. These exhibits have been identified and admitted as follows: calendar for 2007-2008 SY is D-46; calendar for 2008-2009 SY is D-47; calendar for 2009-2010 SY is D-48; schedule for SDC for the 2009-2010 SY is D-49; and schedule for the SDC for 2010-2011 SY is D-50.

<sup>3</sup> The issues, as stated herein, have been renumbered and reworded for clarity by the ALJ. The order following the prehearing conference (PHC) contained an issue labeled "f)." This paragraph was actually a statement of Student's proposed resolutions. Accordingly, this issue has been eliminated. Except as stated herein, there are no other changes to the issues.

- 2) Make a clear written offer regarding whether the District would provide Student with paraprofessional services, which denied Parents the ability to meaningfully participate in Student's educational decision-making process, and;
- 3) address his unique needs?
- c) During the 2009-2010 school year (SY), did the District deny Student a FAPE by failing to make a timely referral to Community Behavioral Health Service (CBHS) for an AB 3632 mental health assessment, and not providing Student with appropriate therapeutic services to address his unique needs?<sup>4</sup>
- d) Did the District deny Student a FAPE at the IEP team meeting of November 6, 2009, when it failed to:
  - 1) Develop measurable goals for Student;
  - 2) Make a clear written offer regarding whether the District would provide Student with paraprofessional services, which denied Parents the ability to meaningfully participate in Student's educational decision-making process, and;
  - 3) Provide Student with paraprofessional services to address his unique needs?<sup>5</sup>

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<sup>4</sup> AB 3632 is legislation enacted in 1983, which requires a public mental health agency to assess a student with emotional and mental health issues, and if the student is eligible, to then provide those services. During the hearing, the parties called this "the AB 3632 referral."

<sup>5</sup> The IEP documents reflect an IEP meeting date of November 6, 2009 on page 2, and the participants all indicate that date next to their signatures on another page.

- e) Did the District deny Student a FAPE for the 2010-2011 SY because it:
- 1) Did not consider Parents' input regarding placement in the least restrictive environment (LRE), which denied Parents the ability to meaningfully participate in Student's educational decision-making process at IEP team meetings on May 10, 2010, and June 1, 2010;
  - 2) Failed to make a clear written offer regarding whether the District would provide Student with paraprofessional services, which denied Parents the ability to meaningfully participate in Student's educational decision-making process;
  - 3) Failed to offer him paraprofessional services to address his unique needs, and;
  - 4) Failed to offer him a placement in the LRE when it offered to place him in a high functioning autism (HFA) special day class (SDC)?

## CONTENTIONS

Student contends that the District exceeded the statutory timelines in assessing him for assistive technology in 2008, and this denied him a FAPE. Further, at the November 2008 IEP team meeting, Student contends that the District failed to provide him with measurable goals, which denied him a FAPE, and prevented Parents from participating in the IEP process in a meaningful way. In addition, at the November 2008 IEP team meeting, Student alleges that the District did not make a clear written offer of paraprofessional services, and this denied Parents meaningful participation in the IEP development process. Finally, at the November 2008 IEP team meeting, Student

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However, on the first page of notes for the meeting, the date is listed as November 9, 2009.

contends that the District failed to offer him adequate paraprofessional services, and as a result denied him a FAPE while that IEP was in effect.

In January 2010, Student contends that he was subjected to "sexual bullying" by another boy in his class, and also in another incident involving other children in April 2010. Student alleges that after Mother requested, in January 2010, that Student be referred to CBHS for assessment pursuant to AB 3632, the District did not pursue this assessment in a timely manner. In addition, Student contends that the District did not provide him with appropriate therapy that he required after the January 2010 incident.

Student also contends that he was denied a FAPE because the District did not provide him with measurable goals to meet his unique needs at the IEP team meeting on November 6, 2009, and this failure also denied Parents meaningful participation in the IEP process. Student also contends that at the November 6, 2009 IEP team meeting, the District failed to make a clear offer of paraprofessional services, and this denied Parents meaningful participation in the IEP development process during the 2009-2010 SY. Finally, Student contends that the District failed to provide him with adequate paraprofessional services following the IEP team meeting in November 2009, and this denied him a FAPE.

For the 2010-2011 SY, Student contends that Parents were denied meaningful participation in IEP team meetings in May and June 2010, because District personnel failed to consider parental input concerning the LRE for Student. In addition, Student argues that Parents were denied meaningful participation in the IEP development process in May and June 2010, because the District failed to make a clear written offer concerning paraprofessional assistance for the upcoming school year. Further, Student contends that the District's offer denied him a FAPE because he was not offered paraprofessional assistance for the 2010-2011 SY. Finally, Student asserts that the District did not offer him a placement in the LRE for the 2010-2011 SY, when it offered

to place him in an HFA SDC at Garfield Elementary School (Garfield) and this denied him a FAPE. As a result, he has attended the Laurel School (Laurel), a nonpublic school (NPS), for the 2010-2011 SY, and he wants the District to reimburse Parents for the tuition and costs they have paid for this placement, and prospectively fund his placement through the fifth grade, Student also asks that the District fund a social skills group, speech and language therapy, and physical therapy (PT) for missed sessions caused by the District's failure to meet his needs that caused him to enroll at Laurel.<sup>6</sup>

The District contends that because Parents signed a waiver and agreed to delay the assistive technology assessment in 2008, they cannot now argue that the assessment was untimely. Further, the District argues that Parents declined a referral for AB 3632 services during the 2008-2009 SY, and when it began the AB 3632 referral process in January 2010, it did so in a timely manner, and was not responsible for any subsequent delay in Student receiving those services. In addition, it increased counseling services for Student at the school site after the January 2010 incident, and suggested other counseling resources that Parents declined. The District also claims that Student's behavioral disintegration actually began in late-November, early December 2009, and was due to increased demands being placed upon him academically in the classroom, not due to the January 2010 incident. As Student's behavior disintegrated in 2010, the District contends that it acted appropriately to provide him with the services that he needed.

In regards to measurable goals, the District contends that it provided Student with measurable goals at the IEP team meetings of November 2008 and 2009, and to the extent that goals were not measurable, Student, nevertheless, received a FAPE, and

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<sup>6</sup> In his complaint Student also requested funding for occupational therapy (OT), but he did not include this request in his closing brief.

this did not deny Parents meaningful participation in the IEP process. Further, the District claims that Parents were encouraged to, and in fact actively participated in IEP team meetings, and were not denied meaningful participation in discussions concerning paraprofessional services at these meetings. The District also defends the level of paraprofessional services provided to Student when he attended a District school for the 2008-2009 and 2009-2010 SYs. The District further argues that its offer to place Student in the Garfield HFA SDC for the 2010-2011 SY was one that offered him a FAPE in the LRE. Finally, the District argues that Student would not have required paraprofessional services if Parents accepted the District's offer of placement in the HFA SDC for the 2010-2011 SY.

## FACTUAL FINDINGS

### BACKGROUND AND JURISDICTION

1. Student resides with his parents within the boundaries of the District. He is eight years old and his primary disability is other health impairment, with a secondary disability of speech and language impairment.

2. Student has a rare neurological condition called periventricular heterotopia that results during pregnancy when nerve cells in the brain of the fetus do not migrate properly during fetal neural development. White matter in some parts of the brain has been replaced by grey matter, which interferes with the transmission of signals from some parts of the brain to others. Children with this condition are at risk of motor delays, learning disabilities, developmental delays, seizures, and mental retardation. Student also has hypotonia, which is extreme muscle weakness that causes Student to tire easily.

3. Student has at least average intelligence, with higher scores in areas of verbal intelligence, and lower scores in areas of nonverbal intelligence. He is a good

reader, but struggles in math and writing. Student has speech and language delays, fine motor deficits, and delayed social skills.

4. Student attended a private preschool, and for kindergarten through second grade, he attended a District school, Miraloma Elementary School (Miraloma) as a full-inclusion student in a general education class with the assistance of paraprofessional support for part of the day, and the services of an inclusion specialist who is a special education teacher. He received speech and language therapy, OT, and PT. At the end of Student's second grade year, the 2009-2010 SY, an IEP team meeting was held, with the District recommending that Student attend the HFA SDC at Garfield for the 2010-2011 SY. However, Parents favored Laurel. Student has attended Laurel since the beginning of the summer of 2010.

## 2008-2009 SY

### Assistive Technology Assessment

5. A child must be assessed by a school district in all areas related to the suspected disability. A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment, not counting calendar days between the pupil's regular school sessions or terms, or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless otherwise agreed upon. In the case of school vacation, the 15-day timeline recommences on the date that the regular schooldays reconvene. An IEP team meeting must be held within 60 days of receiving parental consent to the assessment plan, exclusive of school vacations in excess of five schooldays and other specified days. Failure to assess a child, or to do so in a timely manner, is a procedural violation.



6. Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP development process.

7. Students who receive special education services must be reassessed every three years. As part of this triennial assessment process, on April 16, 2008, Parents asked the District to assess Student to see if he would benefit from assistive technology since his fine motor deficits made it difficult for him to handwrite. Parents believed that Student might benefit from using a computer to write, and possibly some other assistive technology. However, the assistive technology evaluation was not completed until the fall of 2008, and not presented to Parents until an IEP team meeting on November 19, 2008. Parents contend that this delay denied Student a FAPE.

8. The District initially assessed Student for special education in May 2005. Therefore, triennial assessment of Student should have been performed in the spring of 2008, and an IEP team meeting held in May 2008. After Parent's requested an assistive technology assessment, they received a consent for assessment form, which they signed and returned to the school on May 6, 2008. However, on May 12, 2008, at the District's request, Mother signed a document in which she agreed to extend the assessment and IEP timelines to the fall of 2008. The IEP team meeting was to occur no later than October 1, 2008, but it did not occur until November 19, 2008.<sup>7</sup> Mother testified that she did not recall whether she knew she was consenting to a delay in the performance of the assistive technology evaluation when she signed the form on May 12, 2008.

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<sup>7</sup> There was no explanation as to why the IEP team meeting was delayed to November 2008, but Student did not object to the six month delay in completing his triennial IEP at the hearing.

9. Tammy Thompson-Cooke performed an assistive technology evaluation of Student. Ms. Thompson-Cooke has been an assistive technology specialist for the District for six years. She is also an augmentative communications specialist. Ms. Thompson-Cooke reviewed Student's prior IEPs and other assessment reports, consulted with his kindergarten and first grade teachers, his inclusion specialist, and his occupational therapists.

10. Ms. Thompson-Cooke agreed with the delay in assessing Student because she wanted to observe Student, for the purposes of her evaluation, in both his then present kindergarten class and then his first-grade class for the next school year. In her evaluation, Ms. Thompson-Cooke noted that Student had a computer in both his kindergarten and first-grade classrooms that was dedicated to his use, and he used it in both classrooms for written assignments. The computer also had software to assist him with writing assignments, and this was all the assistive technology he required. Ms. Thompson-Cooke opined that it was still important for Student to work on handwriting, and there were goals related to handwriting in the November 19, 2008 IEP. She did not recommend further assistive technology services. Student did not establish that he required further assistive technology other than the classroom computer and writing software to help him access the educational curriculum in either the kindergarten or the first-grade classroom.

11. The evidence established that Student was permitted to use the classroom computer and associated software to assist him in completing written assignments both before the assessment request, and at all times thereafter. There was no evidence that he required any other assistive technology. Therefore, Student did not prove that the delay in conducting the assistive technology evaluation and presenting it at an IEP team meeting in November 2008 denied him a FAPE.

## NOVEMBER 19, 2008 IEP TEAM MEETING

12. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. An IEP can be modified at any time, if the IEP team agrees.

13. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. Parents have meaningfully participated in the development of an IEP when they are informed of their child's problems, attend the IEP team meeting, express their disagreement regarding the IEP team's conclusions, and request revisions in the IEP.

### Measurable Goals

14. For each area in which a special education student has an identified need, the IEP team must develop annual measurable goals that are based upon the child's present levels of academic achievement and functional performance. The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. Failure to develop measurable goals is a procedural violation of the Individuals with Disabilities Education Act (IDEA).<sup>8</sup> Student contends that the IEP team failed to develop measurable goals at the IEP team meeting of November 19, 2008, and thus the resulting IEP denied him a FAPE for the next 12

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<sup>8</sup> 20 U.S.C. § 1400 et seq.

months.<sup>9</sup> He also contends that Parents were denied meaningful participation in the IEP development process because the goals were unmeasurable.<sup>10</sup>

15. The IEP of November 19, 2008, contains a narrative description of Student's present level of performance (PLOP) in academic subjects. It also discusses his participation in activities with other children. The IEP team developed specific goals in writing and math. Student contends that the goals in academics and socialization were not measurable and therefore deficient, and as a result he was denied a FAPE and Parents were denied meaningful participation in the IEP development process.

16. The evidence established that the District was using a new computer program to prepare IEPs when the team met on November 19, 2008. One particular problem was that the IEP forms contained a graphic representation using a circle that was darkened in an area to represent a percentage of achievement next to each goal and objective. Some of the staff drafting goals seemed to think it represented a student's PLOP in that area, and left it blank if Student was currently unable meet the goal. Others seemed to think that it should be completed to show the progress Student

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<sup>9</sup> Student only complains about the goals in academics and social pragmatics. The IEP also contained OT and PT goals, but Student did not object to these goals. Therefore these goals will not be addressed.

<sup>10</sup> Although the issues in the PHC order only refer to Student being denied a FAPE as a result of unmeasurable IEP goals, the complaint and Student's closing argument contend that defective goals denied Parents meaningful participation in the IEP development process. Although Student agreed to the issues as stated in the PHC order and restated at the beginning of the hearing, Parental participation will be discussed in relation to the adequacy of goals in an abundance of caution.

was expected to make in meeting each objective. Parents did not understand the graphic representation, and several witnesses testified that the graphs were inaccurate. However, the evidence established that Parents did understand the basic content of each goal, i.e., what Student needed to demonstrate if he was determined to have achieved the goal. Further, as previously discussed, the IEP contained a narrative describing Student's PLOPs in several domains in another section of the IEP document.

#### WRITING GOAL

17. In the area of English language arts and writing, the goal was for Student to write about experiences, stories, etc., using writing software on the computer, and using letters and phonetic spelling. He was also to do some of this writing by hand. The first measurable objective for this goal was to complete a pre-writing activity to organize his thoughts in one sitting. The second objective was to write three sentences about a topic in one writing session. The general education teacher, the special education teacher, and paraprofessionals were to assist Student in these tasks. Although the bubble graph next to this goal that was supposedly reflecting his PLOP in the area of writing was marked at zero percent, another area of the IEP document reflected that Student was finding writing difficult, although he was writing longer sentences. He needed prompting and encouragement from an adult to complete written tasks. Although the incorrect bubble PLOP beside the goal was misleading, the evidence did not establish that this made the goal so insufficient that Student was denied a FAPE in this area, or Parents were denied meaningful participation in the IEP development process.

18. In spite of the deficiencies in the IEP writing goal, the evidence established that Student met this goal. First, his final report card for the 2008-2009 SY showed that he was proficient in writing at first grade level because he had met six of the seven writing standards that first graders must meet in general education. The one area in

which he was marked as being at a basic to proficient level required him to use more descriptive words, and this area of weakness was addressed in the goals formulated at the IEP team meeting in November 2009. At this IEP team meeting, Student was described as "writing longer sentences," and "enjoying it more." He was writing with pencil and paper, as well as on the computer. This demonstrated that Student certainly made meaningful educational progress and met this goal.

#### MATH GOAL

19. At the IEP team meeting on November 19, 2008, the written portion of the IEP describing Student's PLOPs in academic areas discussed him needing help in memorizing math facts to be prepared for second grade math, which requires students to add and subtract two-digit numbers. Accordingly, the IEP team devised a math goal that required Student to be able to add and subtract numbers up to 20 and to complete 10 written problems with 80 percent accuracy. The bubble graph reflected that 80 percent level. The report card issued at the end of the 2008-2009 school year showed Student proficient in the 21 first grade math standards listed on the report card. The IEP for November 2009 reported that Student still had difficulty with his math facts up to 20, and the same math goal was contained in that IEP as the previous IEP. However, Student had made progress because he was described as now being able to answer math problems orally, although he had difficulty with written problems.

20. The evidence established that the math goal in the IEP of November 19, 2008, was adequate, in spite of the bubble graph being inaccurate, because it did state how the District was to measure Student's progress. In addition, the evidence showed that Student received meaningful educational benefit from his math instruction based on his progress, and he was not denied a FAPE in this area for the 2008-2009 SY. In addition, the evidence did not establish that Parents were denied meaningful

participation in the IEP development process due to any insufficiency in how the math goal was written.

#### SOCIALIZATION (SPEECH AND LANGUAGE) GOAL

21. Social pragmatics was an area of need for Student, and it continues to be a need.<sup>11</sup> The IEP of November 19, 2008, contained a goal that Student would “share ideas and make comments in response to what others have said,” and would enable communication to be maintained for five exchanges on three consecutive trials, or 60 percent of the time. However, his PLOP as measured by the bubble graph for this goal was at 50 percent, and there is a part of the goal where it appears that the expectation was for Student’s skills in this area to increase from “10% to 80% by 11/18/09.” In the section of the IEP where Student is described in a narrative, Student was noted to enjoy playing games with peers, although he preferred to play games alone. However, he was reported to like playing at the water table with peers, and participating in rug activities.

22. At the IEP team meeting of November 19, 2008, Parents and District team members discussed Student’s abilities in the area of social pragmatics, and it was decided that Student would participate in a social skills group, which was begun in the spring of 2009. Further, a few weeks earlier, one of the paraprofessionals assigned to Student had begun to facilitate socialization with him at some recesses. It was also agreed that District personnel and Parents would communicate frequently to address Student’s social and emotional needs.

23. At the IEP team meeting in November 2009, it was reported that Student had made “significant progress” in speech and language therapy. New goals were

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<sup>11</sup> Social pragmatics deals with how language is used: how conversation is initiated, how to maintain conversation, and the use of eye contact.

formulated at that IEP team meeting which showed that progress had been made on the previous year's goal. Although the speech and language goal of November 2008 was not as clearly written as it might have been, the evidence established that Student made progress and received a FAPE in the area of social pragmatics, and Parents were not denied meaningful participation in the IEP development process due to deficits in how the goal was written.

24. In his closing brief, Student argues that the lack of measurable goals in the IEP of November 19, 2008, denied him a FAPE and denied his Parents "meaningful participation in the academic process." Student also contends that the goals were faulty because they called for Student's progress to be measured by "observation/demonstration," and this is a subjective measurement and therefore unreliable. The evidence established that the goals were discussed by the entire IEP team, including Parents, at the IEP team meeting of November 19, 2008. Following that IEP meeting, Student had homework assignments that his parents saw and progress reports and report cards. This gave Parents information as to how Student was progressing on his goals, and teachers had frequent (at least weekly) personal and email contact with Parents which also informed them of Student's ongoing progress.

25. When Student entered the second grade, staff were still implementing the goals from the IEP of November 19, 2009. Although Student's general education second-grade teacher, Jennifer Shivers, and his new paraprofessional, Kelly Shompers, had some difficulty understanding some of the goals, they met and consulted with the special education/inclusion teacher, John Mehring, as well as the first-grade general education teacher, and one of the paraprofessionals who had worked with Student the previous year. As a result, Student's second-grade teacher and paraprofessional were able to formulate strategies to work on the goals until the IEP team meeting of November 6, 2009.



26. The evidence did not establish that the IEP goals developed at the November 19, 2008 meeting were unmeasurable to the extent that they denied Student a FAPE. The evidence established that Student made measurable educational progress, despite any deficits in the goals. Student also failed to establish that his parents were denied meaningful participation in the IEP development process due to a lack of measurable goals in the IEP of November 19, 2008.

#### Offer of Paraprofessional Services

27. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. The requirement of a formal, written offer alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. Student contends that he was denied a FAPE because Parents were denied meaningful participation in the IEP team meeting of November 19, 2008, because the District failed to make a clear written offer of paraprofessional services for Student.

28. At the IEP team meeting of November 19, 2008, the District offered Student placement in a general education first-grade class as a full-inclusion student, with paraprofessional assistance in the classroom daily, also known as designated adult support (DAS). He was also to be provided with modifications and accommodations, such as preferential seating, and having assignments broken down into steps; 90 minutes of specialized instruction each day; special education support services for the teacher; speech and language therapy; physical therapy and occupational therapy. All of these were components of the District's formal offer of placement.

29. Student was already attending that class at the time of the IEP team meeting, and had attended that class since the beginning of the school year. He had

been provided with paraprofessional assistance in the classroom since the beginning of that school year, and some paraprofessional support during recess at least since October 2008. He also had the support of an inclusion specialist who was a special education teacher. Neither party introduced Student's IEP for the 2007-2008 SY, nor was there any other evidence to establish the level of paraprofessional services offered in the previous IEP which was in effect until the IEP team meeting on November 19, 2008.

30. The IEP does not specify what type of DAS services he was to receive, nor the duration, or the location of these services. Nevertheless, Mother's testimony, as well as the testimony of others, established that Student was to receive these support services in the classroom in the areas of math and writing, as well as during some recesses for the facilitation of social interaction with other children. The bulk of the paraprofessional services in the classroom were part of the 90 minutes of specialized instruction. There was no evidence that Student was to be provided with one-to-one paraprofessional services throughout the school day, nor was that the understanding of Parents. Rather, Parents and District personnel were concerned that Student might become overly dependent on adult support academically and socially, and tried to prevent that from happening.

31. The IEP documents from the November 19, 2008 meeting reflect that Parents made comments and requests throughout the meeting, and were active participants. In fact, the evidence generally established that Parents always were active participants in the IEP development process, both during IEP team meetings, and throughout the school year. Mother was very involved as a volunteer at and for the school, and had been for many years before, as Student has an older sibling who attended Miraloma. She was on a first name basis with school personnel. Parents communicated by email with teachers both school years at least one to two times per week, and communicated with staff when they brought Student to school in the

morning. Mother testified that whenever she asked that Student be provided with additional assistance during both school years, the assistance was provided.

32. The District's offer of paraprofessional services in the IEP of November 19, 2008, lacked specificity in terms of what settings the services were to be provided, as well as the duration in each setting and for what purpose, i.e., academics or socialization. Parents and District personnel agreed that there was an intent that Student become less dependent on paraprofessional services, and more able to complete classroom tasks in math and writing on his own, as well as being able to interact socially with other children without adult facilitation. The lack of specificity gave the District flexibility to reduce these services as Student gained independence, and to provide Student with these services in all of the academic areas where he needed them, not just in math and writing.

33. However, this lack of specificity created a situation in which new personnel could not determine how Student was to receive daily paraprofessional support, or who was going to provide him with 90 daily minutes of specialized instruction simply by reading the IEP document. When Student began the 2009-2010 SY with a new classroom teacher, special education teacher, and paraprofessional, both the classroom teacher and paraprofessional consulted with their predecessors about Student at the beginning of the school year about how to best serve Student. Nevertheless, there was no evidence that the lack of specificity concerning paraprofessional services made the District's entire placement offer unclear, or denied Parents meaningful participation in the IEP development process at either the November 19, 2008 IEP team meeting, or thereafter. Nor was there any evidence that Student was denied a FAPE as a result of the lack of specificity about paraprofessional services.

Paraprofessional Services Provided to Student After the IEP Team Meeting  
of November 19, 2008

34. Student contends that after the November 19, 2008 IEP team meeting, the District did not provide him with adequate paraprofessional services, which denied him a FAPE. Student's first grade teacher, Kelley Lehman, testified persuasively about the paraprofessional services provided to Student in her class during the 2008-2009 school year. Ms. Lehman has been with the District eight years, at Miraloma, usually teaching first grade. She has been a teacher for 15 years and teaches general education classes.

35. Student required help in all subjects, but especially in math, writing, social skills and physical education. Several people provided him with assistance, including paraprofessionals. From the beginning of the school year, one paraprofessional provided Student with services from 8:00-8:30 a.m., Mondays, Tuesdays and Thursdays, as well as from 11:45 a.m. to 12:20 p.m., Monday through Wednesday and Fridays, at which time he was assisted in math. Student also received assistance from another paraprofessional beginning in September 2008. This paraprofessional provided Student with support during first recess and lunch recess two to four times per week, as well as assistance with writing every day, and math. Although the IEP did not specify a specific amount of paraprofessional services Student was to receive, the evidence established that Student was provided with sufficient paraprofessional services to meet his needs until the next IEP meeting in November 2009.

36. Parents were informed about the paraprofessional support and communicated with Ms. Lehman at least one to two times per week by email. In addition, Ms. Lehman saw Parents frequently when they brought Student to school. According to Mother, when she asked that Student be provided with additional assistance, such as additional paraprofessional support at recess, the District complied with her requests.

37. The evidence did not establish that Student was provided with inadequate paraprofessional support. Rather, the District provided Student with a great deal of support from paraprofessionals, and this support was adequate to meet his unique needs. This was reflected in his end-of-year report card for the 2008-2009 SY that showed that he was above proficient in all areas of reading, and proficient in all other areas except one math standard, as noted above. In regards to Student's social skills, the evidence established that paraprofessionals did accompany Student at recess some of the time, and facilitated his interaction with other students, and his social skills improved to some degree. Therefore, the evidence established that the paraprofessional support provided to Student was sufficient to meet his unique needs.

## 2009-2010 SY

### Referral for Mental Health Services

38. A student who has been determined to be an individual with exceptional needs, and who is suspected of needing mental health services may, after the student's parent has consented, be referred to a community mental health service. Before making that referral, the District must conduct its own assessment to determine whether the referral to a community mental health service is necessary. Once a parent has signed and returned an assessment plan for the community mental health service assessment, the school district must develop the IEP required as a result of the assessment and convene an IEP team meeting no later than 60 calendar days from the date of receipt of the parent's written consent by the community mental health service, unless the parent agrees in writing to an extension. Student contends that the District did not make a timely AB 3632 referral when requested by Parents in January 2010.

39. During the 2008-2009 SY, Student was having difficulty in the third quarter of that school year, often "shutting down," and refusing to work. District personnel

believed that this was because they began to increase academic demands, as Student had reached grade-level competency in all areas. At that time, Susan Hammond, school counselor at Miraloma, suggested to Parents that Student might benefit from CBHS Services and asked if they would like to make an AB 3632 referral. Parents instead opted to have Student referred to in-school counseling with a counseling intern once per week, and this therapy continued with another intern during the 2009-2010 SY.<sup>12</sup>

40. In late November 2009, Student became anxious after seeing a preview for a children's movie, and became afraid to go to the restroom by himself both at home and at school. He wet himself one or two times at school. A boy in the class became his "bathroom buddy" and would accompany him to the restroom, which was connected to the classroom. In early January 2010, a different boy in the class volunteered to be Student's bathroom buddy.<sup>13</sup> On at least one occasion thereafter, Child One engaged Student in inappropriate sexual behavior that is not typical for seven-year-old children. Student has limited social skills, due to his disability, and would not have instigated this activity. Child One was the instigator.

41. Student disclosed the inappropriate sexual behavior to Mother on or about January 11, 2010. Mother then notified the principal that same night. The principal in turn contacted Ms. Hammond. Ms. Hammond worked with parents, teachers, students and school volunteers in a variety of school settings as both a

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<sup>12</sup> These interns are students at San Francisco State University who are obtaining the necessary clinical hours to become licensed Marriage and Family Therapists (MFTs). Ms. Hammond supervises them when they are on the school site, although she is not their clinical supervisor.

<sup>13</sup> This child will be referred to as Child One hereafter.

teacher, and as a service coordinator from 1992 to 2005. She received her bachelor's degree in elementary education in 1992 and her master's degree in special education inclusion from Providence College in 1996. In 2006, Ms. Hammond received her master's degree in social work from San Jose State University, and a California pupil personnel credential as a school counselor. Ms. Hammond interviewed Student on January 12, 2010, and then filed a report with Children's Protective Services (CPS), which took over the investigation.

42. On January 15, 2010, Mother signed an AB 3632 referral consent form which authorized the school to forward information to the District's Student Intervention Team (SIT), which is comprised of social workers and MFTs. The SIT would then assess whether an AB 3632 referral should be made to CBHS.

43. When a school refers a student to the SIT to determine whether an AB 3632 referral is warranted, certain paperwork must be completed and signed by school personnel. This information is then sent to the SIT. The SIT reviews the information from the school, and sends its approval or disapproval for an AB 3632 referral back to the school site. Parents must then sign a consent form for CBHS to conduct its assessment of the child, and this consent is forwarded to the SIT, which has five business days to send the completed packet to CBHS. The 60-day timeline for holding an IEP team meeting to discuss the mental health assessment starts when CBHS receives the consent form.

44. After Mother agreed to have the District assess Student to determine if he should be referred for an AB 3632 assessment by CBHS, Ms. Hammond had Student's classroom teacher, Jennifer Shivers, complete a SIT-required questionnaire about Student, and also obtained required signatures from Ms. Shivers, his special education teacher; John Mehring, the school psychologist; and the school principal. She gathered

the records that the SIT required for its review. Ms. Hammond sent the completed packet to the SIT on January 29, 2010.

45. On or about February 10, 2010, Ms. Shivers received approval from the SIT to make the referral to CBHS, and on that date she obtained Mother's signature on the consent form and forwarded the signed consent form to the SIT through interoffice mail. However, the SIT claimed it had not received the consent form when Ms. Hammond telephoned it on February 25, 2010, asking for status of the referral to CBHS, so she faxed a copy of the form to them that date. The SIT sent the entire package to CBHS on February 26, 2010. Technically, because Mother signed the consent on February 10, 2010, the District should have sent the form to CBHS no later than February 18, 2010.<sup>14</sup> Instead the District's SIT was six business days late in sending the package to CBHS. However, as discussed below, there was no evidence that this delay in forwarding the package to CBHS denied Student a FAPE.

46. On March 3, 2010, Ms. Hammond was contacted by Mother via email about CBHS' progress on its assessment. Ms. Hammond responded by email and gave Mother the contact information for someone at CBHS who could check on the status of the referral. That person told Mother that CBHS received the referral on March 2, 2010.<sup>15</sup>

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<sup>14</sup> This assumes that the SIT would have received the form the next business day; Monday, February 15, 2010, was a holiday.

<sup>15</sup> In his closing brief, Student contends that Ms. Hammond's lack of diligence delayed the AB 3632 referral. The evidence showed otherwise. When Ms. Hammond called SIT to find out the status of the AB 3632 referral on February 25, 2010, it was on her own initiative; when she responded to Mother's request for information on March 3,



Therefore, the 60-day timeline for holding an IEP team meeting began on March 2, 2010. The IEP team meeting to discuss the CBHS assessment was held on April 8, 2010, which was 37 days after CBHS received the signed consent for referral. Accordingly, the evidence established that in regards to the timing of the IEP team meeting the District did not delay the AB 3632 process. Even if the SIT had received the consent form signed by Mother on February 11, 2010, and forwarded the packet to CBHS on February 12, 2010, the IEP team meeting of April 8, 2010 was still timely.

#### Provision of Mental Health Services

47. If a child requires mental health services to obtain academic benefit, the school district is ultimately responsible for providing those services, even if he is qualified for AB 3632 services. Student contends that after his behavior and emotional state deteriorated in early 2010, the District failed to provide him with appropriate mental health services to address these behaviors.

48. Student began to exhibit anxiety and maladaptive behaviors in late November or early December 2009, before the incident with Child One above. These behaviors escalated as the school year continued. The behaviors included, but were not limited to, sticking his hands into his pants, refusing to do classwork, rolling on the floor, and bothering other children by hitting them with pencils, touching their legs while he was under a classroom table, or trying to pull chairs out from under them. Mother reported to school personnel in early March 2010 that Student had told an adult in his afterschool program that he wanted to kill himself.

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2010, she was on bereavement leave, and was not scheduled to return to the school site until March 5, 2010.

49. As noted above, following winter break during the 2008-2009 SY, Student became very resistant to classroom work. He began to refuse to work with his teacher and paraprofessionals. His school performance deteriorated during the third quarter of the school year. There was evidence that prior to, or during this time, Student experienced a death in the family, and Father changed jobs. In addition, based on his progress earlier in the school year, Ms. Lehman and other classroom staff increased their expectations of academic achievement, and also began working with Student to help him become more independent, and less reliant on paraprofessional assistance. This refusal to work in the classroom was the reason Ms. Hammond recommended that Student be referred for an AB 3632 assessment during the 2008-2009 SY. However, as previously discussed, Parents instead requested that he receive in-school counseling services, which he began receiving weekly from an MFT intern. Student's behavior during the last quarter of that school year, and for the beginning of the following school year markedly improved, as did his academic performance.

50. As previously discussed, following the January 2010 bathroom incident, Parents requested the AB 3632 referral, and agreed that Student's counseling sessions with the MFT intern increase to two times a week. However, Student was resistant to attending these additional counseling sessions. Ms. Hammond recommended that Parents pursue counseling through their health plan, or a community based resource for children and teenagers who had been sexually abused, or a children's crisis team, pending mental health services pursuant to AB 3632.

51. Although Ms. Hammond told Mother in January 2010, that the AB 3632 process would not provide Student with immediate mental health services, Parents continued to expect those services to be the solution to Student's behavioral and mental health issues. The evidence established that Student's maladaptive behaviors were not confined to the school setting, and Parents were struggling with him at home.

However, Parents rejected the proffered community services as inappropriate, or did not attempt to access them, and claimed that their health plan would not provide Student with mental health services.

52. District personnel, for their part, struggled greatly with Student's behaviors for the remainder of the school year. A variety of techniques were implemented in the classroom, including a charting system where Student was rewarded with "stars" for good behavior. Student had his good days, and his bad days. There was little predictability as to what each day might hold. However, Student's maladaptive behaviors in the school setting never rose to the level where he posed a danger to himself or others. For the most part, the behaviors simply interfered with him benefiting from classroom instruction, and also put him in the position where other students in the class began to regard him as something other than just another classmate. School personnel theorized that Student was resisting greater academic demands, just as he had during the 2008-2009 SY.

53. Throughout the hearing, Student focused on the January 2010 bathroom incident and other events in April 2010, that he contended were "sexual bullying" as the cause of his increasing maladaptive behaviors in 2010.<sup>16</sup> Sexual bullying was described

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<sup>16</sup> In April 2010, several children who attended an afterschool program at Miraloma, began pretending that they were "making a movie." Initially it was supposed to be a musical with singing, and then several of the students involved, mostly girls, began pretending to film girls kissing boys. The kissing included touching below the neck over clothing, although it was never established that this was intentional rather than incidental; for example, if the "kissees" were struggling to escape the attention of the "kissers." Student was one of those involved in this activity, and a girl purportedly "kissed" him over the clothes in areas of his body that would be covered by a bathing

by witnesses as a child being victimized by other children in a sexualized way. However, the AB 3632 assessment report convincingly countered this contention. Although the January incident may have contributed to Student's maladaptive behaviors, the evidence established that in late November to early December 2009, as in the 2008-2009 SY, classroom personnel began making greater academic demands upon Student. The AB 3632 assessment attributed Student's mental health issues and resulting behavior to his increasing awareness that his disabilities made him "different" from other students, and thus he became anxious and depressed. Ironically, the resulting behaviors simply created a self-fulfilling prophecy; Student's disabilities caused him to be anxious about fitting-in with his peers, and caused him to display maladaptive behaviors, and the maladaptive behaviors resulted in a separation of him from his classmates.

54. After the April 8, 2010 IEP team meeting concerning the AB 3632 services, CBHS referred Student to a community mental health services center, and Student began the intake process in late April 2010. Following the intake process, he began weekly therapy, probably in May 2010. Mother testified that Student had benefited from the therapy, but there was no evidence as to when his behavior began to improve as a result of the therapy, although it was implied that improvement did not occur until after he had been in therapy for several months. When the school year ended on June 10, 2010, no improvement was noted.

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suit if he were a girl. Ms. Hammond interviewed the children involved, and determined that the activities were not developmentally inappropriate. It was clear that these questionable activities occurred during the afterschool program, not during school hours, and although on the school site, the program was not controlled in any way by the District, and not part of his IEP.

55. The District continued to provide Student with paraprofessional services during the longer of two recesses, during the 2009-2010 SY, and increased this support following the April 2010 incident to include both recesses due to safety concerns. The special education teacher, Mr. Mehring, began to develop a behavior support plan (BSP) that was presented to Parents in an IEP team meeting in May 2010. However, Parents would not consent to the BSP, although the therapist seeing Student reviewed the BSP beforehand and advised Mr. Mehring in an email that he thought it was appropriate. Parents communicated with Miraloma staff several times a week via email and face-to-face contact about Student's behaviors, and staff responded to these contacts. Student continued to be offered twice a week counseling sessions with an MFT intern who was appropriately supervised and monitored. Student's maladaptive behaviors increased and decreased from day to day, and he had exhibited maladaptive behaviors in the third quarter of the 2008-2009 SY that were eventually resolved. The evidence did not establish a failure of the District to provide Student with necessary mental health services during the 2009-2010 SY.

#### NOVEMBER 6, 2009 IEP TEAM MEETING

##### Measurable Goals

56. Student complains that the IEP of November 6, 2009, did not contain measurable goals, and as a result, Parents were denied meaningful participation in the IEP development process, and/or Student was denied a FAPE. Student specifically refers to the IEP goals in social pragmatics, learning strategies, and academics, i.e., reading, writing and math.<sup>17</sup>

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<sup>17</sup> Student did not challenge the adequacy of his PT and OT goals in his closing argument, nor was evidence presented that challenged these goals.

57. Again, it was clear that some school personnel still had difficulty using the IEP program that was first instituted for Student in November 2008. As a result, some of the goals and objectives in the IEP reflected incorrect PLOPs on the bubble graphs for each goal when the IEP team met on November 6, 2009. However, as in the previous year's IEP, there was a narrative section in the IEP that discussed Student's PLOPs.

#### READING GOAL

58. At the IEP team meeting of November 6, 2009, Student was given a reading goal. This goal required him to demonstrate that he comprehended text. The expectation was that he would answer questions about the main idea, recall specific details, infer information that was indirectly stated, and be able to predict possible outcomes of a story. This goal was to be implemented by his speech and language therapist, special education staff, and teacher.

59. Once again, the bubble graphs showing his PLOP in this area, and for each objective, appeared to be inaccurate. However, the language of each objective was clear. For example, the first objective required Student to state the main idea of a short passage after it was read out-loud to him. The expectation was that he would be able to do so with 80 percent accuracy. The second expectation was that he would be able to recall at least three specific details 80 percent of the time, and the third objective was that he would be able to answer questions not stated in "test-form" 70 percent of the time. Student's accomplishment of each objective was to be measured by "observation/demonstration." This goal is clear and measurable.

#### PRAGMATICS-SOCIAL LANGUAGE GOAL

60. The pragmatics-social language goal in the November 6, 2010 IEP team meeting called for Student to "improve his social pragmatic skills as measured by his ability to show understanding of social routines in the form of: using appropriate turn-

taking skills, elaborating, following conversational discourse, responding promptly, maintaining topic relevancy, and using proper eye contact. . . ." Student was to increase his ability to demonstrate these skills with peers, increasing them from 30 percent of the time, to 80 percent of the time, as measured by observation and demonstration by his teacher, special education staff, the speech and language therapist and Parents. The objective called for Student to "use proper eye contact while maintaining topic with prompt comments and questions with peers during specific language activities." The bubble graph shows a PLOP of 30 percent. This goal is clear and measurable.

#### LEARNING STRATEGIES

61. Student was given a goal to "demonstrate effective cognitive and problem solving skills as implemented by his teacher, the special education teacher, other school staff and parents and student from 20 % to 80 %." Measurement was to be through observation/demonstration. The bubble graph showed a 20 percent level beside this goal. This goal is vague and ambiguous, particularly because no objectives are stated. However, at this IEP team meeting, Parents and District personnel discussed concern about Student having difficulty focusing on school work in class without an adult sitting by him and prompting and encouraging him. Witnesses, including Mother, testified about Student's reluctance to do work in non-preferred subjects such as math and writing. In response to questioning at the hearing about how progress was measured, Ms. Shivers testified that she was keeping some notes about Student's problem solving skills during the school year, and believed she was able to determine whether or not he was making progress on this goal. The evidence did not establish that the inadequacy of this goal resulted in Parents being denied meaningful participation in the IEP development process, or Student being denied a FAPE.

#### LANGUAGE ARTS, WRITING GOALS

62. The IEP team developed three writing goals at the IEP team meeting on November 6, 2009. The first required him to "revise original drafts to improve sequence and provide more descriptive detail." Student was to increase his skills to do this from 20 percent of the time to 80 percent of the time, with progress measured through observation/demonstration. The goal is clear and measurable.

63. The second writing goal was for Student to "use sight words and phonetic spelling to write about experiences, stories, objects or people, using either paper and pencil or word processing software. It was reported that at the time of the IEP team meeting Student could do this 50 percent of the time, and he was to improve to do so 90 percent of the time. Progress was to be measured through observation/demonstration, and curriculum-based standardized testing. The goal is clear and measurable.

64. The third writing goal was for Student to "use knowledge of the basic rules of punctuation and capitalization when writing." He was purportedly beginning at a level where he was able to do this 20 percent of the time, and was expected to progress to a level where he could do this 80 percent of the time. Progress was to be measured through observation/demonstration. The objective was that Student, "when given sentences to write, correctly use simple capital letters (beginning of sentences, names, [(I)] and end mark punctuation (. ? or !)." This goal is clear and measurable.

#### MATH GOAL

65. Student's math goal from the November 6, 2009 IEP team meeting was the same as the previous year: to know addition and subtraction facts with sums up to 20 by memory. Progress was to be measured by Student being able to write answers to these types of problems 80 percent of the time when given 10 problems to solve. His PLOP at the time of the IEP team meeting was that he could do so 30 percent of the time.



Testimony from Ms. Shivers established that although Student demonstrated that he knew his math addition and subtraction facts if questioned orally, he could not answer written questions accurately.

66. Student, in his closing brief, expressed concern that measurement by observation/demonstration was “not objective.” However, the evidence established that there were few standardized assessments that could be used to measure Student’s progress for many goals, and observation is objective when one collects data based on observation and uses that data to measure progress. The evidence established that, but for the bubble graphs, Parents understood the content of each goal at the IEP team meeting, and agreed to the goals developed at the IEP team meeting of November 6, 2009.

67. Mother testified that she was concerned because the information relayed by the bubble graphs made it difficult for Parents to measure Student’s progress so that they could provide him with additional help at home. However, the evidence established that Parents were given informal reports of Student’s progress, and work to do with him at home. In addition, whenever Parents requested information, or asked that Student be provided with some sort of new or different assistance at school, District personnel complied with these requests. Finally, the evidence established that Parents were active participants at all the IEP team meetings. Student failed to meet his burden of proof that the District’s failure to draft goals that were clear and measurable, and most were, denied Parents meaningful participation in the IEP development process, or denied him a FAPE.<sup>18</sup> Until March 2010, Student made adequate progress in meeting the goals from the November 6, 2009 IEP. After that time, his maladaptive behaviors interfered with his

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<sup>18</sup> Neither party presented any documentary evidence of progress Student had made in meeting the goals from the IEP team meeting of November 6, 2009.

instruction to such an extent that progress in meeting his goals was minimal. However, lack of progress was due to his maladaptive behaviors, not due to a lack of measurable goals.

#### Offer of Paraprofessional Services

68. Student contends that the IEP of November 6, 2009, does not contain a clear offer of paraprofessional services, and therefore Parents were denied meaningful participation in the IEP development process, and Student was denied a FAPE. Specifically, Student contends that the IEP does not reflect paraprofessional services to facilitate social interaction with other students.

69. The IEP of November 6, 2009, states that Student would be placed in a general education classroom as a full-inclusion student, with accommodations and modifications, special education support services for the general education teacher, DAS services daily, 90 minutes per day of specialized instructional services, as well as physical therapy, occupational therapy, and speech and language therapy. This constituted the District's offer of placement. It was understood by the team that the paraprofessional would spend 90 minutes per day with Student in the classroom to provide him with academic support.

70. The evidence established that in October 2009, at a parent-teacher conference, Parents requested that Student be provided with paraprofessional services during recess for social facilitation. Right after that request was made, Student was provided with this support during the 20-minute recess before lunch every day. Mr. Mehring testified credibly that this support was reflected in the offer of daily DAS services contained in the IEP of November 6, 2009.

71. Although the evidence established that the IEP of November 6, 2009, and subsequent IEPs that school year did not clearly define the paraprofessional services the District would provide Student, there was no evidence that this lack of definition

resulted in the placement offer being so unclear that Parents were denied meaningful participation in the IEP process. At the IEP team meeting of November 6, 2009, Parents actively participated in all discussions, and this is reflected in the notes from the meeting. They knew Student was receiving paraprofessional support in academics, as well as at recess, although they did not have a schedule telling them when he was receiving this support. However, there was no evidence that Parents ever requested a schedule, nor was there evidence that the District would not have provided them with one if requested. Student failed to establish that the lack of a clear offer of paraprofessional services in the November 6, 2009 IEP, made its placement offer so unclear that Parents were denied meaningful participation in the IEP development process. There was no evidence that the lack of specificity concerning paraprofessional services denied Student a FAPE.

Paraprofessional Services Provided to Student After the IEP Team Meeting of November 6, 2009 <sup>19</sup>

72. Student contends that he was not provided with sufficient paraprofessional support following the IEP team meeting of November 6, 2009. This was not established by the evidence. Kelly Shompers was Student's assigned paraprofessional for the 2009-2010 SY. Ms. Shompers received her bachelor's degree in theatre and dance from Luther College in Iowa in 2003, and will be receiving her

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<sup>19</sup> In his closing brief, Student contends that the District failed to provide him with a BSP when his behavior began to deteriorate after the January 2010 bathroom incident. He incorporates this argument into his discussion of paraprofessional support for this school year. However, it is not the responsibility of paraprofessionals to create BSPs, and failure to timely provide Student with a BSP was not designated as an issue for the hearing, and thus will not be addressed in this decision.

master's degree multiple subject teaching credential from the University of San Francisco in December 2011. She has worked as a paraprofessional or teacher for the District since 2008.

73. Ms. Shompers provided Student with one-to-one assistance Mondays and Wednesdays from 7:50-8:30 a.m., and from 10:00-11:30 a.m. daily when the class received instruction in math and writing. During this time, Ms. Shompers assisted Student by clarifying to him the teacher's instructions for classroom work, and providing him with prompting to keep him on task so he would complete work assignments in writing. For math, Ms. Shompers used work sheets, flash cards and math games, often with another student for the latter activities. Ms. Shompers received assistance with strategies for working with Student from Mr. Mehring, Ms. Shivers and Student's related services providers. Ms. Shompers was appropriately trained as a paraprofessional. However, due to Student's maladaptive behaviors in the spring of 2010, Ms. Shompers began to have difficulty providing Student with the academic and social facilitation services he required.

74. In October 2009, Ms. Shompers began providing Student with support during the 20-minute lunch recess, and worked to assist Student in building social skills. She consulted with Student's speech and language therapist about this. However, the evidence established that although Student initially made progress, often, particularly as the school year progressed, he was not interested in playing with other children, in spite of the facilitation by Ms. Shompers, and preferred to walk around the perimeter of the playground by himself, or engage in imaginary play by himself. In May 2010, following the April incident in the afterschool program, Student was also provided with adult support/supervision during the morning recess because the District was concerned for his safety.

75. Student was provided with 90 minutes each day of academic paraprofessional services, and two or three mornings each week, Ms. Shompers assisted Student at the beginning of the school day. Student was also provided with paraprofessional support for social facilitation every day at the lunch recess. The evidence did not establish that the paraprofessional services provided to Student were inadequate to meet his needs. Student's lack of progress in the latter part of the school year was due to his maladaptive behaviors.

#### PLACEMENT OFFER FOR 2010-2011 SY

##### LRE

76. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes with the use of supplementary aids and services "cannot be achieved satisfactorily." The determination of whether a student can be placed in a more restrictive environment uses a four prong test: (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting. As a general rule, placement of a student at a nonpublic school is a more restrictive placement than placement at a public school, even if placement at the public school is in an SDC.<sup>20</sup>

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<sup>20</sup> A nonpublic school is a private school that has been certified by the state to provide special education services to students with disabilities. Although some students

77. The District held IEP team meetings on May 10, 2010, and June 1, 2010. At the end of the IEP team meeting of May 10, 2010, which was held primarily to discuss the District's proposed BSP, there was some discussion about Student's placement for the 2010-2011 SY. In subsequent conversations, both face-to-face and via email, District personnel and Parents discussed potential placements for Student for the next school year. Several District elementary schools were mentioned, as well as Laurel. The District suggested that Parents visit prospective placements in preparation for the next IEP team meeting, which occurred on June 1, 2010.

78. Parents contend that at the IEP team meeting on June 1, 2010, District personnel did not consider their comments concerning why they felt that placement at Laurel for the 2010-2011 SY was the LRE for Student, which denied them meaningful participation in the decision-making process. However, the evidence, which consisted of witness testimony, transcripts of the June 1, 2010 IEP team meeting, and the IEP documents from the meetings of May 10, 2010, and June 1, 2010, demonstrate that this was not the case.<sup>21</sup>

79. Shortly after the May 10, 2010 IEP team meeting, Mr. Mehring suggested to Parents that they might want to observe the HFA SDC at Garfield as a possible placement for Student for the coming school year. He had Kathleen Kolba, a District

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at a NPS may have IEPs, and others may have educational needs outside the norm, there may be some typically developing students at NPSs, although not as a general rule. A NPS is not just a private school.

<sup>21</sup> The IEP team meeting of June 1, 2010, was recorded. Each party supplied a transcript of the IEP team meeting as evidence. The ALJ reviewed both transcripts and found that any discrepancies between the transcripts were nonsubstantive.

autism specialist, contact Mother to assist her with this observation, and any other observations she might wish. Mother did observe the Garfield classroom for one hour, but felt that students in the class were lower functioning than Student. In an email to Mr. Mehring, she named other District schools that Parents might want to observe. However, Parents never observed classrooms at any of these other schools.

80. A few days before the June 1, 2010 IEP team meeting, Student visited Laurel for a day, and Parents began the application process for Laurel. Student was pending acceptance when the IEP team met on June 1, 2010. At that IEP team meeting, Mother and Student's advocate, Ms. Christopher, discussed Laurel as a possible placement for Student. Both pointed out to District personnel that Student's emotional state was such that Parents believed it would be emotionally injurious to him if placement in a District program was unsuccessful, and he had to change schools again.

81. The June 1, 2010 IEP team meeting notes and transcripts of the IEP team meeting strongly support a finding that the District listened carefully to the comments of Mother and Ms. Christopher, and asked questions about those comments. The evidence established that in the end, District personnel disagreed with Parents that placement of Student at Laurel would be LRE for him, and provide him with a FAPE, although not all District personnel supported placement in the Garfield HFA SDC.<sup>22</sup> The fact that District personnel disagreed with Parents' belief that Laurel School was the LRE for Student for the 2010-2011 SY does not mean that they did not consider Parents' comments, thereby denying them meaningful participation in the IEP development process.

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<sup>22</sup> Student's speech and language therapist recommended that the District try to find another inclusion placement with additional paraprofessional support, rather than placing him in an SDC.

### Written Offer of Paraprofessional Support

82. Parents contend that they were denied meaningful participation in the IEP development process because the District failed to make a clear written offer about whether paraprofessional support would be offered to Student for the 2010-2011 SY at the IEP team meetings of May 10, 2010, and June 1, 2010.

83. The IEP team meetings on May 10, and June 1, 2010, were not annual IEP team meetings. As previously discussed, the IEP team meeting on May 10, 2010, was largely a discussion of a BSP prepared by Mr. Mehring, with a brief discussion at the end of the meeting about placement for the 2010-2011 SY. Parents actively participated in this meeting. Parents subsequently rejected the BSP, and towards the end of the IEP team meeting of June 1, 2010, it was agreed that the BSP would be redrafted. An offer of paraprofessional support was not made at either IEP team meeting, although there was a brief discussion of what paraprofessional services would look like if Student was placed in a general education class in a District school at the June 1, 2010 meeting.

84. The participants at the June 1, 2010 IEP team meeting, spent much of the time discussing Student's behavior in the context of determining his placement for the 2010-2011 SY. Mother, who appeared to be the spokesperson for both herself and Father, and Student's advocate participated actively in the IEP team meeting. The IEP document prepared for that meeting contained prior goals from the November 6, 2009 IEP, the previous related services, and the previous accommodations and supports, including paraprofessional services.

85. At the IEP team meeting of June 1, 2010, the District made a formal written offer of placement in the HFA SDC at Garfield. The District did not make a formal offer of paraprofessional support, because the District's offer was not placement in a general education classroom for the 2010-2011 SY, but rather placement in an SDC that had two full-time paraprofessionals in the classroom. Therefore, one-on-one paraprofessional



support for Student was not felt to be necessary, as will be demonstrated below. Finally, although the evidence established that the IEP document prepared at that meeting was a preliminary document, not a final document, the formal written offer of the HFA SDC at Garfield was made at that meeting. At the end of the meeting it was determined that the BSP would be revised, and Parents would be reviewing the goals. Certain information was sent to Parents after the IEP team meeting and never returned. Instead, shortly before the 2010-2011 SY began, Parents informed the District that Student would be attending Laurel. Student failed to establish that Parents were denied meaningful participation in the IEP development process at the IEP team meetings on May 10, and June 1, 2010, because the District failed to make a clear written offer of paraprofessional support at these meetings.

#### Failure to Make an Offer of Paraprofessional Services

86. As discussed above, the IEP document produced as evidence at the hearing from the IEP team meeting of June 1, 2010, was not established to be the final IEP. The process was not completed before Parents informed the District that they were removing Student from the District and placing him at Laurel. Nevertheless, the evidence established that the District did make a formal written offer of placement in the HFA SDC at Garfield. This was a placement where two paraprofessionals were integrated into the SDC, and Student did not establish that he would have required additional paraprofessional support had he been placed in this class.

#### Offer of a FAPE

#### THE HFA SDC

87. Student contends that the District's offer of placement in the HFA SDC at Garfield for the 2010-2011 SY was not an offer of a FAPE. The evidence does not support this contention.

88. At the IEP team meeting of June 1, 2010, it was clear to all participants that continued placement in a general education class at Miraloma was not appropriate for Student, and not the LRE for him. His maladaptive behaviors not only interfered with his education, but also interfered with the learning of other children in the classroom because the teacher was forced to pay attention to Student when he refused to work with Ms. Shompers. In addition, Student would bother children while they were working by crawling under the table and grabbing on to their legs, or the legs of chairs where they were sitting, or roll around on the floor when refusing to work.

89. It was clear by the end of the 2010-2011 SY that Student was not gaining social benefit from being placed in a general education class with typically developing peers. The speech and language therapist suggested that Student be placed in a general education class at another school, with additional paraprofessional support. Parents limited their discussion at the IEP team meeting of June 1, 2010, to claiming the HFA SDC at Garfield was too low-functioning academically for Student, and the number of children attending Garfield was such that they believed Student could not be safe. Further, Parents believed that social skills training was not embedded in the curriculum at the HFA SDC at Garfield as it was at Laurel. All of these contentions were based on Mother's one hour observation of the class in May 2010.

90. Valerie Chan teaches the HFA SDC at Garfield. Ms. Chan is a special education teacher for the District, and has taught this class since 2006. Prior to 2006, she worked for parochial schools in the Bay Area as a teacher's assistant and extended care assistant.

91. Ms. Chan teaches the HFA SDC with two paraprofessionals to assist her. During the 2009-2010 SY the class had nine students. There was one student classified as a first-grader, although his reading and math skills were at the third grade level. Another Student was in second grade, but working at a third-grade level. The remaining

six students were chronologically and academically in third or fourth grade. Most, if not all of the children were mainstreamed into general education classrooms for part of the day, and all were also mainstreamed for lunch and recess. Some general education students came into the classroom for specialized instruction in language arts during the day. This year, the class has six students, all boys, with one second-grader, two third-graders and three fourth-graders. Mainstreaming opportunities for these children is the same as last year.

92. Approximately 120 students are on the playground during recess and at lunch with one general education teacher supervising them. The two paraprofessionals are on the playground with the SDC students during recess. At times, the paraprofessionals will gather groups of children to play games. The goal is for the children in the SDC to learn to initiate social interaction with others independently. The paraprofessionals are focused on the Students of the SDC.

93. Some students in the HFA SDC are on the autism spectrum, and others have mild to moderate learning disabilities. Children in the HFA SDC at Garfield have visual schedules at their desks. The classroom is highly structured. Social skills are "interwoven" throughout the day in the classroom. In addition, the Caring Schools Community curriculum is used with all of the children at Garfield as a social skills program. Of the six students currently in the class, all are at or above grade level in most subjects, and it does not appear that any students are more than one grade-level below in any subject. Two of the students are nonverbal, although they communicate in other ways. The remaining students are verbal. Students are usually instructed in small groups or individually. Mainstreaming opportunities are determined by the child's specific needs and abilities, but Mr. Mehring commented at the IEP meeting that he had no doubt that Student could and would be mainstreamed in one or more general

education classes at Garfield. Because the HFA SDC is in a public school, OT, PT and speech and language services are provided on-site.

#### PROGRAM AT LAUREL

94. Student currently attends Laurel. He is in a class with nine children, although class-size may increase if children from other classes come in for instruction in specific areas during the day. The class is taught by one teacher who has an aide 60 percent of the time. Instruction is large group, small group, and sometimes one-to-one. Social skills are embedded into the classroom, with some emphasis on the social skills program developed by Michele Garcia-Winner. There are 66 students currently enrolled at Laurel. All of the children enrolled at Laurel are disabled; many have specific learning disabilities, although not all of them have an IEP. There is no PT, speech and language therapy or OT on the premises. These services must be obtained privately.

95. Student has made progress this school year at Laurel. He is usually on-task, although occasionally he resists instruction. He socially interacts with other children, and seems to be forming friendships. Student is making educational progress at Laurel. However, Student failed to prove that he would not have received similar educational benefit if he had attended the HFA SDC at Garfield. Accordingly, the evidence established that the District's offer of placement in the HFA SDC at Garfield was an offer of a FAPE.

#### REMEDIES

96. In general, when a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes

of the IDEA.<sup>23</sup> Here, because the District did not deny Student a FAPE at any time, Student is not entitled to relief.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student has the burden of proof in this matter because he is the complainant.

### ELEMENTS OF A FAPE

2. Under both the federal IDEA and State law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit

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<sup>23</sup> *Sch. Comm. of Burlington v. Dep't of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].

standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

4. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; *Rowley*, 458 U.S. at 188-89.) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams*, at 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrman*).)

5. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

## PROCEDURAL VIOLATIONS

6. Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP development process. (*W.G. v. Board of Trustees of*

*Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation constitutes a denial of FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

## ASSESSMENT

7. A child must be assessed by a school district in all areas related to the suspected disability. (20 U.S.C. § 1414(A)(2), (3); 34 C.F.R. § 300.304 (c)(4) (2006);<sup>24</sup> Ed. Code, § 56330(f).) A proposed assessment plan shall be developed within 15 calendar days of the referral for assessment, not counting calendar days between the pupil's regular school sessions or terms or calendar days of school vacation in excess of five school days, from the date of receipt of the referral, unless otherwise agreed upon. (Ed. Code, § 56043, subd. (a).)

In the case of school vacation, the 15-day time recommences on the date that the regular schooldays reconvene. (Ed. Code § 56321, subd. (a).) An IEP team meeting must be held within 60 days of receiving parental consent to the assessment plan, exclusive of school vacations in excess of five schooldays and other specified days. (Ed. Code, §§ 56043, subds. (b), (c), 56344, subd. (a).) A school district is required to conduct a reevaluation of each child at least once every three years, unless the parent and the local educational agency agree that a reevaluation is unnecessary. (34 C.F.R. 300.303(b)(1); Ed. Code, § 56381, subd. (a)(2).)

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<sup>24</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO TIMELY COMPLETE THE REQUESTED ASSISTIVE TECHNOLOGY ASSESSMENT, ON OR AFTER AUGUST 23, 2008?

8. A failure to timely assess a child is a procedural violation of the IDEA. As determined by Legal Conclusions 2-7, and Factual Findings 5-11, Student was not denied a FAPE when the District delayed in assessing his need for assistive technology. Parents signed a waiver in May 2008 delaying all of the triennial assessments, including the assistive technology assessment to the fall of 2008. The assistive technology specialist had requested this delay because she wanted to observe Student in both his kindergarten and first grade settings, prior to making a determination as to what kind of assistive technology he required. This was a reasonable request since the writing demands in first grade are much greater than in kindergarten. There was no evidence that Student was denied access to the assistive technology due to the agreed-upon delay in assessing him, as he was already using, a computer and writing software. Further, no additional assistive technology was recommended for Student as a result of the assessment. Accordingly, Student did not meet his burden of proof on this issue.

#### MEASURABLE GOALS

9. For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance. (Ed. Code, § 56345.) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.347(a)(2)(i)(ii) (2006); 34 C.F.R. Part 300, Appendix A, Q.1; Ed. Code, § 56345.) Failure to provide a student with measurable goals is a procedural violation.



## MEANINGFUL PARTICIPATION

10. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrman, supra*, 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses 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; *Fuhrman, supra*, at 036.)

### DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP TEAM MEETING OF NOVEMBER 19, 2008 WHEN IT FAILED TO DEVELOP MEASURABLE GOALS FOR STUDENT?

11. Based on Legal Conclusions 2-5 and 9-10, and Factual Findings 12-26, some of the goals in the November 2008 IEP were inadequate because the bubble graphs beside each goal often did not reflect Students PLOPs. However, other sections of the IEP discussed his PLOPs. In addition, some of the goals were deficient because they did not provide specific information as to how progress was to be measured. However, the evidence from Student's report card at the end of the 2008-2009 school year, and reports contained in the November 2009 IEP, established that Student made meaningful progress in each of the areas covered by the goals, and was not denied a FAPE for that school year due to goals not being measurable. Further, the evidence established that any deficits in the goals did not deny Parents meaningful participation in the IEP development process.

## IEP OFFER OF PLACEMENT

12. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union School Dist. v. Smith*, (9th Cir. 1993) 15

F.3d 1519, 1526.) In *Union*, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Id.* at p. 1526). The requirement of a formal, written offer alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Id.* at 1526; *Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra*, 15 F.3d at p. 1526).)

DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP TEAM MEETING OF NOVEMBER 19, 2008 WHEN IT FAILED TO MAKE A CLEAR WRITTEN OFFER REGARDING WHETHER THE DISTRICT WOULD PROVIDE STUDENT WITH PARAPROFESSIONAL SERVICES, WHICH DENIED PARENTS THE ABILITY TO MEANINGFULLY PARTICIPATE IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS?

13. Legal Conclusions 2-6, 10 and 12, and Factual Findings 27-33 establish that Parents were active participants in the IEP team meeting on November 19, 2008. Although the IEP was not as detailed as it could have been in describing to Parents the paraprofessional services the District was offering Student, the offer of placement in totality was a clear written offer of placement. Although the IEP did not specify whether paraprofessional services were in the classroom or on the playground, and what they consisted of, there was no evidence that Parents were denied meaningful participation in the IEP development process due to this lack of clarity. Rather, the evidence established that Parents understood what was being offered in terms of

paraprofessional services, and were active participants in the meeting. Further, they had excellent relations with school personnel, and there was an open line of communication between them throughout the duration of the IEP. Student did not establish that Parents were unaware of what paraprofessional services he was receiving as the year progressed because the IEP lacked clarity in this regard, nor was there evidence that this lack of clarity resulted in Student being denied a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP TEAM MEETING OF NOVEMBER 19, 2008, WHEN IT FAILED TO PROVIDE HIM WITH SUFFICIENT PARAPROFESSIONAL SERVICES TO ADDRESS HIS UNIQUE NEEDS?

14. As established by Legal Conclusions 2-5, and Factual Findings 34-37 Student failed to establish that he was denied a FAPE because the District did not offer him enough paraprofessional services. Although the exact number of minutes per week that Student received services from paraprofessionals was not established through the testimony of witnesses, it could be inferred from the evidence that Student received an average of 90 minutes per day of paraprofessional services. In addition, at the end of the school year, Student's excellent report card demonstrated that Student did receive a FAPE for that school year, which indicates that the level of paraprofessional services that were provided to him pursuant to the November 19, 2008 IEP, was appropriate to meet his needs.

#### MENTAL HEALTH ASSESSMENT AND SERVICES

15. A student who has been determined to be an individual with exceptional needs and who is suspected of needing mental health services may, after the student's parent has consented, be referred to a community mental health service in accordance with Government Code section 7576 when the student meets criteria for referral specified in California Code of Regulations, title 2, section 60040, and the school district

has, in accordance with specific requirements, prepared a referral package and provided it to the community mental health service. (Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 2, § 60040, subd. (a).) Once a parent has signed and returned an assessment plan for the community mental health service to conduct the assessment, the LEA must forward that package to the mental health service within five business days. (Cal. Code Regs., tit. 2, § 60040, subd. (a).) In addition, the LEA must develop an IEP required as a result of the assessment and convene an IEP team meeting no later than 60 calendar days from the date of receipt of the parent's written consent, unless the parent agrees in writing to an extension. (20 U.S.C. § 1414(a)(1)(C)(i)(I); Ed. Code, §§ 56043, subd. (c); 56344, subd. (a).)<sup>25</sup>

16. If required by a student's IEP, the California Department of Mental Health (CDMH), or a community mental health service agency designated by CDMH, is responsible for the provision of mental health services after the completion of mental health assessment. (Govt. Code, § 7576, subd. (a) and (b).) CDMH has designated by regulation that the community mental health service agency of student's county of origin is responsible for conducting the mental health assessment and provision of mental health services. (Cal. Code Regs., tit. 2, § 60200, subd. (c).) The school district remains ultimately responsible for making a FAPE available to a student needing mental health services. (20 U.S.C. § 1414(d)(2); Ed. Code, § 56040, subd. (a).)

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<sup>25</sup> Although the language of section 60045, subdivision (d), still retains a reference to a 50-day timeline, this appears to be an oversight. The California Legislature amended the statutory timelines from 50 to 60 days in 2005 to conform to the timelines delineated in the federal IDEA. California Code of Regulations, title 2, section 60045, subdivision (e), was similarly amended to affect a 60-day timeline.

DURING THE 2009-2010 SY, DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO MAKE A TIMELY REFERRAL TO CBHS FOR AN AB 3632 MENTAL HEALTH ASSESSMENT, AND NOT PROVIDING STUDENT WITH APPROPRIATE THERAPEUTIC SERVICES TO ADDRESS HIS UNIQUE NEEDS?

17. Legal Conclusions 2-7 and 15, and Factual Findings 38-46 establish that although the District may not have made a timely referral to CBHS because the consent form signed by Mother was lost in the District's interoffice mail, or misplaced by the SIT, this minor delay did not deny Student a FAPE because the AB 3632 assessment was timely. Prior to making the referral to CBHS, the District's SIT team had to review information sent to them by Ms. Hammond. Mother asked the District to begin the referral process on January 15, 2010. However, if Parents had agreed to the referral during the previous school year when it was suggested to them, it is likely that Student would have already been receiving the AB 3632 services.

18. On January 29, 2010, two weeks after Mother asked for the AB 3632 referral, the assessment packet was sent to the SIT, and 12 days after that, on February 10, 2010, the SIT approved the referral. On the same day, Mother signed the consent form for the AB 3632 referral, and Ms. Hammond sent the form to SIT, which then had five business days to forward the referral package to CBHS. There was no evidence to explain why SIT claimed it did not receive that consent form in February, but the evidence established that on February 25, 2010, Ms. Hammond faxed the SIT a copy of the form, and the SIT forwarded the package to CBHS the following day. CBHS received the package on March 2, 2010. The 60-day timeline began on March 2, 2010, and the IEP team meeting to review the CBHS assessment occurred on April 8, 2010, well before the 60-day deadline. In addition, even if the evidence showed that the SIT timely received the consent form signed by Mother on February 10, 2010, the IEP team meeting still would have occurred within the 60-day timeline.

19. As established by Legal Conclusions 2-7 and 15-16, and Factual Findings 47-55, the District struggled with Student's maladaptive behaviors after late November, early December 2009. In January 2010, his school based counseling was increased from once per week to twice per week, but Student resisted attending the additional sessions. School personnel tried multiple strategies to engage Student, and some days were successful. However, there was no evidence as to what other therapeutic services the District could have provided Student to address his mental health issues. Parents were told in January 2010, that the AB 3632 process was lengthy, and had refused such a referral the previous school year. Although other mental health resources were suggested to Parents by Ms. Hammond, Parents did not access them. The evidence did not establish that Student's behaviors made him a danger to himself or others. Had his behaviors been that extreme, the District would have had to pursue other avenues to address the behaviors, but that was not the case. Student failed to demonstrate that the District had an obligation to provide him with any other therapeutic services, or what those services would look like. Accordingly, Student did not prevail on this issue.

DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP TEAM MEETING OF NOVEMBER 6, 2009, WHEN IT FAILED TO DEVELOP MEASURABLE GOALS FOR STUDENT?

20. Legal Conclusions 2-5, 9-10, and Factual Findings 56-67 establish that although some of the goals contained inaccurate PLOPs, and one, "Learning Strategies" lacked clarity, Student was not denied a FAPE as a result, nor were Parents denied meaningful participation in the IEP development process as a result. Student's PLOPs were discussed in other portions of the IEP. Parents were active participants in the IEP team meeting of November 6, 2009, and had every opportunity to discuss each goal. Parents were kept informed of Student's progress by way of informal, but frequent communication with Ms. Shivers and Mr. Mehring, and they saw his homework.

Although Student's maladaptive behaviors limited his progress in meeting his goals beginning in March 2010, this was not due to any of the goals being inadequate.

DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP TEAM MEETING OF NOVEMBER 6, 2009, WHEN IT FAILED TO MAKE A CLEAR WRITTEN OFFER REGARDING WHETHER THE DISTRICT WOULD PROVIDE STUDENT WITH PARAPROFESSIONAL SERVICES, WHICH DENIED PARENTS THE ABILITY TO MEANINGFULLY PARTICIPATE IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS?

21. As established by Legal Conclusions 2-6, 10 and 12, and Factual Findings 68-71, the IEP of November 6, 2009, understates the paraprofessional services Student was being provided at the time of the IEP team meeting, and does not specify whether those services were academic, social facilitation, or both. However, the evidence did not establish that this lack of clarity resulted in the District failing to make a clear written offer of placement. There was no evidence that this denied Parents meaningful participation in Student's educational decision-making process, or denied Student a FAPE. Further, although Student's progress in both social skills and academic skills slowed significantly beginning in March 2010, Student failed to demonstrate that this was caused by anything other than the increase in maladaptive behaviors, and there was no evidence that these behaviors were affected by the lack of specificity in the IEP in regards to paraprofessional support.

DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP TEAM MEETING OF NOVEMBER 6, 2009, WHEN IT FAILED TO PROVIDE HIM WITH PARAPROFESSIONAL SERVICES TO ADDRESS HIS UNIQUE NEEDS?

22. Legal Conclusions 2-5, and Factual Findings 72-75 establish that the IEP of November 6, 2009, and the subsequent provision of paraprofessional services by the District were adequate to address Student's unique needs. Ms. Shompers was a qualified paraprofessional. Although Student seems to argue that Ms. Shompers was

inadequately trained to handle Student's maladaptive behaviors, this was not established. In terms of providing Student with academic support and social facilitation, Ms. Shompers appropriately consulted Mr. Mehring and other service providers, and implemented strategies in accordance with their advice. In fact, Student received an increasing level of paraprofessional services as the year progressed, which demonstrates that the District was aware that Student's increased needs required increased services, which it then provided. Student failed to establish that the District failed to provide him with adequate paraprofessional services to address his unique needs.

## LRE

23. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).)

24. In *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the "least restrictive environment" for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

25. California Education Code section 56361 contains the continuum of placements for students with special needs, and is arranged in sequence beginning with the least restrictive placement, and ending with the most restrictive placement.



Placement in a public school SDC is in fourth place on the continuum, while placement in a NPS is in fifth place on the continuum.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2010-2011 SY BECAUSE IT DID NOT CONSIDER PARENTS' INPUT REGARDING PLACEMENT IN THE LRE, WHICH DENIED PARENTS THE ABILITY TO MEANINGFULLY PARTICIPATE IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS AT IEP TEAM MEETINGS ON MAY 10, 2010, AND JUNE 1, 2010?

26. As established by Legal Conclusions 2-6, 10, and 23-28, and Factual Findings 76-81, District personnel considered Parents' input at the IEP team meetings on May 10, 2010, and June 1, 2010, and they were not denied meaningful participation at these meetings. Rather, the evidence established that District personnel responded to Parents' questions about potential placements, and discussed potential placements with Parents at both meetings, and during the period between the meetings. At the June 1, 2010 IEP team meeting, District personnel asked Parents and their advocate questions about Laurel, and also asked questions about why Parents disagreed with the offered placement in the HFA SDC. Just because the District did not acquiesce to Parents' request that the IEP team place Student at Laurel, does not mean that Parents were denied meaningful participation in the process.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2010-2011 SY BECAUSE IT FAILED TO MAKE A CLEAR WRITTEN OFFER REGARDING WHETHER THE DISTRICT WOULD PROVIDE STUDENT WITH PARAPROFESSIONAL SERVICES, WHICH DENIED PARENTS THE ABILITY TO MEANINGFULLY PARTICIPATE IN STUDENT'S EDUCATIONAL DECISION-MAKING PROCESS?

27. Legal Conclusions 2-6, 10 and 12, and Factual Findings 82-85, establish that the District did not deny Parents the ability to meaningfully participate in the educational decision-making process because it did not make a clear written offer of whether paraprofessional services would be offered for the 2010-2011 SY at the IEP

team meetings of May 10, and June 1, 2010. First, although there was no final IEP document created at the meeting, the District made it clear that its formal written offer of placement was an HFA SDC. Secondly, Parents, particularly Mother, and their advocate were very vocal participants in the IEP team meeting on June 1, 2010. There was discussion about what paraprofessional support would look like if Student was in a general education classroom, and whether he would need additional paraprofessional support if he were in the District's proposed placement in the HFA SDC at Garfield School. Since the classroom at Garfield already had two paraprofessionals, it did not appear that Student would need additional individual paraprofessional support in that setting. Because paraprofessionals were integrated into the District's HFA SDC, there was no need to make a specific offer of paraprofessional support.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2010-2011 SY BECAUSE IT FAILED TO OFFER HIM PARAPROFESSIONAL SERVICES TO ADDRESS HIS UNIQUE NEEDS?

28. As established by Legal Conclusions 2-6, and Factual Finding 86, Student failed to demonstrate that the District was required to offer paraprofessional services to address his unique needs. The evidence established that the paraprofessional support in the District's proposed placement at Garfield in the HFA SDC was sufficient to meet Student's unique needs, and he did not require individual paraprofessional services.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2010-2011 SY BECAUSE IT FAILED TO OFFER HIM A PLACEMENT IN THE LRE WHEN IT OFFERED TO PLACE HIM IN THE HFA SDC?

29 Legal Conclusions 2-6, and 23-25, and Factual Findings 87-95, establish that the District's offer of placement in the HFA SDC at Garfield was an offer of FAPE in the LRE. In applying the factors from *Rachel H., supra*, 14 F.3d 1398, 1400-1402, the evidence established that at the end of the 2009-2010 SY, Student was very resistant to

instruction in the general education classroom, even when facilitated by Ms. Shompers and Ms. Shivers. There was no evidence that Student was benefitting academically from placement in this environment. In looking at the second factor, by the end of the school year, Student was isolated from other children, both in class, and on the playground. There was no evidence that he was gaining non-academic benefit from his placement in the general education classroom. As to the third factor, Student was very disruptive in his general education classroom at Miraloma. He was bothering other Students, and engaging in maladaptive behaviors that Ms. Shivers needed to address, taking her away from instructing the other children. No evidence was presented about the cost of the HFA SDC at Garfield in comparison to the cost of placement at Laurel, obviating the need to discuss the fourth *Rachel H.* factor.

30. The HFA SDC at Garfield is a in a public school setting with typically developing children on campus so that the HFA SDC students have multiple opportunities to interact with typically developing peers. Laurel, on the other hand, has no typically developing children on its campus, although not all children at Laurel have IEPs. Therefore, the Garfield HFA SDC is a less restrictive environment than Laurel. The adult/student ratio in the Garfield HFA SDC is much lower than that at Laurel. The HFA SDC is approximately two-and-one-half students for each adult in the classroom, compared to one adult for four or five to nine students in the classroom. Both classrooms are highly structured, with social skills embedded in the curriculum. Children are working predominately at grade level in most subjects, depending on the nature of a specific student's disability. At Laurel, Student is not provided with speech and language, OT or PT services. The evidence established that the HFA SDC at Garfield is the LRE for Student, and will provide him with a FAPE.

## ORDER

Student's claims for relief are denied.

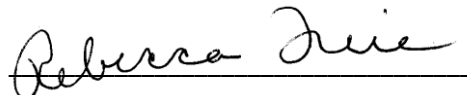
## PREVAILING PARTY

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

## RIGHT TO APPEAL

The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: April 4, 2011

A handwritten signature in cursive script, reading "Rebecca Freie", is written over a horizontal line.

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings