

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN JUAN UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010050862

DECISION

Charles Marson, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on March 1-3 and 7, 2011, in Sacramento, California.

Martha A. Millar, Attorney at Law, represented Student. Student's Mother was present throughout the hearing except for a brief absence on one afternoon.

Linda C.T. Simlick, Attorney at Law, represented the San Juan Unified School District (District). Shelley Ellinghouse, the District's Special Education Program Manager, was present throughout the hearing on behalf of the District.

Student filed his second amended request for due process hearing on December 27, 2010. On January 10, 2011, the matter was continued at the request of the parties. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to March 28, and on March 20 was continued to April 7, 2011, for the submission of closing briefs. On that day, the record was closed and the matter was submitted for decision.

## ISSUES

Did the District fail to offer or provide Student a free appropriate public education (FAPE) from October 22, 2008 through October 21, 2010, by:

1. Failing to design a program to meet his unique needs and prepare him for further education, employment, and independent living;
2. Failing to follow the protocols for administration of the Wechsler Individual Achievement Test – Second Edition (WIAT-II) given to him on September 28, 2010;
3. Failing to assess him in all areas of suspected disability, namely by failing to assess his need for assistive technology; and
4. Failing to provide Parents prior written notice of the reasons that it:
  - a) Failed to provide many of the accommodations and modifications listed in Student's individualized education programs (IEPs);
  - b) Failed to provide Student the therapeutic school setting recommended by his psychiatrist, Dr. Yu, and requested by Parents following Student's first stay in a psychiatric hospital; and
  - c) Failed to provide Student an assistive technology assessment?

## CONTENTIONS OF THE PARTIES

Student contends that he cannot be satisfactorily educated in the general education environment, even with supports, because the severity of his behavioral and social deficits requires placement in a non-public school (NPS), namely the Northern California Preparatory School (NCPS), a private school for children who are autistic or emotionally disturbed. He states that due to his Asperger's Disorder, he is overwhelmed in a general education class, shuts down, and does not learn.

The District argues that Student's behavioral problems are confined to his home and have never appeared at school. The District contends that Student can successfully be taught in the general education environment with proper supports, and can enjoy academic progress and social growth in that environment. The District asserts that Student's academic and social successes in that placement show it is an appropriate placement and that it is the least restrictive environment for him.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is a 15-year-old boy who lives with Parents within the boundaries of the District, and is in the 10th grade at the District's Del Campo High School (Del Campo). Student is eligible for, and has been receiving, special education and related services under the eligibility categories Other Health Impairment (OHI) and Specific Learning Disability (SLD). Student has been diagnosed as having Asperger's Disorder and Attention Deficit Hyperactivity Disorder (ADHD).

2. At least since May 2009, Mother has urged the District to place Student at NCPS. The District has declined to do so, and, although it temporarily made one offer of placement in a Special Day Class (SDC), has continuously taught Student in the general education environment.

3. The issues addressed in this matter relate exclusively to the two-year period between October 22, 2008, and October 21, 2010.<sup>1</sup>

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<sup>1</sup> The request for due process hearing was filed on October 22, 2010, and the statute of limitations limits Student's claims to those arising no more than two years

## ISSUES APPLICABLE TO ALL IEPs IN THE TWO YEARS AT ISSUE

4. In order to provide a FAPE, a disabled student's IEP must address all of the child's unique needs, and must be reasonably calculated to enable the child to obtain educational benefit. Student contends that throughout the time in question, the District denied him a FAPE because it failed to design an appropriate program for him.

5. The validity of an IEP is measured by what was objectively reasonable at the time the IEP was written, and in light of a "snapshot" of the information available to the IEP team when its decisions were made. The "snapshot rule" means that information that was unavailable to the District when the IEP was written cannot be used to undermine the team's decisions.

### The Significance of Student's Behavior

6. The parties agree that Student engages in ongoing and serious misbehavior at home. Student is defiant, inattentive, argumentative, noncompliant and occasionally violent. He repeatedly attacks his younger brother physically. He refuses to focus on his responsibilities, especially homework and school-related assignments, and needs constant prompting in order to complete the basic activities of daily living.

7. Student lives with Parents, two older brothers (ages 27 and 18), and one younger brother, who is 13 years old and receiving special education and services from the District in an SDC for emotionally disturbed children. Father works full time. Mother is now a full time student, and previously, during most of the times relevant here, was employed full time. Their house is small. Mother testified that managing the situation at home is "very difficult."

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before that date. At hearing Student specifically waived any claims for District actions after October 21, 2010.

8. As Student progressed through middle school (grades seven and eight in this District), his relationship with his younger brother deteriorated so badly that it increasingly led him to violence. At times Student's violence extended to Parents. In February 2009, after one such incident, Parents committed Student to the Sutter Center for Psychiatry, where Student remained for about three weeks. In the fall of 2010, he was hospitalized again as the result of a similar event. His behavior at home continues to be seriously disruptive.

9. Student contends that, throughout the time in question, the District should have placed him in a "therapeutic setting" rather than in general education with supports because of his behavior. By "therapeutic setting" Mother means a small, highly structured classroom of autistic children taught by specialists in autism. Mother has selected NCPA as that school, and since at least May 2009 has consistently urged the District to place him there at District expense. Student's principal argument is that his behavioral needs preclude an appropriate placement in general education, even with supports.

10. Mother's argument rests on two propositions that apply generally to the years at issue here. First, she contends that Student's behavior at school so interferes with his education that he should be removed from general education. Second, in the alternative, she contends that Student's misbehavior at home is caused by stresses at school, particularly the assignment of homework, so the District is obliged to change his program to ameliorate his behavior at home.

#### Student's Behavior at School

11. Mother contends that Student displays behaviors at school so inappropriate that the District should have recognized his need for a small therapeutic setting as early as Student's triennial IEP team meeting on October 28, 2008. The District disagrees, saying the school-based behavior she describes does not normally exist,

although Student is frequently embarrassed by the consequences of his failure to complete assignments and homework.

#### THE DISTRICT'S EVIDENCE

12. District witnesses uniformly described Student's general behavior at school as between good and excellent. Many of the periodic reports that teachers gave to Student's IEP teams during the years at issue praise him for his conduct and citizenship. Except for reports from Mother, all the information that was available to the IEP teams when they made program decisions showed that Student's behavior was not problematical. For example, at Student's triennial IEP team meeting in October, 2008, school psychologist Vanessa Adams presented a psychoeducational assessment in which she stated that, on questionnaires, three of his teachers had reported that he showed only "a normal amount of problem behaviors for his age."<sup>2</sup> Dr. Adams testified at hearing that she observed Student for two hours in class in preparation for her assessment, and saw that Student, while quiet and sometimes uninvolved, did not engage in problem behaviors.

13. Mother raised behavioral concerns at the October 2008 triennial IEP team meeting and requested that the District perform a Functional Behavior Analysis (FBA), which it did. For the FBA, Dr. Adams observed Student extensively in class and talked to Student's teachers. Neither she, nor the teachers identified any problem behaviors in

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<sup>2</sup> Dr. Adams is a licensed educational psychologist, a certificated school psychologist, and has a doctorate in educational psychology from the University of the Pacific. She has been a school psychologist for the District for 10 years. Before that, she worked for nine years in the educational section of the California Youth Authority (now the California Educational Authority) and also at the Stockton Developmental Center.

class. In the FBA, Dr. Adams found that Student's academic difficulties revolved almost entirely around his unwillingness to do or turn in his homework and other assignments. She reported that he "avoids the non-preferred activity of written work or exercises," and concluded that Student's "low work completion in school has resulted in many missing assignments, poor test performance due to lack of practice and preparation and very low grades in Social Studies, Algebra, and Language Arts classes." At the time, Student's grades were much better in courses that did not involve homework, such as Art and physical education (PE).

14. In reports to Student's annual IEP team meeting in October 2009, speech and language pathologist Mary Avery described Student as "friendly and cooperative." Occupational therapist Jennifer Weis described him as "a pleasure to work with." Student's case manager and resource Algebra teacher Victoria Clark described him as "a respectful and helpful student" who "tries really hard in my class and is doing a pretty good job." Vicki Welch, Student's study skills teacher, called him "a joy to work with; a delightful young man." J. Anderson, Student's geography teacher, stated that Student's "classroom behavior is excellent." These teachers still reported that Student's grades suffered because he continued to fail to complete or turn in his homework and assignments.

15. At Student's annual IEP in October 2010, the IEP team had before it teacher reports that Student's in-class behavior remained very good, and although his work completion had improved, it was still a problem. Typical of these reports was one from T. Davis, Student's World History teacher, who reported that Student received an A in citizenship and that he enjoyed having Student in his class, but "he does owe me several assignments that were given for homework."

16. Several of Student's teachers during the years at issue testified at hearing. Unanimously they stated that Student has never exhibited behavior problems in school.

All of them testified that Student's problem was in completing assignments, particularly homework. Nothing in the District's school records or the testimony of its witnesses showed any sign of the defiance, noncompliance, or violence that occurred when Student was at home.

#### STUDENT'S EVIDENCE

##### Mother's Visits

17. Mother does not argue that Student displays at school the same kind of violent and defiant behaviors he displayed at home. Instead, she testified that, during the years in issue, she visited Student's class briefly at least five times, and on each occasion Student essentially "shut down." Mother was able to remember four such occasions. In the first week of his ninth grade year (school year (SY) 2009-2010), she went to Student's geography class. He had his head down; he was very agitated; he was trying to block out what was going on; he was not doing his school work; and he was "just sitting there." In September of that same year she visited his geography class again, and saw the same behavior. She visited his English class in the 10th grade and saw that behavior again. And one day she took him to school, where the two of them stood in a line waiting to do some sort of scheduling. He was "extremely uncomfortable" standing in line. He was "very rigid" and "very agitated" and avoided talking to any other students, especially his friends.

18. Mother assumes and argues that the conduct she observed on her visits typified Student's conduct at school, and therefore constituted sufficient evidence that the District should have moved Student to a therapeutic setting. That assumption is unfounded and contrary to the evidence. On this record, what Mother most likely observed was Student's embarrassed response to her own presence. This appears from Mother's testimony itself. Her description of Student when she visited his English class was that he was "very agitated because I had brought attention to him." At another



point mother testified that her son “doesn’t like me to come to school; when I did, he asked me to leave.”

19. Student’s behavior when under observation by Mother is part of a larger pattern of embarrassment at being singled out for attention, especially as a special education student. Mother testified that in the eighth grade Student resisted leaving the classroom to go to resource instruction because “it put a spotlight on him being in special ed.” She also testified that the school had given Student an AlphaSmart (a word processor akin to a computer) but he refused to use it for the same reason. Student is so sensitive to appearances that, although his distance vision is 20/50 and he wears glasses at home, he refuses to wear them at school.

20. Thus Student’s evidence did not show that Student’s behavior when his Mother visited him at school was typical of his behavior at school generally. Instead it showed that her presence singled him out and embarrassed him. This conclusion is also supported by the fact that, when Mother was not there, Student did not usually engage in the conduct Mother observed.

#### The Learning Works Observation

21. Only one observer in addition to Mother claimed that she observed troubling behavior by Student in school. On October 1, 2010, an unidentified employee of Learning Works, Inc. (Learning Works), a private provider, briefly observed Student in his algebra resource class. According to that observer’s report, Student kept his head down and remained silent while other students conversed. When the teacher visited each student asking to see yesterday’s classwork and homework, Student produced nothing. The teacher approached Student’s desk and said: “Do you have anything from yesterday to show me?” Student said: “All I have is this,” and produced a sheet of paper with only three of the previous day’s eight problems on it. When asked for his homework, he said, “I didn’t understand it.” Student then continued to keep his head

down. He did not respond when the teacher asked for volunteers to answer questions. He continued to behave this way for the rest of the observer's visit, particularly when asked by the teacher for completed work.

22. The Learning Works observation proved little, especially since its author did not testify and could not be questioned about the contents of her report. Even if her observations were accurately reported, they do not mean much to this case. The Learning Works observation was a single snapshot of a single day in the only class Student was failing at the time because he was not doing the homework or the assignments. This most likely accounted for his embarrassment in being unable to produce completed assignments for the teacher.

23. More importantly, the Learning Works evaluator sat right next to Student in the front of the class. For the same reasons that Student reacted badly to the presence of Mother in his classes, Student may have been affected by the obvious presence of an adult evaluator sitting next to him. The Learning Works report was before the October 2010 IEP team meeting, which understood Student's behavior better than the evaluator. The notes of the meeting state that the "observer was seated right next to [Student] which clearly made [him] uncomfortable." Thus nothing substantial can be inferred from the Learning Works observation about Student's class performance in general. Student's teachers occasionally saw in Student the kind of behavior Learning Works described when Student was beginning a new class, but that behavior would subside as Student became used to the class.

24 Student argues that the District should have taken action about a "third episode of extreme violence" that occurred in April 2010. The only evidence about this incident came from Mother, who said there had been an incident of shoving in the lunch line, and notes of an IEP team meeting held in June 2010 to discuss that parent concern, among others. The incident is described in the notes only as "'shoving' in the lunch line."

Mother did not claim to have been present at the time, and did not explain how she learned of this event, or what she learned. There is nothing in the record to suggest that this incident, if it occurred, was anything more than a single instance of the usual behavior of a teenage boy.

### The Stress Connection

25. In the alternative, Mother argues that though Student's misbehavior occurs at home, it is caused by the stress generated by school demands and the burden of his homework, and is therefore the product of Student's educational program. When Mother described the February 2009 outbreak of violence at home that led to Student's first hospitalization, she stated that it began with a discussion of his homework completion. When she described his second hospitalization in fall 2010 to the IEP team, she stated that Student "became stressed over homework and became violent." Throughout the years at issue, Mother consistently reported to Student's IEP teams that his misbehavior at home was caused by stress generated by school assignments and particularly homework.

26. Mother made many efforts to help Student with his homework and to urge him to complete it. She set aside a homework time and helped him organize his binders. Although he did not want her to touch his backpack, she would occasionally go through it anyway, looking for assignments. Mother testified, as did the District witnesses, that Student was very disorganized and lost papers, assignments, and even books frequently. When Mother would press Student for reasons his homework was not done, he would respond with a wide range of explanations including that he had lost it, he did not understand it, he got confused, he did not know what he was supposed to do, it was somewhere else, he had already done it and turned it in at school, and the like. Mother, like Student's teachers, never was able to obtain a clear explanation from Student why he was not doing his homework.

27. There was some evidence that conflict at home over Student's failure to do his homework and assignments led to Student's explosions there. Mother testified that at times she would sit with him for two or three hours working on his homework, and he would get "so stressed out." When Mother described the incident that led to Student's three-week hospitalization in February 2009, she stated that she was asking him how he was doing in school, and they were talking about assignments and discussing keeping track of his homework. Student did not want to discuss those matters, became angry, and started throwing things, pushing and shoving both his Parents, and assaulting his younger brother. However, there is a difference between homework that causes stress and violence, and family disputes about uncompleted homework that lead to stress and violence. The evidence showed that Student's violence resulted not from the homework itself but from family disputes about his failure to do it.

28. No other witness, professional or otherwise, supported Mother's view that Student's homework and assignments causes his misbehavior at home, and the preponderance of evidence did not support that view. On the contrary, the evidence showed that Student's misbehavior occurs in the home, is occasioned in important part by Student's relationship with his younger brother, and is the product of family tensions that are exacerbated by Student's failure to do his homework.

#### Student's Social Skills

29. Student contends that throughout the period addressed here, it should have been obvious to the District that his social skills were so deficient that he needed the support of a small, protective environment in a nonpublic private school only for disabled students. Mother testified that he never socialized or visited with other children at night or on weekends when he was home. She believes that his behavior in school was the same. However, except for Mother's testimony about her brief campus visits

described above, no percipient witness testified that Student was seriously socially impaired on the general education campus.

30. The evidence did show that Student is relatively quiet and shy at school and sometimes is uninvolved. Asperger's Disorder is typified by social difficulties, and sometimes Student displays inattention, a lack of eye contact and an unwillingness to engage. On various assessments Student has scored low on some subtests of social adjustment. However, on balance, the evidence showed not only that Student was able to function and advance socially on a general education campus with proper supports, but also that exposure to the general education environment was the best setting in which he could improve his social skills.

31. As part of her psychoeducational assessment in October 2008, Dr. Adams administered to Student the Developmental Neurological Assessment – Second Ed. (NEPSY-II) and found on one of its subtests that Student's ability to determine emotions in others was very low (in the second percentile). Student rated his own social skills as below average. However, the test results did not conform to the reports of observers. Dr. Adams sent questionnaires to three of Student's teachers in the fall of 2008. All three reported to her that Student demonstrated "near average" social skills. Ms. Adams observed Student in class twice, and reported that, by preference, he associated with a particular group of four to six male friends, and was in "companionable discussions" with several male peers. Student was enjoying football at the time.

32. In December 2008, when he was in the eighth grade, Student also tried out for the wrestling team. His voluntary after-school commitments to sports were so time-consuming that they interfered with the delivery to him of related services such as occupational therapy.

33. In the spring of 2009, after his psychiatric hospitalization, Student received instruction at home and had no opportunity to interact with other students for the rest of the regular SY 2008-2009.

34. Victoria Clark, Student's case manager and English and Algebra resource teacher, described at hearing what she observed of Student's social growth in SY 2009-2010, his ninth grade year.<sup>3</sup> She testified that, at the beginning of the school year in her English class, Student was withdrawn into himself, his head was down, and he did not talk to or make eye contact with other Students. Ms. Clark put Student in between two other students who were both kind and talkative, knowing that they would engage Student, and that tactic was successful. Ms. Clark testified that over the course of the year she saw "tremendous" growth in Student. As he came to know the other students, he learned it was "OK to make a mistake." He began to sit up, make eye contact, and go up to the blackboard. Soon the other students learned he was one of the smartest students in the class, and began demanding him in their groups, which he proudly joined. By the end of the year he had blossomed, and was confident and happy to be there. It was "one of the most significant changes" she had seen in a student.

35. In the ninth grade Student also joined the cross-country team. His coach Robert King was critical of his many absences from practice, but testified that Student interacted "just fine" with his teammates and had no problems getting along with them. In the summer of 2010, Mr. King added, Student attended a five-day, four-night running

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<sup>3</sup> Ms. Clark has a master's degree in special education from the University of Southern California. She has learning handicapped, resource, and administrative teaching credentials. She has worked for the District for 15 years, both as an SDC teacher and in its resource program.

camp at the Olema Ranch Campground, participated in games with the other students, and seemed to get along well with them.

36. In the summer of 2010, Student took a reading course from program specialist Heidi Garner.<sup>4</sup> Ms. Garner testified that her summer school class was populated by boisterous students from several schools. In the beginning, Student was quiet, shy, nervous and tentative, and sat quite close to her. As the class went on he became more confident. He moved around from group to group, and became a helper to other students. By the end of the year he had come out of his shell and he “hung out” with his friends.

37. The preponderance of evidence showed that while Student has social deficits related to his disability, those deficits can successfully be addressed in the general education environment, and Student has made substantial social progress in that environment. As Dr. Adams persuasively testified, removing Student to a small school only for disabled students would injure him socially, rather than help him, since it would deprive him of the contact with typically developing peers that he now enjoys.

#### ISSUES APPLICABLE TO SPECIFIC IEPs DURING THE TWO YEARS AT ISSUE

##### SY 2008-2009

38. Student began SY 2008-2009 as an eighth grader in the District’s Will Rogers Middle School (Will Rogers). At the time he was eligible for special education as OHI because of his Asperger’s Disorder. He was placed in general education 86% of his school day, and received individual and small group instruction from a resource

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<sup>4</sup> Ms. Garner has a master’s degree in special education, and has multiple subject, learning handicapped, and resource program teaching credentials. She has worked for the District for 18 years, 16 of them as an SDC teacher.

program specialist in Direct Study Class 14% of the time. He was also eligible for and receiving outpatient mental health counseling. Mother was concerned that he might have a previously undiagnosed disability, so the District agreed to hold his triennial IEP team meeting a year early in order to have the benefit of a full range of assessments. Mother signed an assessment plan.

#### THE OCTOBER 28, 2008 TRIENNIAL IEP TEAM MEETING

39. In preparation for the triennial meeting, the District assessed Student in the areas of intellectual abilities, academics, basic psychological processes, social/emotional status, vision and hearing. Dr. Adams' psychoeducational examination included measurements of Student's abilities, achievements, and motor coordination.

40. Student's IEP team convened for its triennial meeting on October 28, 2008. Dr. Adams' results showed that Student had a severe discrepancy between ability and performance in written language due to a sensory motor disorder. The IEP team responded by adding Learning Disabled (LD) as a secondary eligibility category, and by adding a written language goal to the goals carried over from Student's September 18, 2008 IEP. Student does not challenge his additional classification as LD or the new goal.

41. Ms. Adams had assessed Student's academic abilities with the Wechsler Individual Achievement Test – Second Edition (WIAT-II), and reported to the IEP team that Student was in the average range in reading, in the high range in math, and in the low average range in written language. She also reported that Student had average verbal, nonverbal and spatial reasoning abilities. However, most of Student's grades did not reflect his ability. At the time Student was receiving an A in Art and a B+ in PE, but was receiving a D in History and was failing in Writing, English and Algebra. Neither Ms. Adams, nor any of Student's teachers questioned his academic ability. Uniformly the teachers in the classes that he was failing reported that his low grades were due to his failure to do homework and complete assignments. The written comments of Student's



teachers throughout the years at issue here are replete with references to his failure to turn in his homework and the negative effect of that failure on his grades and learning.

42. The triennial IEP team did not perceive Student's behaviors as problematic. Nothing in the record suggested to them that Student had any behavioral difficulties in class. Student does not identify anything that was before the IEP team in October 2008 that indicated regulation of his behavior might require a different setting, and the record discloses none. Mother did not request a different placement at the meeting; her description of Student's behavior was only that he was "stressed when he gets home" and that it was "difficult to get him to complete assignments." She requested the District perform a Functional Behavior Analysis (FBA), an assessment usually reserved for students manifesting serious behavioral difficulties. The District doubted an FBA was needed, but agreed to do one. Mother signed the IEP.

43. Student now argues that the District should have given him a social goal and put him in a social skills class, but does not describe what that goal might have been, how it might have been helpful, or why, in its absence, the IEP failed to provide him a FAPE. Nor does he explain why a social skills group was required. Student's resource support was in a directed study class. Dominic Covello, a District program specialist, testified without contradiction that the directed study class addressed academics but also included social skills training "interweaved" in the class activities.<sup>5</sup> Student does not argue that the directed study class was inadequate to teach him social skills.

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<sup>5</sup> Mr. Covello has mild-to-moderate handicapped and administrative teaching credentials and has been a District program specialist for six years. Before that he taught in the resource program and as an SDC teacher in middle school for nine years.

44. Thus the information available to the IEP team at the triennial meeting was that Student's low grades were the result of his failure to do his homework and assignments; that his academic abilities were average; that his social skills were nearly average; and that his behavior was unremarkable. Nothing in that information would have put the IEP team on notice that a small therapeutic setting, a social goal, or a social skills group was required to provide Student a FAPE. The IEP team's decision, joined by Mother at the time, was that Student could remain in general education with resource support. That decision was reasonably calculated to allow Student to obtain educational benefit.

#### THE DECEMBER 16, 2008 IEP TEAM MEETING

45. An addendum IEP team meeting was held on December 16, 2008, to discuss the results of the FBA that Dr. Adams had conducted after the triennial meeting. Dr. Adams' FBA described the many measures Student's teachers were taking, with limited success, to encourage him to complete his work:

The teachers report that they have employed various interventions, including 1) checking to know if [Student] understands the assignment, 2) re-introducing or re-teaching the task; 3) reminding him verbally to start working; 4) frequently walking near to [Student], to encourage him nonverbally; 5) having him share his work with a productive peer; 6) use of an adult tutor for re-teaching and to help with organization; 7) allowing the student to submit assignments after the original due date; [and] 8) allowing student opportunities to make up and/or correct work for additional points.

These measures complemented a number of accommodations and modifications Student was accorded in his triennial IEP, including receiving extra time on a test within a testing day; taking a test over more than one day rather than in a single setting; supervised breaks during tests; and reading test questions aloud to Student in some of his classes. At the same time, Mother was working hard to get Student to do his homework. Nonetheless, Dr. Adams found, Student's inattention to his schoolwork occurred between 30 percent and more than 90 percent of class time in a class requiring written work.

46. Dr. Adams set forth in her FBA some steps the District could take to assist Student in work completion.<sup>6</sup> In a further effort to encourage Student to do his homework and assignments, the IEP team changed his English class to the resource program (RSP) for added support, allowed him to turn in late or missing assignments to the RSP teacher, and allowed him to take tests in the RSP room as needed. Mother agreed to these changes and signed the IEP.

#### STUDENT'S HOME AND HOSPITAL INSTRUCTION

47. Student was hospitalized in late February 2009. The District convened an addendum IEP team meeting on March 11, 2009, two days before Student's discharge from the hospital, to discuss changing his triennial IEP. Mother requested that Student be taught at home under the District's Home and Hospital Instruction (HHI) program,

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<sup>6</sup> Student argues unpersuasively in his closing brief that the District should have revised these suggestions, but does not explain how or why it should have done so.

and the District agreed. Upon his discharge from the hospital on March 13, 2009, Student began receiving HHI.<sup>7</sup>

48. The District convened another addendum IEP team meeting on March 23, 2009, to check on Student's progress. Mother reported that Student had been diagnosed as having depression, Pervasive Developmental Disorder Not Otherwise Specified (PDDNOS), Asperger's Syndrome, and Attention Deficit Hyperactivity Disorder (ADHD). The parties agreed that Student would continue on HHI temporarily, and that the District would update its social and emotional assessment of Student. Several new placement options were discussed, including three District SDCs that Mother asked to visit.

49. Student finished the regular SY 2008-2009 in HHI. He now claims that placement was inappropriate because he paid little attention to his HHI instructor, lay down across chairs at the dining room table while working with her, was easily distracted, and got very low grades: a D- in Science, an F in Algebra, an F in English, and a B in PE. Student's HHI instructor, Cara Newman, testified that his performance was poor during this period because of his lack of attention and interest in his studies. But on this record Student's poor performance was less likely caused by his HHI placement than by his still fragile psychological condition. In order to make a home and hospital placement, which is temporary, a district must have in its file a medical report from the student's attending physician or psychologist certifying that "the severity of the condition prevents the pupil from attending a less restrictive placement." (Cal.Code Regs., tit. 5, § 3051.4, subd. (d).) It can be presumed Mother furnished such a statement

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<sup>7</sup> During Student's hospitalization, his educational program was the responsibility of a district not a party to this matter, and Student makes no claim against that district here.

to the District. Ms. Newman, a qualified and experienced HHI instructor, testified credibly that in her opinion HHI placement was appropriate for Student at the time.

50. Student also argues now that his HHI placement was inappropriate because it did not provide “much needed social/emotional support.” The absence of other students is inherent in a placement at home, and as set forth above, Student was not in any condition to participate in a less restrictive placement. Student does not attempt to prove otherwise, and does not state what kind of social skills program would have been appropriate.

51. To the extent that Student argues the District did not offer “emotional” support during his HHI placement, he is incorrect. By the beginning of SY 2008-2009, Student had already been ruled eligible for mental health services under Chapter 26.5 of the Government Code (AB 3632), and those services were included in every IEP offer in the years at issue here. Student was receiving individual therapy from the local county mental health facility (CMH) until shortly before his hospitalization. At that time his individual therapy was stopped at Mother’s request. At the March 18, 2009 IEP team meeting, a CMH representative appeared and asked whether Mother wished to have those services continue. Mother asked for more time to consider that question, and later declined further individual counseling for Student. Thus the District was adequately addressing Student’s emotional needs by continuing to offer individual counseling under Chapter 26.5 in Student’s IEPs, but Mother decided not to accept the service.

52. Neither Mother nor anyone else testified at hearing, or represented to the IEP team at any of its meetings in the winter and spring of 2009, that Student was capable of being educated satisfactorily in a less restrictive environment than HHI, or could manage social skills training during that period of time. There was nothing before the IEP team during those meetings that would have caused it to override the physician’s statement and Ms. Newman’s judgment that Student required temporary

placement in HHI, or that could have caused the team to believe that he could have participated in or benefited from social skills training. The District's judgment in not providing social skills training and in placing Student in HHI just after his hospitalization was reasonably calculated to allow him to obtain educational benefit.

The SY 2009-2010

THE MAY 21, 2009 IEP TEAM MEETING

53. Student finished middle school in 2009 and was scheduled to enter the ninth grade in a high school in the fall. The parties held an IEP team meeting on May 21, 2009, to consider his ninth grade placement. At that time Student was still having difficulty even with HHI placement, and no one at the meeting then thought he could succeed in general education with supports; the team agreed that a smaller, more structured environment was needed.

54. At the May 21, 2009, IEP team meeting, the District recommended placing Student in an SDC for the learning handicapped (the San Juan SDC) on the campus of San Juan High School, a comprehensive school that was also Student's neighborhood school. However, Mother announced that under the school's open enrollment program - a lottery mechanism allowing parents to select a school other than a neighborhood school -- Mother had successfully enrolled Student in Del Campo High School (Del Campo), another comprehensive campus. Acceding to her wishes, the IEP team then also recommended placement in the learning handicapped SDC at Del Campo. However, for the first time, Mother was unwilling to agree to the District's proposed IEP. Instead, she asked the District to support Student's enrollment in NCPS. In support of

her request she presented a letter she had solicited from Dr. Benjamin Yu, Student's psychiatrist.<sup>8</sup> The letter stated in its entirety:

Dear Sir or Madam:

I am currently the treating child and adolescent psychiatrist for [Student]. I am highly recommending that he be transferred to the Northern California Preparatory School. With his Asperger's Disorder, I strongly believe that this school with its behavioral, social, and academic training programs would best optimize his development.

55. The District members of the IEP team were not persuaded by Dr. Yu's letter. They believed that Student could be appropriately educated in the offered District programs; that he showed no behaviors at school that would require such a placement; and that removing Student to a more restrictive environment away from his typically developing peers would be injurious to him. Dr. Adams had updated her social and emotional evaluation of Student, and wrote that his record at Will Rogers "was free of problematic, disruptive, angry or volatile behavior. . . . [and he had] no history of disruptive, excessively angry or out-of-control behavior" at school. The other District IEP team members agreed; the notes of the meeting state that the District members

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<sup>8</sup> Dr. Yu's letter was dated March 2, 2009, when Student was in the hospital. However, it was apparently intended to make a recommendation for high school, not for the rest of Student's eighth grade year. At the two IEP team meetings in March 2009, Mother did not mention placement at NCPS, and there was no evidence that Mother presented Dr. Yu's letter to the IEP team before the May 21, 2009 IEP team meeting.

believed that Student “has demonstrated no behaviors [at] school site that would indicate a need for an NPS placement.”

56. It was reasonable for the District to disregard Dr. Yu’s letter. It has the appearance of a letter dashed off to satisfy Mother’s request, rather than one designed to persuade. It is addressed to no one in particular. It does not explain the doctor’s conclusion, mention the basis for his opinion, nor indicate any awareness that Student was in the hospital when the letter was written. It does not describe the doctor’s perception of Student’s condition beyond making a reference to Asperger’s Disorder. It displays only a cursory knowledge of the programs at NCPS, and does not mention any other options Dr. Yu might have considered. It does not suggest that the author knew anything about schools, anything about Student’s educational program, or anything about the options available to the District, and there is nothing in the record to indicate that he did. The letter argues that NCPS would “best optimize” Student’s development, a goal which the governing law does not require the District to meet. Dr. Yu did not attend any IEP team meeting and was not called as a witness at hearing, so his opinion could not be evaluated by the IEP team or here.

57. Program specialist Len Garfinkel explained why the District’s offer to place Student in the San Juan SDC addressed his needs as they existed at the time.<sup>9</sup> He testified that the District had two autism SDCs on the San Juan campus, and the one offered to Student contained the higher functioning students. They were diploma track students learning the standard state curriculum. The typical student there had Asperger’s Disorder. The class had more instructional aide support than a typical special

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<sup>9</sup> Mr. Garfinkel has been a program specialist for the District for eight years. He has teaching credentials for general education, for teaching the learning handicapped and as a resource specialist.



education class, in part to support the students while they attended several mainstream classes. It offered a specific social skills elective unavailable in other SDCs that was directed to the social problems facing students with Asperger's, including recognizing social cues – something in which Student had a serious deficit. It had a speech therapist regularly available. Students there took core academic classes and physical education, usually with their typically developing peers.

58. Mother's only objection to the San Juan SDC was her view that Student would have been higher functioning than all the other students in the class. She based this in part on a conversation with Mr. Garfinkel in which she claimed that he said all the higher functioning students had been transferred out of the class. Mr. Garfinkel denies he told her that, and there was no evidence such transfers had actually occurred.

59. Mother also testified that she decided all the students in the San Juan SDC were lower functioning than Student on the basis of a 10 to 15 minute visit to the class that she made while considering the District's offer. Asked how she could tell, she stated that when she walked around the class, the students, who were on the floor getting ready for social time, did not acknowledge her presence, and that normally when she walked into a classroom people looked at her.

60. Mother's testimony about her visit to the San Juan SDC did not support her conclusion that all its students were lower functioning than her son. Mother has no training that would equip her to make such a judgment, and she did not describe why the failure of the students to look at her meant that they were lower functioning than Student.<sup>10</sup> Her opinion was unpersuasive and was not persuasive evidence of the level of functioning of the students in that class.

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<sup>10</sup> Mother testified she has attended college and is currently studying to be a court reporter. In the past she has worked for a mortgage company and as a contract

61. Mr. Garfinkel testified that the students in the San Juan SDC represented a “mix” of skill levels. Dr. Adams testified that some but not all of the students in the class were lower functioning than Student. The evidence thus showed that some, but not necessarily all the students in the San Juan SDC would have been lower functioning than Student.

62. Even if all the students in the San Juan SDC had been lower functioning than Student that would not necessarily have meant that the placement would have been inappropriate for him. The program described by Mr. Garfinkel included extensive mixing with typically developing peers in general education classes, and at lunch and recess. Mr. Garfinkel also testified that in the summer of 2010, when Student was quite successful in the reading class taught by Ms. Garner, many of his classmates were from the San Juan SDC. In addition, virtually every special education class will have a student who is the highest functioning in the class, but that does not automatically mean that that student is being denied a FAPE.

63. There was no evidence that placement among the students at the San Juan SDC would have harmed or retarded Student’s education in any way. Nor was there any evidence before the IEP team at its May 21, 2009 meeting that would have required it to offer Student a placement at NCPS or any other NPS. The program described by Mr. Garfinkel would have fit Student’s unique needs as they appeared in May 2009, when Student was still in HHI and recovering from the events surrounding his

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administrator for the Hewlett Packard Co. She was also employed by the McGeorge School of Law in the Special Education Hearing Office, OAH’s predecessor agency in conducting special education due process hearings and mediations in California.

hospitalization. The District's offer to place Student there was, at the time, reasonably calculated to allow him to obtain educational benefit.<sup>11</sup>

#### THE JUNE 18, 2009 IEP TEAM MEETING

64. On June 18, 2009, the District convened another IEP team meeting in order to determine whether Mother would authorize further mental health therapy under Chapter 26.5. Mother wanted Student to receive family therapy but not individual counseling. CMH explained that it could not provide services to Student unless the services included individual counseling. Mother declined further Chapter 26.5 services at the time, although she expressed a desire to retain Student's eligibility.<sup>12</sup> The District again offered placement in the learning handicapped SDC at Del Campo, but Mother again declined. As a consequence of the parties' failure to agree on a placement for the beginning of Student's ninth grade year, the October 2008 triennial IEP remained in effect.

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<sup>11</sup> After Mother announced at the May 21, 2009 IEP team meeting that she had successfully enrolled Student in Del Campo under the open enrollment process, the District added to its offer a placement in the learning handicapped SDC at Del Campo. There was no evidence at hearing about the nature of that class; the parties treated the offer of placement in the San Juan SDC as the offer to be litigated. Since Student bore the burden of proof, it can only be concluded that Student did not prove the alternative offer of placement in the Del Campo SDC would not have provided him a FAPE.

<sup>12</sup> As a result of changing employment, Mother no longer has an insurance policy that covered several private services. There was no evidence that she has renewed a request for Chapter 26.5 services.

#### THE SEPTEMBER 10, 2009 IEP TEAM MEETING

65. The IEP team met on September 10, 2009, to discuss Student's ninth grade placement between then and his annual IEP meeting in October, and the information available to it was substantially more positive than it had been in the previous school year. Pursuant to his triennial IEP, Student had attended an extended school year class from June 15 to July 24, 2009. The class addressed behavior and social skills, and also helped prepare students for the California High School Exit Exam by focusing on core academic subjects such as Math, English and Social Studies. Student earned an A in the class. His teacher reported that Student "behaved appropriately and cooperated fully" in the program; that he had "very good academic skills," and that she enjoyed having him in class. Mr. Garfinkel was the principal of the summer school and confirmed that Student behaved and performed well in the class.

66. In light of this information, the parties set aside plans for an SDC placement and agreed that Student could return to general education with supports. The IEP offer of September 10, 2009, generally reiterated the placement set forth in Student's triennial IEP, although it newly provided that Student would take Algebra as well as Study Skills in the resource program. The District continued to offer Chapter 26.5 services in the IEP. Mother signed the IEP, although she did not accept the Chapter 26.5 services. The IEP proposed that Student continue in general education with resource support until his annual IEP team meeting in October. In light of Student's substantial improvement since he left his HHI placement, the decision of the IEP team was reasonably calculated to allow Student to achieve educational benefit.

#### THE OCTOBER 27, 2009 ANNUAL IEP TEAM MEETING

67. The District convened Student's annual IEP team meeting on October 27, 2009. The team learned that Student had recently been hospitalized again, this time for three days. Notes from that meeting state: "[Student] hospitalized -- mental health

(Sutter Psych) -- Parent states [Student] became stressed over homework and became violent." Nothing else in the record describes this event. However, notwithstanding Student's recent hospitalization, the reports from Student's teachers were positive and encouraging. Although Student still struggled with work completion, his grades had gone up significantly: he was receiving an A- in Study Skills, a B in Algebra, a B- in PE, and a C in Geography. His geography teacher reported that his behavior was "excellent."

68. Once again the District included Chapter 26.5 services in the IEP. Once again Mother declined them, preferring the similar counseling services Student still received from the Alta California Regional Center.

69. In the October 27, 2009 annual IEP, the District offered to keep Student in general education, with Algebra and Study Skills to be taken in the resource program. Mother declined the offer, so Student's program continued to be governed by the October 2008 triennial IEP as modified in September 2009.

#### The Least Restrictive Environment

70. Student now contends that the October 27, 2009 IEP offer violated the requirement that a student be placed in the least restrictive environment (LRE). The IDEA requires that a student with a disability be placed in the least restrictive environment in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. Student's argument appears to be that Student could not be satisfactorily educated in the general education environment at Del Campo.

71. Student's argument inverts the concept of the LRE. That rule requires maximizing a student's exposure to typically developing peers, and placement in general education is the least restrictive environment available. Yet, Student seems to be

arguing that the LRE rule would have been violated by giving Student any exposure to the general education environment at all.<sup>13</sup> That is a contradiction in terms.

72. Moreover, Student's insistence that he be placed in a small, specialized environment populated only by disabled children cannot be reconciled with his argument that he lacked exposure to and training in social skills. The general education environment maximized Student's social opportunities. As Dr. Adams persuasively testified, for social purposes, a small, restrictive environment would be wrong for Student. Victoria Clark, Student's case manager, testified that, as with any student with Asperger's Disorder, it is important that he be in the company of typically developing students so he has proper behavior to model. Nothing about the October 27, 2009 offer contradicted the requirement that Student be placed in the LRE.

### Bullying

73. Under the rubric of the LRE, Student argues that the general education environment was inappropriate for him because he had been the victim of bullying. The evidence that Student was bullied to any troubling degree was unpersuasive. Mother testified that the bullying occurred in the seventh and eighth grades at Will Rogers, in an after-school program called Bridges. She testified that Student told her he was having "problems" with kids "teasing him." But, she also testified that most of the bullying occurred in the seventh grade, which is a time period beyond the statute of limitations.

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<sup>13</sup> By placing Student in the resource program for Study Skills and Algebra, the offer would have removed him from the general education environment for 44 percent of his school day.

74. No other evidence supported Mother's claim that Student had been bullied. There is no mention of bullying in District documents, and no District witness recalled any instances of it. There was no evidence suggesting that the bullying was serious, could not be handled appropriately in the general education environment, or (as Student now argues), that it should have been addressed by a goal in his IEP. In any event, after the eighth grade Student no longer participated in the Bridges program, and his experience in it has no relevance to an IEP offer made in the ninth grade.

75. Mother also testified that the bullying continued throughout Student's ninth and tenth grade years, but did not explain the source of that information. Nothing in the District's records makes any reference to bullying during that time; none of the IEP documents reflects that Mother complained about bullying at the time; and several of Student's teachers testified that they saw no sign of it.

#### Noise, Bright Lights and Crowds

76. Student also contends that the general education environment at Del Campo was inappropriate for him because he could not tolerate noise, bright lights, and crowds. In support of this claim Student cites a letter from Wanda Alteri, described in more detail below. That letter was dated April 15, 2010, and was not seen by the IEP team that determined Student's placement in the fall of 2009. The claim that Student was intolerant of noise, bright lights and crowds was not before the IEP team in October 2009, and rests on Mother's opinion alone. No professional testified in support of the claim, and it was not supported by the evidence.<sup>14</sup>

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<sup>14</sup> According to the notes of the October 8, 2010 IEP team meeting, the observer from Learning Works told the team that Student "was never distracted by the noise around him, even when it got quite loud."

## Goals

77. Student also attacks the October 27, 2009 IEP offer for not containing a sufficient number of goals. He claims a goal should have addressed bullying, but there was nothing before the IEP team to indicate that Student's interactions with his peers were significantly different from those of any other teenage boy.

78. Student argues that he needed a work completion goal. In light of the many attempts by his teachers, case manager, administrators and Mother to get Student to do his homework, the prospect that a goal would have made any difference is improbable, and no evidence indicated a need for such a goal.

79. There was nothing before the IEP team in October 2009 that would have required it to place Student entirely in a restrictive environment. Student's recent success in a less restrictive environment and the preference for placement in the LRE amply supported the IEP team's offer to place him in general education with supports at Del Campo. That decision was reasonably calculated to allow Student to achieve educational benefit in the LRE.

## THE JUNE 7, 2010 IEP TEAM MEETING

80. The District convened an IEP team meeting on June 7, 2010, to address Mother's concerns regarding minor tensions between Student and other students. Student had been involved in an undescribed incident on a bus that had caused another Student to complain. The meeting notes report that the matter was satisfactorily resolved by a teacher. Student had also been involved in the incident mentioned above of "shoving" in the lunch line. No further details were given. On this record, those incidents were insignificant and typical of boys of Student's age. They provided no reason for the District to remove Student from the general education environment.

81. For the first time, Mother brought to the June 7, 2010 IEP team meeting other advocates for placing Student at NCPS. They included her present attorney and



Wanda Alteri, a registered nurse and licensed marriage and family therapist who had been working with Student for several years as a vendor for the Alta California Regional Center. On April 15, 2010, Ms. Alteri had written a "To Whom It May Concern" letter recommending that Student be placed at NCPS. There was no evidence that her letter was shown to the June 7, 2010, IEP team, or that she described its contents at the meeting. The meeting notes make no reference to the letter or her views, and Ms. Alteri testified at hearing only that she "attended" the meeting. So Student did not demonstrate that Ms. Alteri's letter or views were part of the snapshot of information the IEP team considered or should have considered at that meeting.

82. However, assuming that Ms. Alteri did express her views to the IEP team, either by distributing the letter or by speaking about its contents, her views gave the IEP team no basis for altering its decision. It simply repeated the arguments that Mother had been making for more than a year. The letter stated that Student could not handle crowds, was overwhelmed by being around many people, shut down in class, and was "not learning." From the letter and from Ms. Alteri's testimony at hearing, it was clear that this information came from Mother. Mother testified that each week she would tell Ms. Alteri what happened at school, and Ms. Alteri would try to teach Student coping strategies. Ms. Alteri admitted at hearing that she never spoke to Student's teachers or visited him at school.

83. By June 2010, however, the IEP team was well aware that its teachers, counselors and administrators were not seeing at school the behavior Ms. Alteri described. They were also aware that, far from "not learning," Student's grades were on an upward trajectory. In the final period of SY 2009-2010, Student was earning an A in Study Skills, a B- in English, and a C in Algebra. Only in Earth Sciences did he appear to be struggling; he was receiving a D+. These grades were much better than his grades a year earlier, and reflected substantial academic progress. And even taken at face value,

Ms. Alteri's letter argued that placement at NCPS would be "best" for student, a goal that the District was not required to achieve.

84. In April 2010, Mother also solicited a supporting letter from Keri Turner, a post-doctoral fellow working for Falls Creek Counseling Associates, a private provider, and accumulating hours toward licensure as a licensed clinical psychologist. Dr. Turner provided social skills training to Student from January 2009, shortly before his first hospitalization, to mid-July 2009, shortly after his HHI placement ended. She worked with him in a group of three or four other children for approximately 35 minutes in 19 sessions. She did not provide counseling.

85. Dr. Turner's letter is dated April 30, 2010, and is addressed to Mother's attorney. In it Dr. Turner stated that, while Student was under her care, he had significant difficulty in sustaining conversation and interacting with others and had impaired concentration and attention. Dr. Turner also wrote that Student told her he would isolate himself from others at school due to "lack of acceptance and being taunted." The letter also referred to several reports from Mother that Student was unable to tolerate or adapt to change; that his grades were declining; and that his IEP "is reportedly not helping." Based on that information, Dr. Turner recommended that Student be placed "in a therapeutic school setting."

86. There was no evidence that Dr. Turner's letter was ever presented to an IEP team, that its contents were known to the District, or that Dr. Turner attended any IEP team meeting when the decisions at issue here were made. There is no mention of her or her letter in IEP documents. There was no evidence that Dr. Turner's views formed

part of the snapshot of information before the IEP team when any of its relevant decisions was made.<sup>15</sup>

87. Even if the IEP team had seen Dr. Turner's letter, it could reasonably have disagreed with her recommendation that Student be placed in a therapeutic setting. A year had gone by since Dr. Turner had seen Student. She had worked with him during a period in which he was at Will Rogers Middle School, not Del Campo, and was at his worst. Since that time he had prospered in summer school and enjoyed a successful year in general education with supports, receiving improving grades and engaging in social activities on campus such as the cross-country team. Moreover, Dr. Turner's opinion was based on the same factual claims that Mother had been advancing for more than a year and which the IEP team did not believe accurately described Student's behavior at school. Dr. Turner testified that she did not visit Student's school, speak to any teacher about him, or review his grades or IEPs, and relied instead on Mother's reports. When asked at hearing whether she believed that Student's setting at Del Campo impaired his ability to integrate appropriately or successfully into the public school system, she stated she was unable to answer the question.

88. In view of the information before them, the District members of the June 7, 2010 IEP team recommended continued inclusion in the general education program at Del Campo with resource support. Mother declined the offer, once again stating her preference for placement at NCPS. In light of the progress Student was making in the general education environment with supports, the IEP team's decision to retain Student in that placement was reasonably calculated to allow him to obtain educational benefit.

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<sup>15</sup> The opinions newly expressed at hearing by Ms. Alteri and Ms. Turner were not before any IEP team in the relevant time period and are not considered here.

## The SY 2010-2011

89. Student makes claims relating only to that portion of SY 2010-2011 before October 22, 2010. At the beginning of the school year, Student was a sophomore at Del Campo and continued in general education with resource support.

### THE OCTOBER 8, 2010 IEP TEAM MEETING

90. The District convened Student's annual IEP team meeting on October 8, 2010, and almost all the information it had was positive. The team learned that Student's grades in the previous spring had been mostly As and Bs, and his grades in the fall of 2010 were Bs and Cs except for Algebra. His teacher, Ms. Clark, testified at hearing that he understood the concepts of algebra well and would have gotten an A if he had turned in his homework. The team also learned, as described above, that Student had been quite successful in Ms. Garner's reading class during the summer.<sup>16</sup> And it learned that, in the fall, Student had passing grades in all classes except a general education Algebra class.<sup>17</sup>

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<sup>16</sup> According to Ms. Garner, Student enjoyed assisting other students in the class. In his closing brief, Student characterizes his assistance to other students as "tutoring" and argues without support in the evidence that being a "tutor" must have retarded his education in the class. But the evidence showed that Student's reading skills grew substantially in the class. He entered the class scoring 1100 on a scale of 1200 on a reading measure, which put him at grade level. On leaving the class, he was 22 points higher on the same test. Ms. Garner testified that the increase in his score was higher than that of most other students.

<sup>17</sup> Student is retaking the Algebra class, and at the time of hearing was receiving a B+.

91. The IEP team considered new assessments in the areas of occupational therapy (OT) and speech and language. It continued to provide in the IEP for OT, and provided new service for speech and language.<sup>18</sup>

92. Ms. Clark presented the results of a recent WIAT-II assessment she had --- administered to Student. The WIAT-II is normed to students of the same age as Student, and an average score is 100. Student's scores on the WIAT-II were:

Basic Reading	102
Reading Comprehension	104
Pseudoword Decoding	120
Numerical Operations	120
Mathematical Reasoning	110
Spelling	111
Written Expression	96

Almost all of these scores were significantly higher than Student's scores on the same test in October 2008. He had especially improved in written expression, a weakness, from 74 to 96. For the District members of the IEP team, these scores confirmed the trend shown by Student's grades: he was making significant progress in general education with supports.

93. After considering these test results, grades, and reports, the IEP team offered to continue Student's placement in general education with resource support, but

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<sup>18</sup> Throughout the years at issue, Student's IEPs provided him OT to address his motor needs. Mother had difficulty in scheduling the sessions, and Student missed many of them. Some OT sessions caused him to be pulled out of Algebra during the class, which lowered his grade. Student does not claim any inadequacy in the OT or speech and language services given him.

in light of his progress proposed to increase his time in the general education environment to 78 percent of his school day. Mother did not agree to the offer, so Student continued under the 2008 triennial IEP, as modified in September 2009, until October 22, 2010, the end of the time period addressed here.

#### WIAT-II PROTOCOLS

94. A district assessment must be properly administered by trained personnel. Among other legal requirements, it must be administered in accordance with any instructions provided by the producer of the assessments. Student contends that Ms. Clark violated the instructions (protocols) for administering the WIAT-II because she gave him unlimited time to complete it, and therefore its results are “invalid and inflated.” From this he reasons that the October 8, 2010 IEP team wrongly based its programming decisions on an overly optimistic view of his achievement.<sup>19</sup>

95. The only evidence about the WIAT-II protocols that Student introduced was Mother’s testimony. Mother testified that Victoria Clark, who gave Student the WIAT-II, told her at an IEP team meeting that she had given Student all the time he wanted for the entire test. Mother admitted she had no expertise concerning the test, but she thought giving unlimited time on it was odd. So she looked at undescribed information online and found that the publisher stated the test should take between one and one half and two hours. She then called the test publisher, and the unidentified person to whom she spoke stated that the WIAT-II would give inaccurate results if it was not timed.

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<sup>19</sup> Student does not argue that the assessment was inappropriate in the sense that it violated the laws and regulations governing assessments, only that it led to a flawed programming decision in October 2010.

96. Two District witnesses testified about Ms. Clark's compliance with the WIAT-II test protocols. Program specialist Covello testified that he is trained to administer the WIAT-II and has done so more than 50 times. He established that the written expression portion of the test is given in three parts: combining sentences, describing pictures, and fluency (writing an essay). Only the fluency (essay) portion is required to be timed; it is given 15 minutes from beginning to end.

97. Ms. Clark, whose qualifications are described above, testified that she has examined the protocols for the WIAT-II. She agreed with Mr. Covello's description of the protocols, and testified that she timed the fluency portion of the reading test by giving Student 15 minutes to complete it, as the protocols require.

98. Student did not show by a preponderance of the evidence that Ms. Clark violated the WIAT-II protocols. Student did not introduce the protocols themselves, or present any qualified witness to describe or explain them or to opine that Ms. Clark did not comply with them. Nor did he introduce the results of Mother's online investigation. Mother's telephone call to an unidentified person at the test publisher's office, whose position, training, and experience are unknown, was not substantial evidence of the protocols' content. Mother's claim that she was told the entire test must be timed suggests that she did not differentiate in her investigation between any of the different portions of the test. The testimony of Ms. Clark and Mr. Covello was more persuasive because of their qualifications and their apparent knowledge of the structure of the test, and is entitled to more weight than the results of Mother's investigation.

#### CONTRADICTORY RESULTS

99. In preparation for the October 2010 annual IEP team meeting, the District employed Learning Works to conduct an outside assessment of Student. Learning Works administered to Student the Woodcock Johnson III Test of Achievement (Third Ed.)(WJ-III). Student's scores on the WJ-III were somewhat lower than his scores on the

WIAT-II, and he now contends that the results on the two measures are “contradictory.” The evidence showed that claim is substantially overstated.

100. Mr. Covello testified that Student’s scores on the WIAT-II were overall in the average range, including his score of 98 in reading, and that all his scores except for written expression were consistent with his scores on the Learning Works WJ-III. Mr. Covello testified that a student’s scores on the same test can vary substantially from day to day. He also explained that in several technical details, the WIAT-II and the WJ-III were not directly comparable; each test has some characteristics that the other does not.

101. Kimberley Easter, called as an expert by Student, is the chief executive of Learning Works. She has a master’s degree in special education and in educational administration, has several teaching credentials, and has been the director of five NPSs in California. She administered some of the WJ-III to Student. She testified that most of Student’s scores on the WJ-III were in the average range, but his score on basic reading was low. Asked what a wide range in test scores might indicate, she testified that it can mean “any number of things” because a test is only a snapshot taken on any given day, and that on some other day administration of the same test to the same student may produce different results. Notably, she was not asked to compare the results of her WJ-III and Ms. Clark’s WIAT-II. She did not testify that there was anything flawed about the WIAT-II results or that the results of the two assessments were inconsistent.

102. Even if Ms. Clark’s administration of the WIAT-II had been proved to be out of compliance with the protocols, or the results of the WJ-III and the WIAT-II had been proved to have been seriously inconsistent, those facts would have had no consequence to Student’s October 2010 IEP offer. That offer was not based just on the WIAT-II scores; the IEP team had before it a year’s worth of improving grades and numerous teacher reports showing that Student was making substantial progress in general education with support. The evidence revealed no reason to believe the District



would have made a different offer if it had accepted the WJ-III results over the WIAT-II results. The allegedly discrepant score in reading expression at most showed a reading deficit. The team, aware of that deficit, added a written expression goal to the October 2010 to help Student overcome it.

#### PROGRESS ON A WRITTEN EXPRESSION GOAL

103. Student argues he was denied a FAPE because he made little or no progress on his written expression goal in the October 2009 IEP, yet the District did nothing in October 2010 to address that problem. Describing Student's October 2010 written expression goal as "less demanding" than its predecessor, Student states "it can be deduced" that he failed to make progress on his 2009 goal.

104. Student's deduction is not supported by a comparison of the two goals and is invalid. The October 2009 written expression goal was that "Given a familiar topic, [Student] will be able to compose a five paragraph essay with correct structure, grammar, [and] punctuation with 80% accuracy in 2 of 3 trials." Its counterpart in October 2010 was "Given a writing prompt, [Student] will compose a three paragraph essay with correct grammar, punctuation, and spelling." The latter goal required three paragraphs rather than five, but it no longer promised that Student would address a familiar topic, did not allow for partial success by using a percentage of accuracy or a number of trials, and added proper spelling to the requirements. In these ways, the goal was significantly more demanding than its predecessor.

#### LEAST RESTRICTIVE ENVIRONMENT (LRE)

105. As set forth above, during the years at issue Student benefited academically and socially in general education with supports, and was not disruptive. His placement in general education was therefore the LRE for him. Isolation in a school only

for disabled students would have deprived him of contact with typically developing peers and would not have been a placement in the LRE.

#### STUDENT'S PROGRESS OVERALL

106. The evidence showed that Student made significant progress both academically and socially during the years at issue, while in general education with supports. He began that period failing most of his courses, and was soon to be hospitalized. By the end of the period he had advanced from grade to grade, his grades had improved considerably, and he had come "out of his shell" socially, as Ms. Clark put it. By the time of hearing Student had a 2.579 grade point average, was above the middle of his class, and was ahead of schedule in accumulating credits toward graduation. His success in general education demonstrates that the placement decisions made by the District members of the IEP team were reasonably calculated to allow him to obtain educational benefit, and vindicates those decisions.

#### ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

107. A district must assess a Student in all areas of suspected disability. Student argues that the District should have assessed him for assistive technology (AT) needs, even though Mother never requested such an assessment. Student did score low on visual motor integration, but the evidence showed that he had 20/50 distance vision and refused to wear his glasses when tested. No witness testified that his low scores on vision tests had any cause other than his refusal to wear his glasses.

108. Student argues in his closing brief that he "may" have needed a tape recorder, dictation software, and a laptop computer for writing. There was no evidence that Student needed a tape recorder or dictation software, and Student does not identify anything that would have made the District suspect he did. The District met Student's need for a computer by supplying its equivalent for writing, an AlphaSmart

word processor, but Student refused to use it because it embarrassed him and singled him out as a special education student.

109. Student did not prove by a preponderance of the evidence that the District should have suspected that he needed to be assessed for AT needs.

#### PRIOR WRITTEN NOTICE

110. The IDEA requires a school district to provide written notice to parents before it initiates or refuses a change in a student's identification, evaluation, or educational placement. The written notice must describe the action proposed or refused, explain why the district proposes or refuses to take the action, describe the documents underlying the decision, describe the factors relevant to the decision, explain why other options were rejected, and inform parents of their procedural rights with respect to the decision. An IEP document can serve as prior written notice if it contains the requisite information.

#### Accommodations and Modifications

111. Student argues that the District failed to give Mother prior written notice of its decision not to provide certain accommodations and modifications required by his IEPs. The evidence showed that it did not fail to do so, because it made no such decision.

112. During the years at issue, Student's IEPs always provided numerous accommodations and modifications. While the details varied slightly from one IEP to another, generally Student was given preferential seating in the front of the class for his vision difficulties; extra time on tests and assignments; the right to take a test over more than one day rather than in a single setting; supervised breaks during tests; the reading of test questions aloud in some of his classes; reduction of the length of assignments as needed; and the services of a notetaker to compensate for his difficulties in handwriting.

113. Student argues that the District failed to provide him a notetaker in some classes. The only evidence he offers is Mother's testimony that she regularly cleaned out his backpack and did not find any notes taken by a notetaker. However, since the evidence also showed that Student was extremely disorganized, frequently misplaced or lost documents, and sometimes rejected the assistance offered him, Mother's exploration of his backpack does not prove that he was not given a notetaker.

114. Ms. Clark, Student's case manager, testified that Student was given the accommodations and modifications his IEPs required. Kenneth Curtwright, one of Student's algebra teachers, testified that he designated another student in his class to take notes for Student and to give him copies using carbon paper. There was no reason to doubt this testimony.

115. Only Maria Trappe, Student's teacher in a Web Design class, testified that she did not supply him a notetaker. The reason was that no handwritten notes were taken in her class; the students exclusively used computers. Student was proficient with the computer and got a B in her class.

116. Since there was no substantial evidence that Student was denied the accommodations or modifications his IEPs required, no prior written notice was necessary or appropriate.

#### Assistive Technology

117. Student argues that the District failed to provide prior written notice of its reasons for not administering an AT assessment. Since the evidence showed that Mother never requested such an assessment and there was no reason for the District to suspect it was needed, no prior written notice was required or appropriate.

## A Therapeutic Setting

118. Finally, Student argues that the District failed to provide Mother prior written notice of its reasons for declining to place Student in a small therapeutic setting as recommended by Dr. Yu. However, the notes of the IEP team meetings at which Mother urged such a placement show that the District consistently informed her of its reasons for declining such a placement. For example, the notes of the first such meeting, on May 21, 2009, state that the District disagrees with the proposed NPS placement because Student “has demonstrated no behaviors at school site that would indicate a need for an NPS placement.” The notes of the June 18, 2009 IEP team meeting state that, although Mother argued for an NPS placement, “The District and County believe that goals can be met and services can be provided through a combination of programs.” And the notes of the October 8, 2010 meeting state that “the team explained that a NPS is the most restrictive education environment and the district does not agree that it is an appropriate program for [Student].” Since an IEP document can serve as prior written notice, Mother was given prior written notice of the reasons the District would not agree to an NPS placement.

119. Mother does not claim that she was in fact unaware of the District’s reasons for declining to place Student in an NPS, and the evidence showed that she was well aware of those reasons ever since she first requested an NPS placement.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Because Student filed the request for due process hearing, he has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

## ELEMENTS OF A FAPE

2. Under the IDEA and State law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term “free appropriate public education” means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(9).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07 [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*, 458 U.S. at p. 198.) School districts are required to provide 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. 2009) 575 F.2d 1025, 1035-1038.)

4. 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. 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. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

## REQUIREMENTS OF GOALS, ACCOMMODATIONS AND MODIFICATIONS

5. Federal and state law specify in detail what an IEP must contain. Among other things, it must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

6. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

## LEAST RESTRICTIVE ENVIRONMENT

7. 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) (2006).) In light of this preference, and in order to determine whether a child can be placed in a

general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. In general, a regular education setting is the least restrictive of available environments considered in placement decisions. (See Ed. Code, § 56361.)

8. In order to make a home and hospital placement, a district must have in its file a medical report from the student's attending physician or psychologist certifying that "the severity of the condition prevents the pupil from attending a less restrictive placement." (Cal.Code Regs., tit. 5, § 3051.4, subd. (d).)

ISSUE NO. 1: DID THE DISTRICT FAIL TO OFFER OR PROVIDE STUDENT A FAPE FROM OCTOBER 22, 2008 THROUGH OCTOBER 21, 2010, BY FAILING TO DESIGN A PROGRAM TO MEET STUDENT'S UNIQUE NEEDS AND PREPARE HIM FOR FURTHER EDUCATION, EMPLOYMENT, AND INDEPENDENT LIVING?

9. Based on Factual Findings 1-106 and Legal Conclusions 1-8, the District did not fail to design a program for Student that offered him a FAPE. Each of its IEP offers addressed all of Student's unique needs and was reasonably calculated to allow him to obtain educational benefit given the information available to the IEP team at the time the offer was made.

10. Based on Factual Findings 1-106 and Legal Conclusions 1-8, each District offer during the years at issue would have placed Student in the LRE. The only offer that was more restrictive than the general education environment was the offer of the San Juan SDC, made in May 2009 when Student was recovering from the events surrounding his recent hospitalization and was struggling even with his HHI placement. That offer reflected the fact that, in May 2009, there was no reason to believe Student could be



satisfactorily educated in the general education environment. Because of his rapid subsequent progress in the summer of 2009, Student was in fact placed in the general education environment in the fall, with appropriate supports, as he was throughout the years at issue.

## ASSESSMENTS

11. A district assessment must be properly administered by trained personnel. Among many other legal requirements, it must be "administered in accordance with any instructions provided by the producer of the assessments." (Ed. Code, § 56320, subd. (b)(3).)

12. In California, a district assessing a student for eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code § 56320(c),(f).) Federal law also requires that the child "is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B).)

ISSUE NO. 2: DID THE DISTRICT FAIL TO OFFER OR PROVIDE STUDENT A FAPE FROM OCTOBER 22, 2008 THROUGH OCTOBER 21, 2010, BY FAILING TO FOLLOW THE PROTOCOLS FOR ADMINISTRATION OF THE WIAT-II GIVEN TO HIM ON SEPTEMBER 28, 2010?

13. Based on Factual Findings 94-98 and Legal Conclusions 1, and 11-12, the District's assessor, Ms. Clark, properly followed the protocols for administering the WIAT-II she administered in September 2010.

ISSUE NO. 3: DID THE DISTRICT FAIL TO OFFER OR PROVIDE STUDENT A FAPE FROM OCTOBER 22, 2008 THROUGH OCTOBER 21, 2010, BY FAILING TO ASSESS HIM IN ALL AREAS OF SUSPECTED DISABILITY, NAMELY BY FAILING TO ASSESS HIS NEED FOR ASSISTIVE TECHNOLOGY?

14. Based on Factual Findings 107-109 and Legal Conclusions 1, and 11-12, the District had no reason to suspect that Student needed an AT assessment.

#### PRIOR WRITTEN NOTICE

15. The IDEA requires an educational agency provide "prior written notice" whenever the agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." (20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a)(2006); Ed. Code, § 56500.4, subd. (a).) The notice must contain (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a)(2006); Ed. Code, § 56500.4, subd. (b).) An IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46691 (Aug. 14, 2006)(Comments to 2006 Regulations).) The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

## CONSEQUENCES OF PROCEDURAL ERROR

16. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089; *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

ISSUE NO. 4: DID THE DISTRICT FAIL TO OFFER OR PROVIDE STUDENT A FAPE FROM OCTOBER 22, 2008 THROUGH OCTOBER 21, 2010, BY FAILING TO PROVIDE PARENTS PRIOR WRITTEN NOTICE OF THE REASONS THAT IT: A) FAILED TO PROVIDE MANY OF THE ACCOMMODATIONS AND MODIFICATIONS LISTED IN STUDENT'S IEPs; B) FAILED TO PROVIDE STUDENT THE THERAPEUTIC SCHOOL SETTING RECOMMENDED BY HIS PSYCHIATRIST, DR. YU, AND REQUESTED BY PARENTS FOLLOWING STUDENT'S FIRST STAY IN A PSYCHIATRIC HOSPITAL; AND C) FAILED TO PROVIDE STUDENT AN ASSISTIVE TECHNOLOGY ASSESSMENT?

17. Based on Factual Findings 111-116 and Legal Conclusions 15-16, the District did not fail to provide the modifications and accommodations required by Student's IEPs and therefore was not required to give prior written notice of any decision not to do so. Based on Factual Findings 118-119 and Legal Conclusions 15-16, the District provided Mother adequate prior written notice of its reasons for not accepting Dr. Yu's recommendation. Its IEP documents gave Mother adequate notice, and Mother was aware of its reasons. Based on Factual Finding 117 and Legal Conclusions 15-16, the District was not required to give Mother prior written notice of a decision not to conduct an AT assessment.

## ORDER

All of Student's requests for relief are denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

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

Dated: May 18, 2011

A handwritten signature in black ink, appearing to read 'Charles Marson', is written over a horizontal line.

CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings