

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2011080031

v.

VICTOR VALLEY UNION HIGH SCHOOL
DISTRICT, DESERT MOUNTAIN SELPA
AND SAN BERNARDINO COUNTY
SUPERINTENDENT OF SCHOOLS,

VICTOR VALLEY UNION HIGH SCHOOL
DISTRICT,

OAH CASE NO. 2011080382

v.

PARENT ON BEHALF OF STUDENT.

CORRECTED DECISION¹

Administrative Law Judge June R. Lehrman, Office of Administrative Hearings, State of California, heard this matter in Victorville, California, on November 15, 16, 17, 28, 2011; December 5, 6, 7, 8, 12, 13, 2011; and January 17, 18, 19, 24, 25 and 26, 2012.

¹ This Decision, originally issued March 12, 2012, has been corrected to address errors in the Final Order and in formatting. The only changes appear in the wording of Paragraphs 2 and 5 of the Order, and in the indentation of numbered paragraphs throughout the Decision.

Student's mother (Mother) represented Student, and attended the hearing on all days. Howard Fulfrost and Keith Yanov, Attorneys at Law, appeared on behalf of Victor Valley Union High School District (District), Desert Mountain Special Education Local Plan Area (SELPA), and San Bernardino County Superintendent of Schools. Denise Edge, Program Manager of SELPA, attended the hearing on all days. District Director of Special Education Gayle Hinazumi, attended the hearing on all days except January 17, 18 and 19, on which days Ms. Edge attended the hearing on behalf of both District and SELPA. Assistant Superintendent Sharon Bolle, School Psychologist Scott Hansen, and Area Director Stephen Vaughn, attended the hearing for San Bernardino County Superintendent of Schools on November 15, 16, 17, 28, 2011, and December 5, 2011. By Order dated December 1, 2011, and issued December 5, 2011, respondent San Bernardino County Superintendent of Schools was dismissed. Thereafter the matter proceeded as between Student, District, and SELPA.

Student filed the Due Process Request (Student's complaint) on July 29, 2011. On August 8, 2011, District filed a Due Process Complaint (District's complaint) naming Student as the respondent. Student filed an amended request for due process (Student's amended complaint) on August 31, 2011. On September 16, 2011, District moved to consolidate District's complaint with Student's amended complaint. OAH granted the motion on September 23, 2011, and held that the 45-day timeline for issuance of a decision in the consolidated cases shall be based upon timelines calculated for Student's amended complaint.

The parties jointly moved to continue the hearing, and the motion was granted for good cause on October 10, 2011. At hearing, the parties requested and were granted a continuance to file written closing arguments by February 21, 2012. Upon receipt of the written closing arguments, the record was closed and the matter was submitted.

ISSUES²

(1) DISTRICT'S ISSUE:

1. Did District, in the June 2, 2011, individualized educational program (IEP), offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE), and, if so, may District implement its offer without parental consent?

(2) STUDENT'S ISSUES AGAINST DISTRICT:

1. In the Spring of 2010, did District deny Student a FAPE by:
 - a. denying appropriate aide support from March 18-26, 2010; and
 - b. denying adequate reading and resource support program (RSP) services in March and June 2010?
2. From the Spring of 2010, and continuing through the end of the 2010-2011 school year, did District deny Student a FAPE by:
 - a. failing to provide professional development to teachers, speech therapist, occupational therapist, and aides from March 17, 2010 until June 2011;
 - b. failing to provide appropriate behavior services from March 16, 2010 until July 21, 2011;
 - c. failing to complete appropriate SELPA forms for behavioral intervention from March 16, 2010 until July 21, 2011;

² Student's 54-page amended complaint, filed August 31, 2011, contained numerous unnumbered separate issues. For purposes of clarity, the issues have been restated, ordered chronologically, and numbered to follow the chronology. The parties stipulated at hearing to the wording of the Issues as stated in the Amended Prehearing Conference Order dated November 14, 2011.

- d. failing to refer Student for appropriate behavioral services and/or assessments;
 - e. failing to develop a behavior plan from May 2010 through July 2011;
 - f. allowing entry of behavior data on nonpublic agency (NPA) forms by unauthorized personnel from May 2010 until March 2011;
 - g. failing to provide educational supports to Student from May 2010 through July 2011;
 - h. failing to provide individual educational therapy or an "educational learning treatment plan" from May 2010 through July 2011;
 - i. failing to modify Student's curriculum from May 2010 through July 2011; and
 - j. failing to provide appropriate occupational therapy (OT) from May 2010 until May 2011?
3. Did District deny Student a FAPE by performing an inappropriate functional analysis assessment (FAA) on or around May 21, 2010?
4. Did District deny Student a FAPE in the May 21, 2010, IEP by:
- a. removing his eligibility category of Emotional Disturbance;³
 - b. removing his eligibility category of Speech Language Impairment;
 - c. failing to discuss a continuum of placement and related services options;
 - d. denying appropriate OT;
 - e. offering an inappropriate placement and RSP services; and

³ Although the complaint referred to Student's "diagnoses," the gravamen of Issues 4 (a) and (b) was not diagnosis but rather eligibility category.

- f. failing to offer the recommendations of the FAA performed on May 21, 2010?

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5. Did District deny Student a FAPE by failing to provide Student's parent (Parent) with a copy of the May 21, 2010, IEP until June 29, 2010?

6. Did District deny Student a FAPE in the June 8, 2010, IEP by:

- a. failing to comply with state standards in developing, and by improperly writing the June 8, 2010 IEP;
- b. failing to offer appropriate full-time aide support; and
- c. failing to offer inclusion supports?

7. Did District deny Student a FAPE by failing to monitor Student's progress from June 8, 2010- June 8, 2011, and by failing to provide a quarterly progress report for the quarterly period beginning August 2010?

8. Did District deny Student a FAPE by monitoring goals in the June 10, 2010 progress report that were not stated in the June 8, 2010, IEP?

9. Did District deny Student a FAPE by failing to implement the June 8, 2010, IEP in the following respects:

- a. failing to implement the NPA services during extended school year (ESY) 2010 from June 13, 2010 through July 21, 2010;
- b. failing to implement OT from August 22, 2010 until June 8, 2011; and
- c. failing to implement speech services from August 22, 2010 until June 8, 2011?

10. On or around August 25, 2010, did District deny Student a FAPE by failing to respond appropriately to an incident with another student and an aide?

⁴ Although the complaint referred to "implementation," the gravamen of Issue 4 (f) was not implementation of the May 21, 2010, IEP, the IEP but rather the offer made therein.

11. Did District deny Student a FAPE in the August 25, 2010, IEP addendum, because it did not appropriately address an incident with another student and an aide?

12. In or around September 2010, did District deny Student a FAPE when an aide informed another student that Student had autism?

13. Did District deny Student a FAPE by failing to offer transition services from December 2010 until July 2011 regarding Student's transition to high school?

14. Did District deny Student a FAPE at and after the January 6, 2011, manifestation IEP, by failing to conduct a FAA and create a behavior intervention plan (BIP)?

15. Did District, in the January 2011, IEP, deny Student a FAPE by:

- a. failing to offer placement in the LRE; and
- b. failing to provide a transition plan?

16. Did District, in the February 16, 2011, IEP, deny Student a FAPE by failing to offer appropriate placement in the LRE by failing to offer Student "cadet core?"

17. Did District, in the March 21, 2011 IEP, deny Student a FAPE by failing to offer appropriate related services to enable Student to attend "cadet core" five times per week?

18. In the Spring of 2011, did District deny Student a FAPE by:

- a. denying appropriate reading services from March 2011 until June 2011;
- b. failing to provide appropriate aide support from March 21-25, 2011; and
- c. failing to provide behavioral supervision hours from April 2011 until August 2011?

19. During and subsequent to an incident on or around April 6, 2011, did District deny Student a FAPE by failing to provide appropriate behavioral supports, resulting in a 12-day suspension and a denial of access to campus on April 12, 2011?

20. Did District deny Student a FAPE by failing to give prior written notice of cancellation of an IEP meeting scheduled for April 12, 2011?

21. Did District deny Student a FAPE at the April 18, 2011, IEP, by failing to offer full-time NPA aide support?

22. After Parent consented to a FAA on April 18, 2011, did District deny Student a FAPE by failing to timely conduct the FAA, and by subsequently failing to develop a timely BIP?

23. Did District deny Student a FAPE in the June 2, 2011, IEP, by:

- a. predetermining its offer of placement and services; and
- b. failing to offer an appropriate placement in the LRE, after a discussion of the continuum of program options?

24. After the June 2, 2011, IEP, did District deny Student a FAPE by failing to assist Student to achieve his IEP goals?

25. Did District deny Student a FAPE by failing to give Parent a copy of the June 2011 IEP progress report?

26. Did District deny Student a FAPE by failing to hold an IEP team meeting to discuss a FAA that was conducted on June 10, 2011?

(3) STUDENT'S ISSUES AGAINST SELPA:

27. Did SELPA deny Student a FAPE during the 2009-2010 and 2010-2011 school years by failing to modify the curriculum, and by failing to provide an inclusion specialist during Student's seventh (2009-2010) and eighth (2010-2011) grade years?

28. From September 2009 until the filing of the complaint, did SELPA deny Student a FAPE in the following respects:

- a. because SELPA program manager does not have a special education credential, made "terrible recommendations" regarding Student's education and refused to coordinate special education services for Student;

- b. because SELPA failed to use proper forms, as follows: observation form; utilized interventions form; suspension review form; evaluation report form; triennial assessment worksheet form; IEP compliance checklist form?
- c. by failure to coordinate effective educational strategies; refer Student for an educational assessment; modify curriculum or provide assistance to help student access curriculum?
- d. by failing to allow Student to participate in the "workability" program;
- e. by denying Student's request for independent education evaluations (IEE) for speech therapy, OT, and educational therapy?

29. In or around September 2009, did SELPA deny Student a FAPE by placing him in an overcrowded classroom?

30. Between September 2009 and November 20, 2009, did SELPA deny Student a FAPE by failing to implement his transfer IEP from a previous district, which provided for two periods of mainstreaming?

31. From September through December 12, 2009, did SELPA deny Student a FAPE by failing to coordinate an observation to determine autism services that had been requested August 30, 2009?

32. Between September 2009 and April 2010, did SELPA deny Student a FAPE by failing to implement his behavior plan dated March 2009?

33. From September 2009 until April 2011, did SELPA deny Student a FAPE by:
- a. refusing to assign a special circumstances instructional assistant "SCIA" case manager;
 - b. failing to give Student's aides proper support; and
 - c. by failing to use appropriate SCIA SELPA forms?

34. From September 2009 until June 8, 2011, did SELPA deny Student a FAPE by:

- a. failing to provide him with SELPA behavior intervention support;
- b. failing to refer him for a behavioral assessment; and
- c. from September 2009 until April 2011 by failing to follow NPA behavior assessment services procedures?

35. From September 3, 2009 until July 21, 2011, did SELPA deny Student a FAPE by denying him access to the California Reading Initiative program that requires 2.5 hours of reading a day for grades 4 through 8?

36. From October 2009 until December 2009, did SELPA deny Student a FAPE by placing him in a classroom with a substitute teacher who lacked proper training and credential?

37. Did SELPA deny Student a FAPE by failing to implement the October 23, 2009 IEP in the following respects:

- a. failing to provide a reading outline or reading instruction for 45 minutes per day until April 2010;
- b. failing to provide RSP services until June 2010;
- c. from January 2010 until June 2011, failing to provide NPA OT for 45 minutes per week.

38. From November 2009 until January 2010, did SELPA deny Student a FAPE by providing a teacher for math and science who lacked proper training and credentials?

39. From November 2009 until June 2010, did SELPA deny Student a FAPE by allowing an unlicensed speech therapist to work with Student?

40. Did SELPA deny Student a FAPE by not timely holding an IEP team meeting after a December 12, 2009, autism observation?

41. From February 2010 to June 2010, did SELPA deny Student a FAPE by providing a teacher for math and science who lacked proper training and credentials?

42. Did SELPA deny Student a FAPE in the April 2010 IEP addendum and May 21, 2010, IEP's by using outdated forms when the IEP forms had been updated?

43. Did SELPA deny Student a FAPE on or around May 12, 2010, by performing an inappropriate psycho-educational assessment conducted without appropriate testing accommodations?

44. Did SELPA deny Student a FAPE from May 2010 until June 2011 by failing to offer inclusion support for mainstreaming?

45. Did SELPA deny Student a FAPE from May 2010 until June 2011 by failing to develop a behavior intervention plan and refusing to assign a Behavior Intervention Case Manager (BICM)?

46. Did SELPA deny Parent meaningful participation in the June 8, 2010 IEP?

47. Did SELPA deny Student a FAPE in the June 8, 2010, IEP, by failing to include inclusion support for mainstreaming in general education English and Language Arts classes?

48. Did SELPA deny Student a FAPE by failing to implement the consented-to portions of the June 8, 2010, IEP, specifically by failing to provide two NPA aides, without making such support temporary and without any change of placement?

49. Did SELPA deny Student a FAPE by failing to provide a copy of the June 8, 2010, IEP, until June 29, 2010?

50. Did SELPA deny Student a FAPE by failing to coordinate autism therapy from June 2010 until June 2011?

51. Did SELPA deny Student a FAPE from March 2011 to August 2011 by failing to coordinate NPA supervision consultation hours?

52. Did SELPA deny Student a FAPE by failing to implement the consented-to portions of the April 18, 2011, IEP, specifically by failing for one week until April 25, 2011, to provide NPA autism aide services?

53. Following consent to a FAA assessment plan signed on April 18, 2011, did SELPA deny Student a FAPE by failing to ensure that the NPA conducted a timely assessment and develop a BIP?

54. Did SELPA in the June 2, 2011, IEP, deny Student a FAPE by denying Student a "consortium of schools" and denying inclusion support?

55. After an incomplete FAA was reviewed at the June 2, 2011, IEP, did SELPA deny Student a FAPE by failing to timely provide an appropriate emergency behavior plan?

FACTUAL FINDINGS

BACKGROUND

1. Student is a 14 year-old boy who moved into District at the beginning of the 2009-2010 school year, on or around September 1, 2009. Assessments from regional centers, service providers, and Student's prior districts of residence, Los Angeles Unified School District (LAUSD), Palmdale, and Adelanto, indicated that Student had been diagnosed with attention deficit hyperactivity disorder (ADHD)-Combined Type, Asperger's Disorder, mild Autistic Disorder, pervasive developmental delay not otherwise specified, and bipolar disorder. Those assessments reported a history of challenging behaviors such as physical aggression, tantrums, threats, insults, fighting, defiance, disobedience, and noncompliance.

2. After LAUSD determined Student eligible in 2000 for special education with an eligibility category of autistic-like behaviors, Student's 2005 triennial psycho-educational assessment, conducted by Palmdale, changed his primary disabling condition category to emotional disturbance (ED), and made autistic-like behaviors a secondary eligibility category. His 2008 triennial assessment, conducted by Adelanto, left those eligibility categories unchanged. Thus, when Student moved into District on or

around September 1, 2009, his preexisting eligibility categories for special education were ED and autistic-like behaviors.

3. Student's educational program for 2008-2009 was governed by an Adelanto IEP dated November 4, 2008, and amended in December 2008 and in January, March, and April 2009. It provided for specialized academic instruction in small group classes, and mainstreaming 33% of the school day in general education for science, social studies, recess, lunch, and all activities. Services consisted of counseling, speech therapy, OT provided by an NPA once per week for 45 minutes, and a 1:1 aide. Adelanto did not offer ESY.

4. While at Adelanto, Student had a behavior support plan (BSP) prepared on or around March 11, 2009, by UHS, a NPA. The UHS BSP identified three problem behaviors that had been observed in the classroom: physical aggression; threats and insults to peers; and noncompliance with directions. It identified environmental factors contributing to these problem behaviors. It set forth a general approach of reinforcement through use of a token economy, prompting and modeling. It set forth three specific BSP measurable goals involving peer interaction, conflict resolution, and following of instructions, and three specific consequence strategies for procedures to be implemented following the display of problematic behavior. It set forth specific data that were to be collected with regard to each identified problem behavior. It also displayed all the above information in the form of a reference chart that showed events, antecedents, problem behaviors, desired behaviors, and consequences.

5. In the summer of 2009, Mother and Adelanto agreed that Student should be observed in his new school setting in District, at the onset of the upcoming 2009-2010 school year, by a NPA called CIBA Leafwing (CIBA) for a five-hour observation. Mother and Adelanto agreed that CIBA should generate a written report to inform

District, as Student's new local educational agency, about Student's needs in the area of behavior supervision services. Adelanto and District were both located within SELPA.

6. Districts within SELPA did not access NPA services directly, but rather through the auspices of SELPA. SELPA entered into master contracts with NPA's for each school year. The master contracts authorized districts within SELPA to request services from the NPA, and authorized the NPA to bill SELPA. SELPA then paid the NPA for the services provided. Districts within SELPA requisitioned individual services for students by means of documents entitled Individual Services Agreements (ISA's), which named the individual student slated to receive services, and specified the services requested. These ISA's, once requested by districts within SELPA, were signed by SELPA and NPA personnel, thus authorizing the provision and payment for the services rendered.

7. On or around August 31, 2009, Adelanto requested SELPA to complete the necessary ISA paperwork to authorize the five-hour observation by CIBA.

2009-2010 SCHOOL YEAR

8. At the beginning of the 2009-2010 school year, Jeannette Anderson (Anderson) had just started her employment with District as its Director of Special Education. Her duties were to oversee programs and services, to administer special education offers and ensure compliance, and to develop new District programs. Anderson held a Master's Degree in Education, a mild-moderate special education teaching credential and an administrative services credential.

9. Douglas Kubacki (Kubacki) was the Department Chair for special education at Lakeview Middle School (LMS). He held a Bachelor's Degree in psychology and a teaching credential entitling him to teach students with mild-moderate disabilities. He had also participated in various ongoing professional development courses in topics including behavior intervention, through SELPA training programs. At or around the time of Student's transfer into District, Kubacki met with Mother. After learning of

Student's history, Kubacki informed Mother that LMS might not be the best placement for Student due to Student's multiple eligibility categories of ED and autistic-like behaviors. Kubacki felt LMS programs were not geared to these conditions. LMS offered specialized academic instruction in special day classes (SDC's). It also offered general education with push-in resource support, known as the "Excel" collaboration model. Kubacki felt District's middle school program for students with autism, located at Hook Middle School, would be more appropriate for Student, or another program for ED located at another campus. Kubacki, therefore, asked Mother to discuss Student's placement with Anderson.

10. Anderson first met Student in August or September 2009, when Mother came to enroll him in District. At the time, Student was 11 years old, and an incoming seventh grader. Mother and Anderson reviewed the Adelanto IEP, and discussed placement and services. District's process was to review incoming IEP's and offer comparable placement and services, and hold a thirty-day IEP thereafter. Anderson and Mother agreed that Student would attend LMS with 1:1 aide support.

11. Kendall Dawson (Dawson) was a substitute instructional assistant with District. District assigned Dawson to serve as Student's aide during the 2009-2010 school year. He had no specific education or training in working with students with autism, and only informal behavior intervention training.

12. On September 25, 2009, SELPA executed the ISA authorizing the five-hour observation, which had been requested on August 31, 2009 by Adelanto. CIBA signed the ISA on October 6, 2009.

13. On October 20, 2009, District administered to Student the Woodcock Johnson Test of Achievement, Third Edition (WJ-3) which measured Student's academic achievement. Student's results placed Student's reading, writing and math proficiencies at third or fourth grade level equivalencies.

October 23, 2009, IEP

14. On October 23, 2009, District convened an IEP meeting. The document listed Student's eligibility categories as ED and autistic-like behavior, as had Adelanto. Student was described as coming to school well-dressed and groomed, and thus appearing to have no needs in the area of daily living skills. While he had had behavioral issues in the past, he had been doing well since his entry into District, with cueing and redirection from his 1:1 aide, Dawson, who attended the IEP. Dawson reported that Student was doing well despite having ongoing issues with socialization.

15. The October 23, 2009, IEP stated that the method of reporting progress toward goals would be through the use of annual goal sheets, report cards, parent conferences, and IEP meetings, as needed, each semester. It also stated that progress reports would be mailed at the end of each semester.

16. The IEP stated nine goals in areas of reading, writing, math, speech and language, OT, behavior, and counseling. District offered a combined placement at LMS in a SDC for part of the day, and mainstreaming in general education with special education supports for the remainder. Specifically, Student was to be placed into a SDC four periods a day for math, reading, science, and an elective. The remaining two periods of the day for English Language Arts and World History were to be in general education with both a general education teacher, Maureen Casian (Casian), and a special education teacher, Jacqueline Quintero (Quintero), providing "push-in" resource support, within LMS' collaboration Excel model. Student was also offered general education for physical education. Pursuant to this offer, Student would participate in the mainstream general education setting 44% of his school day. District also offered the following related services: 1:1 aide support to be provided by a District aide; OT once a week for 45 minutes to be provided by a NPA; speech and language therapy once a week for 30 minutes to be provided by a District speech language pathologist; and

counseling. The IEP stated that the UHS BSP was to be implemented for the balance of the 2009-2010 school year. The IEP did not offer ESY for summer 2010.

17. CIBA had not begun the five-hour observation by the time of the IEP meeting. The IEP team, including Mother, agreed to wait at least a month while Student acclimated to his new surroundings before the commencement of CIBA's observation.

18. The IEP stated generally that Student's workload and curriculum would be modified, but it included no specifics about what modifications were to be implemented.

19. Mother consented to the implementation of the October 23, 2009, IEP.

20. The first date of CIBA's five-hour observation was December 3, 2009. CIBA staff did not observe any challenging behaviors from Student.

Due Process Complaint in OAH Case No. 2009120327

21. Mother filed for due process against District in OAH Case No. 2009120327, on or around December 8, 2009.

CIBA Five-hour Observation

22. The second date of CIBA's five-hour observation was December 10, 2009. CIBA staff did not observe any challenging behaviors from Student.

23. CIBA's five-hour observation report was completed December 20, 2009. Its author was Ronia Wood (Wood), a Regional Director and a Clinical Director at CIBA. Her job duties were to supervise and create programs for individual students. She also had administrative duties, including hiring. She held Bachelor's and Master's degrees in Psychology, and was a doctoral candidate in Educational Leadership, but had not yet completed that coursework. She was a Board Certified Assistant Behavior Analyst, which allowed her to perform behavioral analysis services under the supervision of a Board Certified Behavior Analyst.

24. Wood generally concluded, and the report stated, that Dawson “lacks the skills needed to work through challenging behaviors that may occur during the school day,” and that he was over-prompting Student, thereby fomenting dependence on prompts. Although some of the strategies Dawson employed were effective, Wood opined that Dawson invaded Student’s space, and that he required training in how to fade out his prompting.

25. CIBA recommended that it consult with the aide, with up to ten hours per month supervision services, to be used for consultation and training.

26. The report stated some general goals both for Student and his aide: to introduce Student to a typing program; to type 30 words a minute; to provide Student with pre-written notes; to identify a group of friends and approach them daily 100% of the time; to identify precursor behaviors leading to challenging behaviors when presented in a receptive format; to vocally relay precursor behaviors that are part of the antecedent to a challenging behavior; to initiate walking away from potential disagreements in a non-provoking situation; to walk away from potential escalations 100% of the time; to engage in three reciprocal exchanges once daily in four out of five opportunities; and to raise his hand once daily to respond to a question.

27. The report did not identify how these goals were developed, as they were not based on any observation of problematic behavior. Wood’s recommendation was for more in-depth observation that would enable her to create baseline data, and generate strategies to address challenging behaviors when they occurred.

28. At hearing, Wood explained that the purpose of the five-hour report was to observe Student and determine the level of his need, including whether he could function in the general education environment, and what level of support he would require. It was not to create a functional behavioral analysis (FBA) or a FAA. Those would require extensive interviews, observations and the collection of data allowing the analyst

to draw conclusions regarding the functions that the problem behaviors served. The purpose of a FAA would be to determine an appropriate behavior plan. A behavior plan would identify and define problem behaviors, and their functions, and would then recommend strategies to shape the problem behaviors into more appropriate ones. Identifying the function of a behavior would generally be the most important component of a behavior plan. While writing the five-hour observation report, Wood had access to, and reviewed, the UHS BSP.

District's Development of "Perspectives" Autism Program

29. In February or the early spring of 2010, Anderson asked District school psychologist Feliciano Joseph Inzunza (Inzunza), who had an extensive background working with students with autism, to develop a District program for students with autism. This was in the first set of Anderson's list of priorities for District after being hired as Director of Special Education. As conceived and developed by Anderson and Inzunza, the program was intended to serve the needs of students: in the seventh through twelfth grades; with moderate to severe autistic behaviors and low cognitive abilities; with mild intellectual disability up through the "lower borderline" level of intellectual disability; on a certificate rather than a diploma track; and who would need functional, rather than academic skills.

Dawson Incident Reports February 2010

30. On February 17, 2010, Dawson filed an incident report stating that Student hit a female student in the chest area, martial-arts style. Dawson filed five other incident reports between February 18, 2010, and February 25, 2010, regarding altercations between Student and other students.

Settlement in OAH Case No. 2009120327

31. On March 16, 2010, Student and District settled OAH Case No. 2009120327 by means of a written settlement agreement (SA). The SA contained a full release of District of all claims arising from or related to Student's educational program through and including the date of execution, March 16, 2010. SELPA was not a party to the case. Thus, the SA did not release SELPA.

32. The parties to the SA agreed that OT, speech and language, and psycho-educational assessments, as well as a FAA, would be conducted. Mother signed an assessment plan on March 16, 2010. The assessment plan specified that the FAA would be conducted by CIBA.

33. The SA further provided for a log book, to be signed by all personnel working with or assessing Student, as well as feedback regarding Student's progress across all domains, including behavior, academics, and social skills.

34. The SA also provided that District would provide Student with a "Special Circumstances Instructional Assistant" (SCIA), a term used for a 1:1 aide, who met "highly qualified" standards under the No Child Left Behind Act (NCLB).

35. The SA also provided that an IEP meeting would be held on April 6, 2010, where the IEP team would "discuss, in detail, modifications to be provided to Student in order to assist Student with meaningfully accessing the curriculum."

36. The SA also provided that the IEP team would discuss the CIBA five-hour observation report dated December 20, 2009, and that District would implement behavior intervention services recommended by CIBA.

37. The SA also provided that the IEP team would develop a training plan for the SCIA, including but not limited to: (i) behavior intervention training as recommended by CIBA at that IEP, and to be provided by CIBA; and (ii) SELPA's Certificate in the

Education of Students with Autism (CESA). The SA did not specify the time frame within which these training programs would occur.

38. The CESA training was developed by SELPA in conjunction with University of California at Riverside (UCR). It was an optional professional development class that could also count as credits toward UCR coursework. It consisted of ten training days, addressing issues including "autism and Asperger's," "intensive behavioral intervention," "social stories," "communication," and other topics. It was designed to take place over the course of one full school year, with the first day of training taking place in September, and scattered other one- or two-day segments finishing in June. CESA training could be taken out of order, or taken in separate modules.

April 6, 2010, IEP

39. As required by the SA, the IEP team met on April 6, 2010. This IEP meeting was an addendum to the October 23, 2009, IEP.

40. The team briefly discussed the modifications and accommodations Student received in his general education Excel English Language Arts and World History classes, taught by Casian, where Student was mainstreamed. Mother requested additional modifications, specifically more time to complete written assignments. Student's teachers reported on his progress. His SDC Math and Science teacher, Mr. Alsina, reported that Student was highly motivated in class, doing well and exhibited no behavioral problems. Student's SDC Reading teacher Quintero reported that he was doing well in reading, attaining a grade of C+, with no behavior problems. PE was the class where most of his problems occurred. Casian reported that he was a "great student."

41. By this date, Dawson had been replaced as Student's aide by another District employee, Joe Malady (Malady). Malady attended the April 6, 2010, IEP meeting. The evidence at hearing did not establish precisely when Dawson had been replaced by

Malady. There was a gap between the two aides such that Student was without an aide for several days or one week. During this time, various substitute aides and staff members accompanied Student, including Tosh Stephenson (Stephenson) and Kubacki. One morning, Student had to stay in Kubacki's office and not go to PE, due to lack of aide coverage. However, there were no incidents during this brief gap in 1:1 aide coverage, and Student was never without the support of a staff member or teacher.

42. Malady had just started working at LMS. He had previously worked as a substitute aide at Hook Middle School for six months. Malady had a son with multiple disabilities, one of which was autism. Malady had worked with his son on social emotional functioning and social skills for 16 years. Malady had no college training and no formal training in behavior intervention.

43. As required by the SA, at the April 6, 2010, IEP, District offered CIBA training for Malady, and scheduled it to begin on April 7, 2010. Malady's CIBA training did commence at or about that time. The IEP team did not make any specific arrangements with regard to the SA requirement that the aide obtain the CESA certificate.

44. As required by the SA, the IEP team also discussed the CIBA five-hour observation report dated December 20, 2009, in which CIBA had recommended up to ten hours per month supervision services for the duration of the 2009-2010 school year. As required by the SA, District agreed to implement these behavior intervention services recommended by CIBA.

45. There was no discussion at this IEP meeting about the UHS or any other BSP. CIBA did not discuss or make any recommendation concerning a BSP at this IEP meeting. However, some participants at the IEP had the understanding that the UHS BSP was being supplanted or superseded by CIBA, from this point forward.

46. Haley Papez (Papez), school psychologist, was involved with Student's case management in consultation with Kubacki and Student's teachers during his seventh grade year (2009-2010). She had frequent interactions with him on a daily basis in her office. She attended this IEP and considered the CIBA five-hour observation report to be Student's new BSP. To her understanding, a decision was made at the April 6, 2010, IEP meeting to stop implementing the UHS BSP and replace it with the CIBA five-hour observation report, which was the only other behavioral intervention document that existed at that time.

47. At hearing, Papez opined that the goals in the CIBA five-hour observation report constituted a BSP, and the services recommended therein were to replace the UHS BSP, even though CIBA was, at the time of the IEP, about to undertake a more formal FAA. At hearing, CIBA's Wood also testified that she understood that the recommendations she made in the five-hour observation report were thereafter implemented, either supplanting, or supplementing, those in the UHS BSP.

48. Mother consented to April 6, 2010, IEP addendum.

49. The next day, April 7, 2010, Mother wrote a letter partially revoking her consent to the April 6, 2010, IEP Addendum. District received this letter on April 14, 2010. Mother's areas of concern were 1:1 aide assistance during sports events, and the training of aides. She reiterated that Student's aide should be "highly qualified" according to the SA, and she disputed whether Dawson had been or whether Malady was. She also requested that the training envisioned by the SA should take place immediately.

50. Thereafter, on or around April 29, 2010, District wrote Mother a "prior written notice" letter in which it responded to Mother's April 7, 2010, letter. In pertinent part, the response set forth the exact timing of the CESA training requirement that had been left blank in the SA. Specifically, CESA training for Student's aide would begin with

one CESA training module on September 23, 2010, and would continue with additional class modules through the balance of the 2010-2011 school year, as follows: one day in October, two days in November, two days in January, two in February, one in March, and one in April, with the training concluding in April 2011. District also laid out the definition of “highly qualified” under NCLB and represented that Malady met the qualifications, as required by the SA. District also consented to Mother’s request for additional modifications, specifically more time for written assignments, and reduced homework.

Assessments in April-May 2010

51. Pursuant to the SA, District conducted speech and language, psycho-educational, and OT assessments. Per the assessment plan, CIBA conducted a FAA.

52. Speech and language pathologist, Jana Holmer (Holmer), assessed Student and generated a written report dated April 14, 2010. Holmer concluded that Student met the legal criteria required for eligibility for special education and related services under the qualifying condition of Speech Language Impairment. At hearing, Mother presented no evidence that she had disagreed with the assessment or requested an independent educational evaluation (IEE).

53. On dates in March and on May 12, 2010, occupational therapist, Patricia Gonzales (Gonzales), assessed Student and generated a written report on or about May 12, 2010. Gonzales had been an occupational therapist for 24 years, held a Bachelor of Science degree, was licensed by the State of California as an occupational therapist, and certified by the National Board of Certification of Occupational Therapy. In order to maintain her license in good standing, she was required to complete 24 hours of professional development education every two years and had done so. The educational coursework she had completed included trainings in assessment tools, treatment strategies, therapy techniques, and serving specific populations, including autistic and

orthopedically impaired persons, as well as trainings in sensory processing and neurological deficits. Her license allowed her to assess and provide services to all student populations, and she had in her career assessed and serviced many thousands of students.

54. Gonzales was employed by the Visiting Nurses Association of Inland County, which was certified as a NPA by the State of California to provide educational OT services to students pursuant to IEP's, and which contracted with districts within SELPA to do so. For the 2009-2010 school year through the present, Gonzales was Student's provider of OT services pursuant to his IEP's.

55. Gonzales assessed Student in the areas of fine motor, visual motor, self-care, and handwriting skills, as they were the areas she had found relevant through her document review and discussions with teachers, as well as in the individual services she had been providing. Student's performance in fine motor skills was below average, which could impact manipulation of pencils, scissors and other objects. He had visual motor deficits which could impact the accuracy of his perceptions and his ability to copy accurately. His handwriting was below average. He had some sensory processing deficits in visual, tactile and proprioceptive perception. His self-care skills were independent in the school setting with supervision, i.e., he could change clothes in PE, get items out of his backpack, etc.

56. Gonzales' report recommended a reduction in service from the pre-existing level of once a week for 45 minutes direct service, down to once a month as a consultation service with Student's teachers and aides. At hearing, Mother presented no evidence that she had disagreed with the assessment or requested an OT IEE.

MAY 12, 2010, PSYCHO-EDUCATIONAL ASSESSMENT

57. In or around May 2010, school psychologist Papez conducted a psycho-educational assessment of Student and prepared a written assessment report dated May

12, 2010. Papez had a Masters degree in school psychology, and a pupil personnel services credential.

58. The report summarized the background of Student's diagnoses and his eligibility categories, and summarized previous assessments from regional centers, service providers, and Student's prior districts of residence. It mentioned Mother's past reporting to the effect that Student did not engage with other members of the family unless he wanted something, needed constant reinforcement to complete tasks, fixated on electronics and video games, could become physically violent when frustrated, failed to take responsibility for his actions, and lied to avoid doing so or to gain attention.

59. The report summarized Student's educational history, including his then-current seventh grade performance at LMS, where he maintained a C average.

60. Papez interviewed Student's teachers, and reported their comments. Specifically, Quintero, Student's teacher for SDC Reading class, reported that Student was reading in a third grade level book with good fluency, but had difficulty understanding the stories, because despite good comprehension, he was unable to draw inferences and conclusions. His SDC Math and Science teacher Mr. Alsina reported that he was working on seventh grade math, and had poor computational skills and conceptual understanding. Although Student appeared to learn, he quickly forgot basic facts. Regarding his social-emotional functioning, Student was reported to make inappropriate and negative comments to others, such as "you are stupid." Although compliant overall, he could also be argumentative and defiant.

61. Papez interviewed Kubacki, who reported that Student followed directions, appeared to express himself adequately, and was compliant in class when his aide was with him.

62. Casian reported that in his general education Excel classes, Student was reading in a seventh grade level book with adequate fluency. He struggled with word

recognition, but once he learned to decode the words, had good reading comprehension. He enjoyed the class, listened and seemed to understand the stories that were read aloud. He participated and was a “very valuable contributor to class.” He had trouble drawing conclusions and inferences, and had difficulties seeing the big picture, but could remember details.

63. Papez administered the following standardized tests: Cognitive Assessment System (CAS); Woodcock Johnson Test of Achievement, 3d Edition (WJ-3); Bender Visual-Motor Gestalt, 2d Edition (Bender-2); Wide Range Assessment of Memory and Learning, 2d Edition (WRAML-2); Vineland – II Adaptive Behavior Scales (Vineland-II); Behavior Assessment System for Children (BASC); Conners 3 Behavior Rating Scale (Conners-3); Behavior Rating Inventory of Executive Function (BRIEF); Devereaux Behavior Rating Scale-School Form (Devereaux); and the Gilliam Autism Rating Scale, 2d Edition (GARS-2). No test modifications were utilized, but Papez provided appropriate testing accommodations including frequent prompting and reinforcement, redirection to tasks, extra time and frequent breaks.

64. Student’s results on the CAS, which measured Student’s cognitive ability, indicated cognitive scores ranging from borderline and low-average down to mild-to-moderate developmental delay, equivalent to the lowest 2% of the scaled population. The CAS full-scale score indicated moderate developmental delay, within the lowest 2% of the scaled population. In Papez’ opinion, a student at this level of cognition would require a significant amount of modification and accommodation to access the general education curriculum

65. The results of the WJ-3, which measured Student’s academic achievement, indicated age equivalencies in reading, comprehension, spelling, writing, math and other academic subjects ranging from seven years old up to nine years old, with grade equivalencies ranging from second to fourth grade levels. His overall academic

achievement fell within the very low range, with a third grade equivalence level. Papez concluded that his scores fell within the borderline to mild developmental delay range, and indicated that he had not mastered basic math and reading skills such as addition, subtraction, and calculation. In the area of written language, she concluded Student could create a sentence but not a paragraph.

66. On the Bender-2, which measured the integration of Student's visual and motor abilities by testing Student's abilities to draw geometric shapes, Student's results were extremely low and indicated difficulties with fine motor tasks like copying, drawing, cutting, pasting, etc. Papez opined that Student was moderately developmentally delayed, and would be unable to take meaningful notes or comprehend grade level material in an age appropriate manner.

67. On the WRAML-2, which measured Student's memory and his overall ability to learn, Student's scores ranged from borderline down to mild-to-moderate developmental delay.

68. The Vineland-II measured Student's adaptive behavior, as reported by Mother. The results indicated age equivalencies in communication, daily living skills, and motor skills ranging from two and one-half years old up to seven years old, in the mild-to-moderate developmental delay range. Student's scores were much lower in the category of socialization skills, with age equivalencies under one year old, indicating severe developmental delay. His highest scores were in written communication and in the "domestic" and "community" daily living skills domain, where he was functioning at approximately the level of a typical six or seven year old. His score on the "personal" daily living skills domain was approximately at the level of a typical three year old.

69. The results of the BASC, which measured Student's behavioral development, were generated by reports by teachers and parents, and intended to facilitate the differential diagnosis and classification of a variety of emotional and

behavioral disorders. The responses were not consistent between Mother's and teacher's responses. Mother's responses indicated hyperactivity, aggression, and behavioral problems, with "clinically significant" (i.e. requiring therapy or medical management) levels of oppositional defiance, acting out and "atypical" threatening behaviors that can endanger Student or others. As reported by Mother and interpreted by Papez, Student's adaptive skills scores in the areas of adaptability, social skills, leadership, activities of daily living, and functional communication were "clinically significant" and consistent with Student's diagnoses of ADHD and autism. Significantly, the rating of Student's SDC teacher, Quintero, was higher, indicating better functioning at school than at home, and did not comprise activities of daily living, which on this instrument were assessed only in the home environment.

70. The results of the Conners-3, which measured Student's attention, were generated by means of reporting by teachers and parents. The responses indicated clinically significant inattention, hyperactivity, learning problems, aggression, conduct disorder, and oppositional defiant disorder.

71. The results of the BRIEF, which measured Student's executive functioning, were generated by means of reporting by teachers and parents. Student's scores indicated that he functioned overall in the acceptable range, but had deficits with impulsivity, and problems with transitioning.

72. The results of the Devereaux, which measured behavioral problems in four subscales (interpersonal problems, inappropriate behaviors/feelings, depression and physical symptoms/fears), were generated by means of reporting by teachers and parents. Student's scores indicated "very significant" interpersonal problems, inappropriate behaviors or feelings, depression, and physical symptoms or phobias. Papez interpreted Student's scores to be consistent with Student's diagnosis of autism.

73. The GARS-2 is a screening test for identifying persons who have autism based on the definitions of autism from the American Psychiatric Association and the Autism Society of America. The GARS-2 was the only autism-specific instrument Papez administered. It was generated by means of a parent interview and rating scales in the areas of stereotyped behaviors, communication, and social interaction. These were completed by Mother and Kubacki. The results from Mother overall indicated a "very likely" probability of autism; the results from Kubacki overall indicated a "possible" diagnosis of autism.

74. The report concluded that Student's eligibility category for special education should be changed from a primary category of ED to one of autistic-like behavior. Papez interpreted the ED category to exclude a student whose behaviors were the result of cognitive delays. Papez concluded that Student's behavioral problems appeared to be the result of his limited cognitive abilities, slow processing of information and emotional immaturity. Therefore, she concluded, Student did not appear to qualify under the eligibility category of ED, although it appeared that his behaviors mimicked those of an emotionally disturbed student.

75. The report further concluded that Student's overall cognitive and executive functioning fell within the borderline to mild developmental delay range of functioning, indicating a significantly impaired ability to anticipate consequences, control impulses, and monitor his own behavior. The report concluded that his developmental cognitive delays were indicative of autism rather than intellectual disability because his cognitive functioning was not flat in all areas, but was significantly higher in some areas than others.

76. The report concluded that Student met the definition of a student with autistic-like behaviors by virtue of (1) having been identified with severe disorders in expressive and receptive language and delays in emergence of his use of language prior

to age four or five; (2) Mother's reports of early developmental delays prior to the age of three in Student's smiling, crying, isolation and other normal social functioning; (3) prior reports of his inability to transition; (4) Student's perseveration on video games and electronics; (5) tantrums when confronted with authority; (6) avoidance of eye contact and shutting out sounds by covering his ears; and (7) fidgeting and prior reports of hand flapping and other self stimulatory behaviors. The report is not clear as to when each of these behaviors was observed, and appears to rely heavily on Student's historical documents rather than current observations.

77. Papez testified at hearing concerning her findings, and opined that Student did not receive any educational benefit from his seventh grade general education classes. His class contributions, although reported by Casian as "valuable," were off-topic. Papez opined that Student could not interact with peers, or keep pace with the curriculum in the general education setting. In her opinion, the curriculum modifications that would be necessary would be so extensive as to make the general education curriculum not meaningful. Further, Papez predicted Student would never be able to perform at the seventh or eighth grade level. She believed he needed to be provided with more functional life skills training.

78. Papez also opined at hearing that the change in Student's primary eligibility category from ED to autistic like behaviors was significant, because his prior program was designed for a student with ED. That kind of program would not be the same as what one would design for a student who fell where Student did on the autism spectrum, because his condition was not simply behavioral, but also cognitive and sensory. The eligibility category change was thus a change in the way the IEP team viewed Student. At hearing, Anderson agreed with this analysis.

MAY 15, 2010, FAA

79. Pursuant to the SA and the assessment plan, CIBA's Wood performed a FAA and generated a written report dated May 15, 2010. On the cover page, the report is titled "Functional Assessment." There is no indication in the written report itself that its intent was also to constitute a BSP.

80. Wood never obtained a release from Mother allowing her to review confidential information, and did not review any of Student's medical records, prior assessments or discipline records. She did review a file she received from Mother, but did not record its contents, nor at hearing did she recall them. She interviewed Student's aides, teachers, occupational therapist, speech pathologist, and Mother. She reviewed Student's IEP's, and records kept by Student's aides. At hearing, Wood could not recall from whom she got these documents, although it may have been SELPA. She provided Mother with a Motivational Assessment Scale questionnaire, and reviewed Mother's answers.

81. CIBA staff observed Student on five occasions in April and May. During the observations, CIBA observed no challenging behaviors. Wood, therefore, identified target behaviors for the FAA from reports by Student's aides. From these, the FAA identified five target behaviors that were, in Wood's opinion, impeding Student's educational progress. These behaviors included running away; teasing (including name-calling, staring, touching, and talking about non-preferred topics); refusal or noncompliance; trading of objects or money; and repetitive talk (including talk relating to video games). Wood did not include physical aggression, threats, or insults as target behaviors, although these had been addressed in the UHS BSP. Wood had, from her interviews with Student's aides, determined that these behaviors did not occur often enough to be identified as current target behaviors. The report noted that sexual

statements to females had recently become an area of concern to Student's aide; however, Wood did not include this as a target behavior.

82. The report presented operational definitions for the five chosen target behaviors and discussed their frequency, severity, duration and intensity. For each of the five target behaviors, the document contained "goals" not for Student, but rather for Student's aide. Wood intended these to assist in Malady's training. One of these, related to the target behavior of running away, stated that the aide should allow Student to take breaks from the aide for up to five minutes, two times a day. The document then proceeded to list general information regarding intervention strategies, including social scripts, and various proactive and reactive strategies. It did not link the strategies to any of the targeted behaviors or to any of the aide's goals.

83. The last three pages of the document contained a list of "goals for skills to be taught," in the areas of Attention, Peer Interaction, Communication/Conversation Skills, Nonverbal Communication, and Spatial Awareness. Each of these also contained a baseline stating Student's current challenges in that area. Although not clearly delineated in the document, this portion of the document contained goals for Student. In the area of Attention, it stated two goals: to "look at the speaker for up to 80% opportunities when being spoken to;" and to respond to a question after being spoken to in four out of five opportunities. In the area of Peer Interaction, it stated five goals: to greet others during functional opportunities in four out of five opportunities; to identify a group of friends and approach them daily 100% of the time; to initiate walking away from potential disagreements in four out of five opportunities; to walk away from potential escalations (raising of volume of voice, tense muscles, verbal threats or comments) 100% of the time; and to engage in three reciprocal exchanges once daily in four out of five opportunities. In the area of Communication/Conversation, it stated five goals: to initiate statements during conversations in four out of five opportunities; to

initiate questions in four out of five opportunities; to stay on topic during conversation with 80% accuracy; to appropriately end a conversation with 80% accuracy; and then to combine all the above skills. In the area of Nonverbal Communication, it stated three goals: to receptively identify communicative gestures in four out of five opportunities; to identify communicative gestures by others in four out of five opportunities; and to identify how others perceived situations in four out of five opportunities when presented with scenarios. The report identified three remaining goals in the area of Spatial Awareness: to identify "what is wrong" when presented with two dimensional stimuli in four out of five opportunities; to state "what is wrong" when presented with scenarios in four out of five opportunities; and to label scenarios when presented in four out of five opportunities. This made for a total of 18 total goals.

84. The FAA concluded with a recommendation of continuing ten hours per month supervision services by CIBA to be used for consultation and training.

85. At hearing, Wood testified that although not labeled as such, the FAA document also contained a behavior plan because it contained goals for Student's aides and for Student himself. Wood testified that CIBA did generate documents that were explicitly titled as "behavior plans," and did not explain why CIBA did not. Wood also testified that the plan was implemented from its inception in May 2010 forward until June 2011, and that CIBA performed the recommendations with Malady, teachers, Wood, CIBA supervisor Takia Fischer (Fischer), and CIBA aide Michael Barrett.

86. John Lubbers (Lubbers), the owner and Director of CIBA, testified at hearing regarding CIBA documents and business practices. Lubbers holds a Doctorate in Education with an emphasis in special education. Lubbers did not recognize the CIBA May 2010 FAA as a behavior plan. At most, the document contained "suggested interventions that could inform" a BSP.

May 21, 2010, IEP

87. On May 21, 2010, District convened an IEP meeting to make an offer of placement and services for eighth grade in the 2010-2011 school year.

88. Student was described as having no significant needs in the area of daily living skills in the school environment. The IEP form had a "special factors" checklist on which the following question was answered in the negative: "Does the student's functional performance indicate needs in this area?"

89. The May 21, 2010, draft IEP stated 16 goals in areas of reading, writing, math, speech and language, OT, behavior, and social/emotional skills. None of these corresponded to any of the 18 student goals from the last three pages of the FAA.

90. The IEP stated that the method of reporting progress toward goals would be through the use of annual goal sheets, report cards, parent conferences, and IEP meetings, as needed, each semester. It also stated that progress reports would be mailed at the end of each semester.

91. The May 21, 2010, draft IEP document listed Student's eligibility categories as ED and autistic like behavior.

92. In pertinent part, the team at the May 21, 2010, meeting discussed the psycho-educational assessment and the changing of the primary eligibility category from ED to autistic like behavior. Speech and language pathologist Cheryl Angel (Angel) confirmed Student's eligibility as speech/language impaired. The occupational therapist discussed reducing Student's services from the previous level of 45 minutes per week. There was extensive conversation regarding Student's PLOPS and goals.

93. The team at the May 21, 2010, meeting discussed potential placements for Student. First they discussed various options including hospital settings, residential placement, and nonpublic schools, as well as County and SELPA-run programs for students with ED and autism.

94. This was the first time District initiated a discussion about the appropriateness of removing Student from the mainstream setting. District's counsel attended the meeting and discussed the law of least restrictive environment, and the factors that were relevant in determining whether placement in the mainstream setting was appropriate. The team then reviewed a written report that had been prepared by general education Excel teacher Casian, who did not attend the meeting. The report expressed the opinion that Student fixated on other students, one female in particular; echoed the behavior of others; needed to be prompted to start work; did not finish assignments; and wrote illegibly. Casian's report expressed the opinion that Student would benefit from a controlled therapeutic environment, with intense instruction. Casian further opined in her report that in the mainstream setting, Student would become fixated and distracted.

95. Papez discussed Student's overall levels, and asked whether he had peaked, and whether the team must look at functional opportunities for Student to be successful in the real world. Anderson stated that Student had developmental delays, and that functional living skills needed to be a focus, and asked whether or not he was gaining meaningful interaction in his current setting. District's counsel agreed with Papez' and Anderson's opinions, stating that Student had not received meaningful educational benefit from, and therefore did not qualify for, the mainstream setting. He, therefore, opined that the current placement was a disservice to Student.

96. Mother attended the meeting accompanied by Student's grandfather. They expressed their opinions that expectations for Student should be set higher; that Student should still benefit from and stay in regular education; that a NPS was not appropriate; and that Student should stay in public school with additional services to enable him to be successful.

97. Wood attended the IEP and discussed her FAA report. Student's goals from the last three pages of the report were specifically discussed as a "behavior plan."

98. The IEP contained a "special factors checklist" box asking whether Student's behavior impeded his learning or the learning of others, which had been checked "no."

99. The IEP meeting did not conclude on May 21, 2010. Although the offer of placement and services had not been finalized, as of May 21, 2010, it consisted of placement and services similar to Student's existing program per his then-current October 23, 2009, IEP. Specifically, it included a combined placement in a separate SDC for specialized academic instruction for part of the day, and mainstreaming in the regular general education class with special education supports for the remainder, with related services that included, in pertinent part, 1:1 aide support by a District aide with ten hours monthly supervision services by CIBA. The IEP team agreed to reconvene on June 8, 2010.

June 4, 2010, Incident

100. Between the May and June IEP meetings, on June 4, 2010, Kubacki and Papez filed incident reports documenting an incident in which Student had a dispute over money with another student. Malady intervened. Student became extremely agitated, and Kubacki could not de-escalate him. Student yelled obscenities. School security guards arrived after which Mother was called.

101. At hearing, Kubacki testified that during this incident Student was physically out of control, throwing chairs, and could not be calmed, reinforced or redirected. The CIBA May 2010 FAA was not modified as a result of this incident.

June 8, 2010, IEP

102. The May 21, 2010, IEP team meeting continued on June 8, 2010.

103. Student was again described as having no significant needs in the area of daily living skills in the school environment. The IEP form had a "special factors" checklist on which the team again answered in the negative the question of whether Student's functional performance indicated needs in that area.

104. The June 8, 2010, IEP contained a statement of Student's present levels of academic achievement and functional performance, including the manner in which Student's disability affected his involvement and progress in the general education curriculum. Specifically, the statement indicated that due to Student's diagnosis of autism, as well as Speech Language Impairment, Student needed additional support in order to be successful in all of his classes. The statement also indicated that Student needed small group instruction, extended time on all of his assignments, and a modified curriculum. Additionally, Student needed the support of a 1:1 aide to ensure appropriate socialization with his peers.

105. The 16 goals from the May meeting were expanded into 20 goals, in the same areas: reading, writing, math, speech and language, OT, behavior, and social/emotional skills. The four new goals were in the counseling/social-emotional area of need and related to compliance with adult directives; expressing feelings and using coping strategies; playground activities; and lying. None of the goals corresponded to any of the 18 student goals from the last three pages of the FAA.

106. The June 8, 2010, IEP, stated that reporting progress on goals would be reported through the use of annual goal sheets, report cards, parent conferences, and IEP meetings, each trimester. The IEP stated that regular school progress reports would be mailed at the end of each semester rather than each trimester, but that IEP goal progress reports would be mailed at the end of each trimester.

107. Student's eligibility categories were changed between the May and June draft IEP documents, and were listed on the June 8, 2010, document as autistic like

behavior and Speech Language Impairment. The June 8, 2010, document was the first time Speech Language Impairment appeared on any of Student's IEP's as one of his eligibility categories.

108. The placement discussion that had been initiated on May 21, 2010, continued on June 8, 2010. Anderson continued to opine that Student's levels of cognitive functioning, and his behaviors, made mainstreaming for him inappropriate. Mother disagreed. The possible placements Anderson mentioned included one nonpublic school and the District SDC classroom at Hook Middle School (Hook) for students with mild cognitive delays. Anderson also mentioned at this meeting for the first time the likely availability ("about 95 percent sure") of the new program for students with autism that she had asked Inzunza to create, and that was contemplated to be operating by the start of the 2010-2011 school year. The team continued the discussion of the meaning of "least restrictive environment," with Anderson, Papez, and District counsel all questioning whether Student was accessing the general education curriculum in any way, or making any meaningful academic or social benefit. Finally, Anderson opined that Student would require support for the duration of his life in employment and daily living, and that a general education setting for academics would not benefit him in his future as an adult; and that he would be best served by focusing on giving him the right support so that he can function to his best ability in the future.

109. The District's ultimate offer of placement and services continued to be similar to that made in Student's October 23, 2009, IEP: a combined placement in a SDC for specialized academic instruction for part of the day, and mainstreaming in the regular general education class with special education supports for the remainder. Specifically, Student was to be placed into a SDC four periods a day for English, Math, Social Studies, and Reading. The remainder of the day was to be in a collaboration model general education setting, with a general education teacher and a special

education teacher providing push-in RSP support, for two periods daily for Science and an elective. Student was also offered general education for physical education. Pursuant to this offer, Student was to be mainstreamed 44 percent of his day. District offered Student the following related services: OT once a week for 45 minutes to be provided by a NPA; speech and language therapy once a week for 30 minutes to be provided by a District speech and language pathologist; and counseling. The setting for this offer was to be Hook.

110. For the first time, this IEP offered ESY for summer 2010, including ten hours of monthly supervision services by CIBA.

111. With regard to supplementary aids and services to be offered, the IEP stated that "Modification of curriculum, instruction, time management, and educational setting will all be needed to ensure that [Student] is successful. [Student] needs to work with a 1:1 aide to keep him on task. All work will be modified to meet [Student's] needs. Due to short-term memory and visual processing difficulties, work to be copied from the board will be presented to [Student] to work on to ensure that [Student] receives and comprehends the material."

112. In regard to behavioral services, CIBA recommended full-time NPA aide support, as follows: two aides, on different days of the week, one for Monday, Wednesday and Friday, and the other for Tuesday and Thursday, as a temporary measure for 60 days, while Malady received his training required by the SA. CIBA also recommended ten hours monthly supervision services by CIBA. The notes indicated that the team agreed to make that offer.

113. The answers in the "special factors checklist" box asking whether Student's behavior impeded his learning or the learning of others, which had been checked "no," in the May IEP, was now changed to "yes." Two additional boxes were checked "yes," one asking whether behavioral goals and objectives had been included, and the other

asking whether a behavior support plan had been written. Significantly, someone had stricken out the word "support" and replaced it with "intervention," thus clearly intending to indicate that a behavior intervention plan (BIP) was in place.

114. At hearing, Papez and Wood both opined that even if not specifically so stated, the team intended to offer the goals/behavior plan portion of the FAA as part of the offer of placement and services made in the June 8, 2010, IEP.

Due Process Complaint in OAH Case No. 2011060578

115. At the conclusion of the June 8, 2010, IEP meeting, Mother served District with a copy of a due process complaint in OAH Case No. 2010060578, which she then formally filed on June 15, 2010.

Mailing of May and June, 2010, IEP's

116. District did not provide Mother with a copy of the IEP documents from the May 21, 2010, or the June 8, 2010, IEP's until June 23, 2010, on which date Anderson mailed both documents under a single cover letter.

Partial Consent to June 8, 2010, IEP

117. By a document that purported to be dated July 1, 2010, but which District did not receive until July 29, 2010, Mother signed the June 8, 2010, IEP, indicating partial consent. She attached an explanatory letter. The letter disagreed with the proposed placement at Hook and all the other placement options that had been discussed. It also disagreed with the temporary 60-day CIBA NPA offer, stating that the CIBA aide should be permanent. It also disagreed with District's position regarding mainstreaming of Student. At most, after reviewing the exceptions, the letter could be construed to agree to PLOPS, goals and ESY.

118. District understood that Mother was attempting to obtain a permanent CIBA NPA full-time aide, rather than the temporary service that had been offered, and that she wanted continuing placement at LMS. District did not agree to these requests. Rather, District implemented what it understood to be “stay put” during the pendency of OAH Case No. 2010060578. This consisted, in pertinent part, of the placement and services that had already been provided pursuant to the October 23, 2009, IEP, as supplemented by the SA and the resulting April 26, 2010, IEP. Therefore, during the following 2010-2011 school year, Student remained at LMS. Both parties understood, however, that Mother’s partial consent was effective with regard to the offer of ESY for summer school 2010.

Hearing Testimony Regarding Student’s 2009-2010, Seventh Grade Year

119. At hearing, Dawson testified that during the time he served Student in the 2009-2010 school year, concluding in April 2010, Student’s behavior was good for the beginning of the school year but escalated in the second part of the year, when he was more verbal and physical with other students. When Student had conflicts, Dawson did not utilize any behavior plan document, although he did use strategies to de-escalate Student. Student’s behavior problems during 2009-2010 were not during class periods. During class periods, Student was intent on trying to learn.

120. At hearing, Malady testified that during the portion of the seventh grade school year that he served as Student’s aide, beginning in April 2010, Student wanted to trade electronics around campus. However, in first period Excel class, he would settle down. Transitions between classes and after breaks were challenging, as Student had a tendency to “bolt” out the door. In seventh grade, Student’s greatest area of need was in social interactions. Sometimes Student was rude and did not approach people in the right way.

121. Kubacki and Quintero provided push-in RSP support to Casian's general education Excel classroom throughout the 2009-2010 school year. As department chair, Kubacki also provided other support to Student and his teachers. He observed Student's classes, and worked with Student and his aide. Kubacki observed Student wanting to participate in class, but not completely following along; however, overall, Student did well for a student with autism. Student performed academically at the second grade level. He attempted to take notes and tried to do the work. He raised his hand. He asked questions, which were sometimes, but not always, pertinent. For example, he would raise his hand, but then talk off-topic about games he liked to play. Kubacki felt Student performed better in Quintero's SDC than in Casian's general education classes. Kubacki believed Student's thinking was concrete and not inferential, thus he could not follow the seventh grade curriculum using figurative language, poetry, abstract concepts, or idioms. For example, Student would not be able to understand a phrase like "raining cats and dogs." In math class, he would need to see a picture of two objects and another two objects in order to add two plus two. Kubacki opined that Student received some educational benefit from general education during seventh grade in the form of taking notes and being in a classroom, but the benefit was negligible. In early seventh grade, Student obtained social benefits from general education, but this deteriorated over the course of the year.

122. Kubacki was the person who was called in for discipline issues. Kubacki explained that during seventh grade, Student caused very large disruptions from acting out, yelling, and knocking items off his desk. These incidents occurred approximately 20 times. Student had to be removed from class by Kubacki or the aide, on approximately eight or ten occasions during the second half of seventh grade. Kubacki confirmed Dawson's testimony that Student's behavior at the start of the year was compliant, but changed as the year progressed.

123. District protocol when behavior incidents occurred was to attend to safety first, investigate, and then file incident reports. All students and staff involved filed such reports, after which District administrators took whatever action they deemed appropriate. During seventh grade, Kubacki filed approximately 20 incident reports regarding disruptions by Student that Kubacki had to address. Except as specifically described herein, however, no such documents filed by Kubacki were presented as evidence at hearing.

124. Per Kubacki, Student's social functioning also deteriorated over the course of the year. At the beginning of the year, Student functioned socially at a normal level for his seventh grade SDC classes, which was equivalent to a typically developing third or fourth grader. Students at that level were generally compliant, but required cuing and redirection, and were easily distracted. By comparison, a typical seventh grader would be expected to arrive in the classroom, sit down, do work, and attend to task without assistance. Student's socialization skills deteriorated through the course of the year, down to the first or second grade level. He had an egocentric world view, which caused tensions between him and other students that sometimes escalated into conflicts. Student talked to others who did not want to interact, did not take turns talking, stole, lied, and used negative language, insults, and curse words.

125. District physical education teacher Lucinda Day (Day), taught Student during the 2009-2010 school year. She modified the curriculum for Student by giving him extra time to run a mile, for example. Student exhibited problematic behaviors in Day's class. He had trouble following directions. He picked fights with other students. Day utilized the assistance of Student's 1:1 aide. Day and Student's aide would intervene by separating him from other students, and explaining to him what behaviors had been inappropriate. Day also, on occasion, called Papez for assistance. Day was familiar with the UHS BSP. Papez had a copy of it in her office, and the two of them would look to it

for guidance. Day was not familiar with any CIBA documents. CIBA employees came out to her class once to observe Student.

126. District special education teacher Quintero taught Student's reading SDC during the 2009-2010 school year. Quintero was a credentialed special education teacher with a clear credential, and a Master's degree in education. She had not been trained in behavior intervention, but had received some training in BSP's, and in data interpretation. Her seventh grade SDC reading class was for lower-skilled readers, similar to a class for English learners. She modified Student's curriculum by, for example, reading questions to him and giving him work that was tailored to the level at which he was testing. She did not have a written plan for the modifications she provided, but she did give him individualized instruction tailored to his level. Student's behavior during seventh grade, in Quintero's opinion, was good. Quintero was familiar with the UHS BSP; she had a copy and implemented it. CIBA personnel came to her class once or twice during the last three months of the 2009-2010 school year. They informed her that they had a new BSP and were going to come in and help Student. Quintero was not familiar with any CIBA documents.

ESY 2010

127. Student attended ESY during the six-week summer program during June and July 2010. Jeremy Cornell was Student's teacher. He was not aware of the UHS BSP, or the FAA, and had no interaction with CIBA during ESY 2010. However, Student exhibited no behavior problems in his class. Student did well and was very quiet in class.

128. For ESY 2010, Malady was not Student's 1:1 aide; rather, District employee Duewing Hardrick (Hardrick) served as Student's aide during ESY 2010. Hardrick had taken classes in autism, and some classes in behavior interventions, and worked with students with autism for eight years. He was not aware of the UHS BSP, or the FAA. However, Student exhibited no behavior problems while being served by Hardrick.

129. Hardrick completed a log entry every day recounting Student's assignments and behaviors. Cornell also made entries.

130. Hardrick interacted with CIBA during the summer. Specifically, Wood consulted with him, and directed him to implement three goals. Hardrick did, in fact, implement the goals, and rewarded Student at the end of each week when he had met his goals. Hardrick implemented a token economy using computer game cards as rewards. CIBA did not formally train Hardrick, but did consult with him about how to serve Student.

131. CIBA's first bill for supervision services indicated that no hours were expended in July, 2010. At hearing, Wood could not explain this, but confirmed that all ten monthly supervision hours had in fact been provided from April 2010 onward.

132. CIBA's first written notes of its supervision services were dated June 25, 2010, and concerned a conversation Wood had with Hardrick. Wood also made entries in the log book.

133. Wood observed Student on June 28, 2010, from 9:40 a.m.-12:00 p.m. Her supervision notes referenced recommendations Wood made on the first visit on June 25, 2010. These recommendations concerned a "self-management system" which consisted of a sheet with questions for Student to answer "yes" or "no." The questions included: "When I go up to people I will say 'hi'; I will tell the truth when someone asks me something," and others. Student was to sign the bottom of the "contract" which was to say "I [Student] will follow my contract in order to earn something at home, if I do not follow my contract I will not earn anything for that day." The sheets also were to contain some information for Student to help identify people who were "friends vs. not my friends."

134. Hardrick's logs for the next several days indicated that Student had completed his contracts.

135. Wood observed Student and Hardrick on July 14, 2010, and made an entry in the log book stating that she had made a modification to the contract.

136. Wood's supervision notes dated August 6, 2010, concerned the last week of summer school in July 2010, and reflected that Student had been using the self management chart, also referred to as a "checklist." The notes stated that, in regard to the program "friends" vs. "non friends," Student mastered sorting, so the aide had begun to add mastered items to the management list in order to transfer skills. None of these strategies had been mentioned or defined in the FAA.

137. The August 6, 2010, notes reflected a plan to transition the self management list into the 2010-2011 school year, in order to assist Student in managing his own behaviors, with the goal of teaching Student to rate himself, in order to build self-awareness concerning specific behaviors.

2010-2011 SCHOOL YEAR

Opening of "Perspectives" Autism Program

138. District's new autism program, which Anderson had asked school psychologist Inzunza to develop in the Spring of 2010, opened in the Fall of 2010. It was housed at the Silverado Early College Campus (ECC), a new campus next to Silverado High School. ECC housed a number of different programs, including general education classes for District high school students who were simultaneously seeking AA degrees and/or were college bound. ECC also housed self-contained SDC classes for severely handicapped students; a class for students with emotional difficulties who were transitioning back into District schools from nonpublic placements; and County programs for severely disabled students.

139. The Perspectives program consisted of a highly structured day, with different workstations through which the students rotated. The beginning of the day

was devoted to sensory exploration and circle-time. The end of the day was devoted to cleaning-up and preparing for the next day, including vacuuming and washing dishes, cleaning tables and blackboards, which was known as the “domestics” component. The domestics component also taught cooking skills, for which purpose the program purchased a stove and refrigerator. Other than domestics, the program components included functional academics, community and leisure activities, language and communication, and hygiene. In regard to hygiene, all the students in Perspectives were toilet-trained, but some required prompting in order to ensure cleanliness. With regard to functional academics, the curriculum was an alternative curriculum for moderate to severely disabled students. It was not based on grade level standards for mild to moderate students, for which the cognitive profile of the Perspectives students was too low. Academics could be individualized for particular students, but only within the general profile and intent of the target population. There could be some balancing of higher cognitive abilities with more severe autistic-like characteristics, such that the program might accommodate, as exceptions, students with higher cognition but more severe autistic-like behaviors.

140. The program had a sensory station with various objects for sensory exploration, built-in sensory breaks, and a “sensory diet.” It had lighting and sound systems geared towards the special sensitivities of students on the autism spectrum.

141. At hearing, Inzunza explained that, in order for a student to be a candidate for Perspectives, the student’s assessments and profile should generally indicate the following: a developmental range of a 5 year old up to a 10 year old; an academic equivalence of kindergarten to third grade level, topping out at third grade level, and, therefore, learning money math rather than academic math. The students in Perspectives would not be expected to be able to read for comprehension. For adaptive skills, Inzunza testified that he would expect Perspectives students to fall within the

significantly/extremely low, or very deficient range on the Vineland-II, which measured adaptive behavior. Cognitively, students would be mildly intellectually disabled up through the lower borderline range, again with attention paid to the balance of their cognition with their behaviors.

August 2010

142. The 2010-2011 school year began the week starting Monday, August 23, 2010. Student's District aide service transitioned back to Malady from Hardrick. Student remained at LMS.

143. Fischer was a Program Supervisor with CIBA. Her duties were to implement programs for individual students, and to analyze behavior data. She had a Bachelor's degree in Sociology and was working towards her Masters' degree. She was appointed as the CIBA supervisor on Student's case during the 2010-2011 school year. From then forward, she was the CIBA individual most responsible for training and supervising Malady.

144. Fischer observed Student and Malady on the second day of school on August 24, 2010, from 11:45 a.m.-2:30 p.m., and noted no concerns. Student raised his hand appropriately in class during the observation, and complied with teacher requests.

145. On or around August 25, 2010, Student called Mother and reported that Malady was not helping Student in class, was being mean, and was touching Student. An IEP meeting occurred that same day to discuss the concerns. Student, Mother, Mother's husband, Student's grandfather, principal Greg Johnson, Papez, Malady, Quintero, and Kubacki attended the IEP. CIBA did not attend. Student accused Malady of not helping him in class, and of petting his arm. Student also accused Malady of calling him names. Malady stated that in Quintero's class, Student had refused to correct his class work when asked to do so, and then became agitated when he was not permitted to participate in the other eighth grade activities. Student cursed at Malady, threatened

to call Mother, and then went to the office to do so. Thereafter, Malady and Student proceeded to the next period where Student also refused to do his work, and continued to curse at Malady.

146. The team questioned Student closely about his allegations. Stepfather indicated that perhaps the allegations were fabricated. The team discussed cursing, name-calling, treating others with respect, and how to talk when upset. Mother suggested that Student be permitted to take a time-out from class when necessary, and Kubacki offered his office as a place to do so. The team agreed that Student should stay at school for the remainder of the day, and not go home early. The meeting ended with a discussion about honesty and respect. No recommendations or changes in placement or services were made as a result of this IEP team meeting. The CIBA FAA was not modified as a result of this incident.

September 2, 2010, CIBA Observation

147. Fischer observed Student and Malady from 11:30-3:00 p.m. on September 2, 2010. She presented Student with two "social scripts" concerning "people I don't like" and "having friends." Student read the scripts and put his self-management checklist in his backpack. Fischer gave 14 copies of the self-management checklist to Malady, and explained to him the procedure for Student to complete the checklists. Fischer noted no behavioral concerns. Fischer gave Student instruction in how to request that Malady give him more space. Malady appropriately prompted Student, and redirected him in class, and gave him appropriate space when Student interacted with peers, which he did appropriately. Student read aloud in class, copied from the board independently, raised his hand, and answered questions correctly.

148. At the conclusion of this observation, Fischer made recommendations to Malady. She spoke to him about possible reinforcers, discussed with him the FAA goals, gave him a copy of the FAA, gave him copies of social stories, and instructed him to

allow Student to take breaks from Malady for up to five minutes while still maintaining Student in view.

149. Despite having made these notes at the time, Fischer testified at hearing to being unfamiliar with the CIBA May 15, 2010 FAA, and did not recognize it as containing a behavior plan that she and Malady had been charged with implementing. In her understanding, there was no particular document that governed her services. Rather, she learned what she should work on from Wood, who gave her instructions, and identified target behaviors. Wood orally directed Fischer to set up a token economy system, and a behavior contract with appropriate replacement behaviors, which were identified by Wood. The target behaviors Wood orally identified for Fischer to address were name-calling; blurting out in class; running away and obscenities. Wood periodically added new target behaviors. For example, when Student bolted from class on one occasion, Wood added that behavior to the token economy system.

150. At hearing, Malady confirmed that he and Fischer implemented different strategies at different times as directed by Wood. At hearing, Malady testified that some of the techniques he used with Student were verbal praise, high fives, thumbs up, and encouragement.

September 29-30, 2010, Incident Report

151. On or around September 30, 2010, an IEP team meeting was held at parent request. When Mother arrived she informed school principal, Gregory Johnson, that she had called the police. When the police arrived, they determined that Mother was alleging that Malady had informed other students that Student was autistic. Student had filed an incident report dated the previous day, September 29, 2010, in which Student alleged that Malady had revealed Student's diagnosis of autism to another student, who then approached and confronted Student. Johnson decided to undertake an investigation of the allegation.

152. Thereafter, Johnson conducted an investigation during which he interviewed Malady, Student, and two other students. The investigation was credibly conducted and included an interview of Student himself. It revealed no evidence that Malady had disclosed any of Student's personal information. At most, Malady had been approached by other students with questions about Student, and he had told those students that he was not at liberty to discuss the issue. Johnson concluded that the allegation that Malady had revealed confidential information was unsubstantiated. No further action was taken, and the matter was dropped.

153. At hearing, Malady credibly confirmed what had occurred. Another student had asked Student "do you have autism," and Student had stated he did not want to talk about it. Thus, at hearing, Malady credibly confirmed what he told Johnson at the time, namely that he did not reveal Student's confidential information to anyone.

September 30, 2010, IEP Meeting: Status of Aide Training and CIBA Services

154. After Mother made the above allegation to Johnson, the IEP meeting ensued. In pertinent part, Malady and Fischer reported on their behavior interventions with Student, and on Malady's training.

155. Malady's CIBA office training was intermittent, having begun in April 2010 when he was assigned Student's case. Malady had completed portions of his CIBA training. Thus far, he had received instruction in the history and characteristics of autism, and research-based CIBA interventions.

156. Malady's CIBA "field training" had started and was ongoing. It consisted of instruction in the functions of behaviors, data collection techniques, forms of reinforcement, discreet trials, and prompting. Fischer had been training Malady and she reported on his training at the IEP. She had trained Malady in data collection techniques, and ensured that he implemented the behavior plan, as she understood it. She

instructed Malady to train Student to use replacement behaviors such as raising his hand instead of blurting out in class.

157. Regarding CESA training, per District's letter that it had sent to Mother on April 29, 2010, shortly after the SA, CESA modules began with the first CESA training on September 23, 2010.

158. Fischer reported on the use of the "self monitoring checklist" given to Student to complete. Student was given reinforcements for completion of the checklist. Fischer also called the checklist a "behavior contract" and reported that Student had been given the document to take home. Fischer also reported on the use of "social scripts." Student and Malady reviewed the "social scripts" at the beginning of every day. The scripts had been provided to Mother.

December 2010-January 2011

DECEMBER 2010, EVENTS

159. Student's discipline records indicated that four incidents occurred in December 2010. The first, on December 1, 2010, involved the use of profanity. On December 3, 2010, Student, in the locker room, stated that another male student wanted to "suck his dick." On December 14, 2010, two incidents were reported. The first involved Student passing out prescription pills on the school bus. The second involved Student passing notes containing lewd language like, "do you like to fuck" and "do you like to suck dick" to female students. Student was suspended for three days, from December 14, 2010 through December 16, 2010, which was the last day of school before Winter break. District recommended suspension and expulsion, and scheduled a manifestation determination meeting for Monday January 3, 2011, the first day of school following Winter break. That meeting actually took place on January 5, 2011.

JANUARY 5, 2011, MANIFESTATION DETERMINATION

160. At the January 5, 2011, manifestation determination meeting, it was determined and agreed by the team, including Mother, that Student's conduct had been a manifestation of his disability. Anderson checked the box on the form indicating that the conduct had not been a result of any failures to implement Student's IEP's. Mother signed, although the notes indicated that she dissented on this point.

161. District offered no follow-up, other than a suggestion to hold an IEP meeting in the future to follow-up and consider service alternatives. Specifically, Anderson wanted to discuss placement options, like an autism program. Mother did not agree to the follow-up IEP suggestion or to that placement option. The notes of this IEP indicated that Wood attended, and stated that CIBA "ha[d] some new protocols that they are attempting to implement," but did not specify what those were. No further action was taken. There was no mention of a FAA or a behavior plan. The CIBA May 2010 FAA was not modified.

162. At hearing, Anderson testified that the FAA was the operative BSP at that time. Papez testified that no new assessment was recommended at this IEP because a BSP was already in place, and CIBA was trying new ways to implement it, and not enough time had yet passed to see if CIBA's implementation would be successful.

JANUARY 5, 2011, IEP

163. Immediately following the January 5, 2011, manifestation determination meeting, an IEP team meeting was held at parent request to discuss Student's ongoing program. Inzunza attended the meeting, and discussed the Perspectives program. Student's teachers and service providers gave reports. Eighth grade general education teacher, Kathleen Hanson, stated Student was not a behavior problem and was doing well, participated in class and appeared to enjoy and benefit from her class. She also stated that she sent weekly reports to Mother regarding Student's progress. Music

appreciation teacher, Kevin Norton (Norton), indicated that Student attended to class sessions and was doing well.

164. Wood reported on Malady's ongoing training, stating that he had almost completed his Level 1 field training. Wood discussed how she worked with Student, and explained that new incentives that were not implemented before break would be implemented starting with Student's new sessions. She did not specify what the new incentives were.

165. There was a continuation of the ongoing discussion that had been initiated by District in the May and June 2010, IEP's, specifically about the appropriateness of removing Student from the partial mainstream placement. Mother requested that Student's elective be changed to Cadet Corps, a military elective class, and that he be in general education classes for 100 percent of the school day. Mother also requested "educational therapy" for Student. Mother's requests were not directly granted or rejected but the team elected to put off the discussion for another time. Due to an upcoming semester break, it was agreed that the discussion would continue at a later IEP meeting.

JANUARY 18, 2011, PARENT REQUEST IEP

166. A further parent request IEP was held on January 18, 2011. Mother reiterated her request for 100% mainstreaming, and for Student's elective to be changed to Cadet Corps. Anderson stated that "District has offered an autism program," although it had not actually yet done so, and that that program would best suit Student's needs and, in her opinion, his need for functional skills training.

DISMISSAL OF OAH CASE NO. 2010060578

167. On January 28, 2011, OAH case No 2010060578 was dismissed.

February 2011

168. At another IEP meeting on February 16, 2011, Mother reiterated her request for Cadet Corps. District disagreed, because Cadet Corps took place during first period, when Student's eighth grade SDC reading class with Quintero also occurred. Mother requested that Student's schedule be re-worked to place him in a different reading class at a different time of the day. District did not agree, since the SDC Reading class first period was the one most appropriately suited to Student's needs.

169. Fischer observed Student and Malady on February 18, 2011. She noted no behavior concerns. Student was compliant and worked quietly. He took his materials out independently, ignored distractions, and completed his assignment along with the rest of the class. Her observation notes mentioned an updated behavior plan for Student's behaviors that occurred during school sessions, but did not set forth the specific updates. These notes appeared to be a summary of oral conversations between Wood and Fischer regarding new strategies to implement.

170. Fischer also observed Student and Malady on February 22, 2011, March 3, 2011, and March 10, 2011, and wrote observation notes. These notes contained suggestions, but no relevant issues or concerns.

Spring 2011

171. In March, 2011, District compromised, in part, with Mother's request that Student be allowed to attend Cadet Corps. In order to accomplish this without pulling Student out of his SDC reading class every day, District offered Cadet Corps twice weekly rather than five times weekly. At an IEP meeting on March 22, 2011, Mother consented. Student was, thereafter, until the end of the school year, removed from Quintero's eighth grade SDC reading class twice weekly to attend Cadet Corps. During this 2010-2011 school year, Quintero taught only one eighth grade SDC reading class a day. Mother requested that Student be allowed to attend another reading class that did

not conflict with Cadet Corps, such as Quintero's seventh grade SDC Reading class. District did not agree. Quintero felt that her seventh grade reading class would have been inappropriately low for Student's level. Since the class was interactive, modifying its curriculum for Student's level would have required adding a second teacher.

April 2011, Events

172. During Spring 2011, there were changes in Student's aide personnel. Malady was reassigned to another student at or around the beginning or end of Spring break, which was from Monday, March 26, 2011, until Friday April 1, 2011, with school resuming on Monday April 4, 2011. By this time, Malady had completed 20 hours of CIBA office training and had attended CESA modules regarding behavioral interventions, analysis, data collection, reinforcers and prompting, visual aides, and the functions of behaviors.

173. After Malady left, several different substitute aides were assigned to Student, with a result of a number of changes in personnel. For a brief time, Student was without an aide, so Quintero had to serve as his aide. Student was temporarily given substitute aides or SDC staff to supervise him.

174. On April 5, 2011, Student's aide was Dawson, the same aide who had served during the 2009-2010 school year prior to the SA, and whom Malady had replaced. Dawson did not utilize the CIBA FAA document and testified at hearing to not recognizing it.

175. On or around April 5 and 6, 2011, Student was referred for a five-day suspension. On April 5, 2011, the reason for the referral was that Student tried to hit another student. On April 6, 2011, the referral arose because Student's aide Dawson thought that Student had brought contraband to school. Dawson attempted to search Student's backpack, but Student would not comply. Dawson then called Mother, who came to school with her husband and father. The family and Dawson went into an

administrative office, and the family searched the backpack. During this incident Student became extremely agitated, and verbally violent, toward Dawson and toward the family, and shouted obscenities. School security was called. Two security guards arrived. Student was, at this point, in addition to shouting obscenities, hitting and punching cabinets and the walls with his fists and head, and attempting to hit at others. He also hit at one of the guards, and after several attempts to subdue Student, the two guards successfully restrained him. Police were called and they took charge of the situation.

176. On that day, Student was suspended from April 6, 2011 through April 11, 2011. Student was scheduled to return to school on April 12, 2011, on which date an IEP team meeting was scheduled.

177. However, sometime between April 6 and April 12, 2011, District recommended Student for expulsion, and prepared an "expulsion packet." According to that documentation, the five-day suspension was extended. Student's attendance record confirmed that he did not return to school on April 12, 2011, as the suspension was extended through and including April 18, 2011. This extension brought the total number of days Student had been suspended during the 2010-2011 school year up to 15.

178. Meanwhile, the IEP that had been scheduled for April 12, 2011, was cancelled by District. District's paperwork, including documents in the expulsion packet that bore multiple dates, was unclear regarding why and when the April 12, 2011, IEP meeting was cancelled, or if in fact any notice of cancellation was ever sent. Counselor, Jessica Martinez, appeared for the April 12, 2011, meeting as noticed, as she had received no notice of cancellation. Mother, Student's grandfather, and other persons were waiting for the meeting to begin, when Kubacki told them the meeting had been cancelled, and he apologized that they had not been notified.

179. Principal, Greg Johnson, met with Mother on April 12, 2011. Mother requested and received a homework packet. By letter dated April 12, 2011,

memorializing the meeting, District confirmed that it recommended expulsion. The letter informed Mother that she would get a packet of information about an upcoming expulsion hearing. The notice of that hearing, sent on April 12, 2011, scheduled it for April 18, 2011.

April 18, 2011, Manifestation Determination

180. When the April 18, 2011, meeting actually occurred, however, it was not styled as an expulsion hearing, but rather as a manifestation determination meeting. The team concluded that Student's conduct had been a manifestation of his disability.

181. The team recommended that Dawson be replaced with a NPA aide through CIBA. The team recommended a temporary CIBA aide at first, while CIBA located and hired personnel to serve as Student's permanent NPA aide throughout the balance of the school year. Mother misunderstood this, thinking that the offer was for a temporary NPA aide only. She, therefore, signed consent stating that she agreed with the NPA aide but disagreed with its being temporary only.

182. The team agreed that the FAA should be updated, and that the "behavior plan" should be reviewed and modified. The IEP notes did not indicate what, if any, document the team referred to as Student's "behavior plan." On that day, Mother signed an assessment plan that provided that CIBA would conduct a FAA.

183. During the discussion at this IEP meeting, Wood stated that CIBA had never seen the extent of negative behaviors from Student that resulted in his recent suspension. Others, including Kubacki, disagreed.

184. At hearing, Anderson testified that the team "reviewed his BSP and it was being implemented" but did not clarify what, if any document, was reviewed.

185. NPA aide services were implemented thereafter, for the balance of the 2010-2011 school year. CIBA initially appointed various persons to serve as Student's aide, but then assigned Michael Barrett (Barrett) at the end of April, 2011, and he served

as Student's aide for two months until the end of the school year in June 2011. At hearing, Barrett did not recognize the FAA and, like CIBA Director Lubbers, testified that the document contained components of a BSP, but did not appear to be an actual BSP.

May 30, 2011, CIBA Draft Assessment Document

186. On or around May 30, 2011, CIBA generated a draft of a report that was not a complete FAA. It was entitled "Behavior Assessment Report." It contained the beginning portions of a FAA that was then in progress. Wood was unable to complete a full FAA prior to May 30, 2011.

187. The report stated that CIBA had been requested to address the target behavior of "excessive dishonesty" which it defined as stealing electronics, selling, trading, and lastly, lying about these behaviors. CIBA requested additional time to complete the FAA with respect to this target behavior. The report stated that it contained a "hypothesized" behavior plan with respect to the target behavior of excessive dishonesty.

188. For the target behavior of dishonesty, the draft set forth three goals: to gain access to items by implementing an earning system in his home environment; to gain such access during the school day by engaging in appropriate peer interactions; and to purchase items independently from a store.

189. The report also stated that it contained a behavior support plan with respect to one other targeted behavior that had recently been observed, namely harassment of female peers.

190. For the target behavior of harassment, the draft set forth three goals: to complete a behavioral contract on a daily basis in which Student would rate his behavior in four out of five opportunities; to follow the behavioral contract on a daily basis in four out of five opportunities; to initiate up to 10 appropriate comments in order to gain the attention of a female, in four out of five opportunities.

191. The report also contained a “hypothesized” emergency behavior plan to address physical outbursts toward adults.

192. For the target behavior of physical outbursts, the draft set forth three goals: to vocalize Student’s needs to be left alone and given space 100% of the time; to request to go for a walk when precursor behaviors were observed, these being identified as tightening of the body, noncompliance or escalated tone; to request to type or write how Student feels when precursor behaviors occur in four out of five opportunities.

193. The draft also set forth intervention strategies for the target behaviors including proactive strategies like functional communication training and teaching alternative behaviors. Reactive strategies included differential reinforcement of alternative behaviors, and extinction.

194. CIBA did not complete the final version of the FAA until June 10, 2011.

June 2, 2011, IEP

195. Student’s annual IEP was scheduled for June 2, 2011. Shortly before the meeting, District held a staff meeting attended by Anderson, Papez, District counsel, SELPA’s Denise Edge, Quintero, Wood, eighth grade SDC Math and Science teacher, Stephenson, eighth grade general education Excel teacher, Kathleen Hanson (Hanson), eighth grade RSP teacher, Banae Kirby (Kirby), and speech pathologist, Angel.

196. These individuals all credibly testified at hearing that the District members of the IEP team did not have a predetermined placement or services in mind. The meeting was to focus on Student’s progress from the previous year’s goals. Some of those had been met, while others had not, despite significant progress. The team also met to review Student’s present levels of performance (PLOPS) and to write draft goals.

197. The staff generated a list of Student’s strengths at that meeting. It stated, in pertinent part, that Student had improved in his peer relations, was compliant, did not disrupt class, and was not aggressive. With regard to SDC reading and writing, it noted

that Student independently accessed computer reading programs, completed the program levels and advanced to higher levels, answered the comprehension questions correctly, and had improved his spelling to the fourth grade level. With regard to SDC math, the summary noted that he could multiply up to ten, could verbalize simple formulae but not apply them, could do computations but only with assistance, and became lost on multiple step problems. In SDC science class, he was an eager participant, and did well with assistance.

198. On June 2, 2011, the full IEP team met, including Mother, her attorney, and her father. Mother participated, gave input, and asked questions. The meeting lasted from 9:30 a.m. until 3:00 p.m.

199. A draft IEP document was generated from the meeting. Student's eligibility categories, which still had not been resolved from the change made at the June 2010, IEP, reflected that change, thus stating eligibility categories of autistic like behavior and Speech Language Impairment.

200. Student was described as having no needs in the area of daily living skills in the school environment, although he had some needs in the home environment. He came to school well-dressed and groomed and presented no difficulties in these areas while at school.

201. Student's strengths were summarized as follows: Eighth grade general education Excel teacher, Hanson, and RSP Reading teacher, Quintero, reported that Student had done well with spelling at approximately the third grade to fourth grade level. He had done well with rhyming and poetry. His writing had been difficult to read, but was improving. In math, he worked at the third or fourth grade level, knew basic calculations and could verbally master the times tables up to ten. He could verbalize many mathematical formulae although he had difficulty when these were on paper. Generally he appeared happy and was well-liked. His behavior had improved overall in

relation to male students. He worked well with his CIBA aides and had become more compliant to directions and cues. He enjoyed engaging and volunteering in science class, although he had difficulty with abstract concepts. In Hanson's general education Excel classes, he did well with peer support and assistance, participated in class discussions and lessons, enjoyed social studies and did well with visual aids. He had no interest in Norton's Music Appreciation class.

202. In the portion of the document addressing how Student's disability affected his involvement and progress in the general curriculum, the document stated: "Due to [Student's] eligibility under Autistic Like Behavior combined with identified speech delays, [Student] requires modifications of curriculum, setting and assignments. [Student] requires both modifications and accommodations [] in order to gain access to core curriculum. Additionally, [Student] requires access to a functional curriculum."

203. The IEP included 22 goals in the areas of reading, writing, math, speech and language, OT, behavior, and social/emotional skills. Many of the goals stated in this IEP were repeated from the May–June 2010 IEP draft IEP's, because, while Student had made progress, some goals had not been mastered. Overall, the team consensus was he was close to meeting many of his previous year's goals.

204. Student's goals numbered 1, 2, 5 and 16 through 17 addressed his needs in the area of OT. The OT PLOPs indicated that Student had proprioceptive (i.e. where the body is in space) and vestibular (i.e. balancing) processing issues. Student also had needs in the areas of fine motor skills and penmanship. PLOP 1 reflected that Student arrived at school in an over-stimulated state, requiring supervision and redirection to enter his first class in a calm alert state for learning. The PLOPS were accurate. The goals developed from them were measurable, and met Student's unique needs in this area. Goal 1 addressed Student's issues with transitioning into the school day by suggesting that Student demonstrate improved self-regulation skills following a sensory diet as

demonstrated by appropriate alert level transitioning into his first class in 4 out of 5 days, 80 percent of the time. The responsible persons identified to address and measure Student's OT goals were the special education teachers, aides, and the OT.

205. The notes reflected that Gonzales provided Student with individual OT services once a week for 45 minutes. Gonzales discussed Student's OT PLOPs and Goals at the IEP meeting, indicating that he had improved with transitions, and was compliant and receptive. She worked with him on fine motor precision in their OT sessions, i.e. copying, tracing and writing. He learned to work in space, and was improving his ability to utilize proprioceptive input; however, he had not shown correct proprioceptive responses and either over-or under-responded. Gonzalez reported that while he still became over-stimulated at times, he had shown great progress in that area.

206. Goals 3, 4, 6 through 10 and 18 were in the areas of speech and language/communication, behavior, and social/emotional skills. The PLOPs for these goals stated that Student struggled with social skills when interacting with peers, especially girls; struggled with following directions and required multiple prompts to return to task; exhibited impulsivity in his thoughts and actions; lied to avoid getting into trouble; and had difficulties with organization. The PLOPs were accurate. The goals developed from them were measurable, and met Student's unique needs in this area. The IEP identified the special education teachers, aides, speech and language pathologist, and counselor to implement and measure these goals. For Goals 4 (organizational planning), 9 (speech language/communication) and 10 (speech language/communication), the responsible persons identified also included general education teachers and/or Excel staff.

207. Goals 11 through 13 and 22 addressed Student's reading. The PLOPs for these goals stated that Student read well in the computer lab using reading programs, such as Reading Plus and Lexia; he read independently at the fourth grade level; had

needs in the areas of understanding inference, figurative language and context, but could understand verbal and visual concrete ideas in text. In his core curriculum general education classes, he read far below average and at a slow rate, and struggled with speed and intonation; had trouble decoding multisyllabic words or those with diphthongs. The PLOPs were accurate. The goals developed from them were measurable, and met Student's unique needs in this area. Goal 13 stated that Student would progress toward reading aloud materials that were at the fifth grade level. At hearing, Hanson credibly testified that in her opinion, this was a reasonable goal for Student, who read at fourth grade level. The responsible persons identified to address and measure goals 11 through 13 and 22 were the special education teachers and aides. For Goals 11 through 13, the responsible persons also included the general education teachers and Excel staff.

208. Goals PLOPS 14, 15 and 21 addressed Student's writing. The PLOPs for these goals stated that Student had difficulties with penmanship and with the sentence structure of complex sentences and paragraphs. He could write simple and compound sentences with good structure and punctuation, but not complex sentences. His spelling was at the fourth grade level. The PLOPs were accurate. The goals developed from them were measurable, and met Student's unique needs in this area. The IEP identified the responsible persons to address and measure goals 14, 15 and 21 as the special education teachers and aides. For goals 14 and 15, the responsible persons also included the general education teachers and Excel staff.

209. Student's needs in math were addressed in goals 19 and 20. The PLOPs for these goals accurately showed that Student performed at the 4.5 grade level. He could do problems with formulae, and multi-step problems, but required prompting. The goals developed from them were measurable, and met Student's unique needs in this area. The responsible persons identified to address and measure goals 19 and 20 were

the special education teachers and aides. For goal 19, the responsible persons also included the general education teachers and Excel staff.

210. In summary, the PLOPS were current and accurate. They reflected Student's continuing struggles with social skills. Student had difficulties with transitions that his OT suggested be addressed with a sensory diet. Student's academic performance in reading, writing, and math, was at approximately a fourth grade level. The goals were measurable, and met Student's unique needs. Student had progressed from the previous year, although many of his goals were continuing and had not been met. None of the PLOPS or goals addressed functional living skills like domestics, personal hygiene, or cleanliness.

211. The team proceeded to discuss potential placements. Because Student was in eighth grade, the next year would normally involve a transition to high school. Mother's view was that Student should be retained at LMS. Mother stated that she wanted Student to go on to college and wished him to work toward a high school diploma even if it meant keeping him in school past the age of 18. The team discussed the research on retention, which overall, did not support retention. The research indicated that better results were obtained with social promotion, with supports. Papez also expressed her opinion, that the research did not support retention, and concluded that Student had made progress in his behavior and social skills, and, as such, should move on to high school.

212. Anderson stated her view that, despite his progress, Student required access to a functional life skills curriculum including money management, safety, recreation and functional academics. She introduced Jeannette Gomez (Gomez) to the team. Gomez taught the Perspectives program at ECC.

213. Anderson suggested a hybrid schedule to address both Student's functional and general education academic needs, with the day starting and ending in

the Perspectives program and core subjects in between. The IEP notes indicated that the conversation at first revolved around core academic subjects in an Excel-type model, providing modified core curriculum based on state standards and leading to a high school graduation, as also reflected on the cover page of the IEP containing the offer of placement and related services. Specifically, the cover page stated that: 63 percent of the school day would be in the general education setting; Student would be on a diploma track and not a certificate of completion track; and three periods per day would be in the “regular class,” i.e. in the general education setting.

214. However, as the discussion progressed, District clarified its offer as involving no general education except for PE. Anderson explained that transitioning to regular classes was more difficult at the high school level. The IEP notes then set forth the final offer of placement and services, which consisted of placement at the Silverado High School campus, which was next door to the Early College Campus, at which location the Perspectives Autism program was housed, in a hybrid schedule with three mild-moderate SDC periods in core subjects (i.e. English, math, science, and/or social science) with a modified core curriculum according to state standards. Two periods a day, first period and last period, would be in the Perspectives program teaching an alternate curriculum.

215. The IEP offered related services as follows: speech and language once a week for 30 minutes; counseling three times per month for 30 minutes; full-time 1:1 NPA aide services plus ten hours a month supervision, both from CIBA; OT twice a month for 45 minutes; ESY for summer 2011 with related services in the same frequency and duration; and transportation.

216. The IEP team discussed modifications and accommodations. The discussion included alpha smart software, a portable keyboard; a digilock for PE; extra time for assignments, tests and quizzes; use of graphic organizers; preferential seating;

and prompting as necessary and consistent with goals. Other items were discussed but not clearly defined: OT tools, as needed and to be defined after trials in occupational therapy; hand writing/ prepared notes/ Cloze notes Student could be assessed on; dictation for modification for classroom instruction.

217. The OT offered was a reduction from what had previously been provided, which was once a week for 45 minutes, but it was higher than what Gonzales had recommended in 2010. Gonzales felt Student could make progress with a lower level of service. She opined that the offered level was appropriate and sufficient to enable him to receive educational benefit.

218. Regarding behavioral services, the IEP did not contain a behavior plan. CIBA had not yet completed the FAA, so Wood presented her incomplete FAA report at the IEP meeting. She stated that it was not complete; however, the document "including goals as part of the behavior assessment report will be implemented for now." The IEP notes reflected that CIBA would work on a new behavior plan, that the draft discussed would be offered once it was complete, and that the "current FAA and BIP" would remain in place until then. CIBA would present the new FAA and BIP at next IEP team meeting.

219. At hearing, Anderson testified that a primary eligibility category of autistic like behavior for Student was appropriate because "these designations would give us a solid methodological approach to address his unique needs," and because "you would approach a Student with autism differently." She felt that even though, at the time of the June 2, 2011 IEP, Student had made progress from the previous year and had either met or was close to meeting many of his previous year's goals, he did so with "tremendous" amounts of support, i.e. the 1:1 aide, modifications and accommodations in the classroom, his SDC classes and the RSP collaboration support he received in his general education classes. Anderson's focus was on independence. Anderson's impression was

that Student had not, during the 2009-2010 and 2010-2011 school years, been meaningfully participating in general education, but was “going through the motions.” She felt that Student had not really retained anything, that his participation in class had not been meaningful and had not given him the skills to be an independent adult. She felt that the general education teachers, most notably music teacher Norton, agreed with her assessment. To the extent other teachers, most notably Hanson, focused on Student’s progress, Anderson discounted their views. She testified that as educators, teachers had a tendency to focus on the positive, evidencing that she felt their views were overly optimistic.

220. At hearing, Anderson insisted that there was ample support for her views in the teachers’ impressions and in Student’s assessments. Although, she recalled Student as being very heavily assessed, she could cite to no assessment other than the May 2010 psycho-educational assessment. And, when pressed, the only teacher she could name whose views accorded with her own was Norton, the music appreciation teacher.

221. Anderson based her opinions very heavily on Students’ cognitive levels from the 2010 psycho-educational assessment, which she recalled as being in the second percentile, too low to attend college or even attain a regular high school diploma. She felt that the appropriate education would focus on a skill set to enable Student to become as functional and independent as possible when he left school.

222. Anderson testified that Student fell within the target population for the Perspectives program, due to his high degree of need, the requirement of a structured environment, and his need to learn functional skills for independent living. Although the IEP reflected no needs in the area of daily living skills in the school environment, at hearing Anderson opined that, although Student’s hygiene was okay, his organizational skills were weak. Anderson further opined that, because Student fell on the cusp

between mild-moderate and moderate-severely handicapped, the Perspectives program would not have been appropriate for Student for his entire school day. Thus, he was offered SDC for most of his school day, with a modified curriculum based on grade level standards. However, she did feel that what the Perspectives program offered in the way of a functional life skills curriculum would be appropriate for Student. For example, she felt he could benefit from learning about kitchen safety, cooking and domestic skills, money management, and safety in the general environment.

223. The offer of first and last periods of the day at the Perspectives program, according to Anderson, would be a very common intervention for students with behavioral difficulties. It would provide Student with a transitional environment into and out of his school day, and a place to check in and out.

224. Papez testified at hearing that in her opinion, based on her psycho-educational assessment from the previous year, and her observations of Student, that he was not receiving any educational benefit from the general education placements. In her opinion, Student required an SDC that would focus on multiple learning modalities and go at a slower pace, with significant modifications of the curriculum. In her opinion, it was appropriate for Student to begin and end his day in the Perspectives program to address transition, sensory needs, get prepared for the day, wrap up at the end of the day, and transition home.

225. At hearing, Kubacki testified that he agreed with the offer. He felt Student's behaviors needed to be addressed before education could be addressed. He felt it would be very unlikely for Student to attend college, although, vocational school was a possibility. Kubacki believed it was very unlikely Student would attain a regular high school diploma. Kubacki believed the Perspectives program for transitional periods at the beginning and end of the day, where Student's problems had often occurred, would be appropriate because it was designed for students with autism. Kubacki

believed Student had had the most success in his SDC classes and, therefore, agreed with the proposed SDC placement for the balance of the day. In Kubacki's opinion, this was the LRE.

226. Anderson provided Mother with a copy of the June 2, 2011, draft IEP, on June 20, 2011, by delivering it to Mother's home, where a family member signed a receipt for it.

Partial Consent to June 2, 2011, IEP

227. After the June 2, 2011, IEP, Mother filed for due process in the instant matter on July 29, 2011. At hearing, Mother presented a partial consent to the June 2, 2011, IEP, that she appeared to have signed on June 29, 2011, prior to her due process filing. The document stated that she partially consented, except for "placement, high school, restrictive environment for core subjects, and autism class." District witnesses credibly testified that they did not receive this document from Mother until the resolution session in this due process matter on August 8, 2011.

Student's Academic Performance During 2010-2011 School Year (Eighth Grade)

228. During the 2010-2011 eighth grade school year, Student had attended general education English Language Arts and World History classes with teacher Hanson, supported by RSP teacher Kirby; Music Appreciation with teacher Norton, supported by RSP teacher Stephenson; and Physical Education class with teacher Douglas Wakefield (Wakefield). From March 2011 onward, he also attended Cadet Corps twice a week, taught by Commandant of Cadets Kenneth Cook-Askins (Cook-Askins).

229. Student attended Quintero's reading SDC class, and Stephenson's Math and Science SDC classes.

230. Hanson testified credibly at hearing to Student's performance in her eighth grade general education English Language Arts and World History classes. She modified the curriculum for Student. For example, she read vocabulary words aloud and posted a corresponding picture and a definition for Student, as well as color-coded the words to indicate the parts of speech. With aide and RSP assistance, Student was able to complete his assignments. Student received grades ranging from C to C-, based on the modified curriculum. In Hanson's credible opinion, Student meaningfully participated in, and received educational benefit from Hanson's general education classes, albeit with support. He retained information, and was not simply prompted by his aide. At hearing, she disagreed with opinions that Student's participation was rote, not meaningful or a waste of time. For example, Student participated in a poetry project where Student wrote eight different types of poems and his work was compiled into a booklet with other students' poems. He also completed a history project called "boomtown" where he created a diorama representing an old west town.

231. In general education Music Appreciation class, teacher Norton modified the curriculum for Student. The modifications consisted of limiting the amount of content Student was responsible for, and modifying his tests. Student required curriculum modifications and direct assistance from his aide to negotiate the music appreciation curriculum. Even with modifications, Norton felt the eighth grade music concepts were too abstract for Student.

232. Stephenson, who provided RSP support there, observed that Student had difficulties in music appreciation class, as the class was very abstract and Student did not get much educational benefit. He retained almost none of the information, and could only remember that there were different genres of music.

233. Wakefield modified the PE curriculum for Student and, in conjunction with the aide, redirected Student when necessary. The modifications consisted in part of

breaking instructions down into smaller steps and reiterating the instructions numerous times. Student required some extra assistance from Wakefield, which took some of his attention away from other students, but not an excessive amount. With curriculum modifications and extra assistance from Wakefield and his aide, Student obtained educational benefit from his PE class.

234. Student attended Cadet Corps, the military education class, twice a week during first period from March 2011 until June 2011. Cadet Corps was an elective designed for attendance five days per week. Per the credible testimony at hearing of Cook-Askins, Student participated in and obtained educational benefit from attending Cadet Corps. Student received the grade of "B."

235. For Math and Science, Student attended a SDC class with teacher Stephenson. Stephenson held a Bachelors degree and was working on his Masters degree in special education. He held an internship credential, entitling him to teach all subjects to special education students, aged K-12, under supervision. During the relevant time period, he worked under the supervision of his professor, who reviewed his lesson plans, and Kubacki, who observed him daily. He also took professional development courses through SELPA.

236. Stephenson modified Student's curriculum by providing extra time on assignments, using repetition and foundational analysis, step-by-step analysis and instruction. Stephenson provided sequential teaching, individualized instruction, and individual attention to his students. For example in math class, Stephenson worked with Student on the order of operations in mathematical calculations. Stephenson also used a modified textbook which he compiled from math and science textbooks ranging from the fourth to seventh grade levels.

237. Student had trouble with material that was not concrete, or for which there were ambiguities or non-specific answers. Student took everything very literally, and had

trouble with figurative or abstract concepts. It was difficult for Student to retain information if it was not presented in multiple steps. Because the material was at a level he could understand, and because the other students were all at the same cognitive level, Student received educational benefit in Stephenson's SDC classes. Student behaved very well, raised his hand, volunteered and was a very active participant. Stephenson testified that in his view, the SDC was good for Student, due to its smaller class size and individual attention. Stephenson persuasively explained that the SDC would be the most appropriate placement for Student due to the success he showed there in eighth grade, the individual attention, the comparable cognitive levels of other students, and the additional time available to analyze and absorb the material. Stephenson felt that educational benefit from ninth grade general education would be minimal for Student, based on Stephenson's perception of Student during the 2010-2011 eighth grade, because ninth grade would be more difficult and would build on past learning foundations which Student did not have. Stephenson also believed it was unlikely Student would attain a regular high school diploma or attend college, due to his cognitive levels and his processing problems.

238. RSP teacher Kirby provided RSP support in Hanson's general education Excel classroom. She held a Bachelor's and a Masters degree in Special Education and was currently working on a mild-moderate clear credential, with a focus in autism. She had received training in behavior supports from SELPA. Kirby observed Student's low social skills. For example, Student would giggle and stare at girls, trade cards, and trade or bargain for other items belonging to other students, especially cell phones or electronics.

239. As collaborating RSP teacher in Hanson's classes, Kirby modified the curriculum by re-teaching it for better absorption, going slower, skipping the harder parts and adjusting the pacing to aid absorption. She also used visual aids and a graphic

organizer that, for example, showed different parts of speech in different colors. Kirby or Student's aide would always have backup notes, and would point out to Student what to read, and explain what had just been read. Student understood nouns and punctuation, but not verbs or adjectives or abstract, figurative language. He could spell and write simple sentences. He could also write poetry. But he had challenges in multi-step thinking, so directions needed to be broken down into step-by step-instruction. His challenges included staying on task and learning to think abstractly.

240. At hearing, Kirby opined that Student did not obtain more than minimal educational benefit from Hanson's Language Arts class, because he could not retain enough to master eighth grade standards even with a modified curriculum. He wanted to participate and raised his hand, but at times his participation was completely off-topic. In her opinion, he required more 1:1 instruction in a smaller group setting. Socially, Student made gains and friendships, but also alienated others by making false accusations. For example, he accused a peer of stealing a cell phone, and accused another peer of stealing a girlfriend. Kirby felt that Student had grown in the area of functional skills and organization.

241. At hearing, Kubacki opined that in Hanson's general education classroom, Student learned rules and procedures, but not the core curriculum, such that the educational benefit he obtained was minimal. In part, this was due to the eighth grade curriculum increasing in difficulty over seventh grade. Student, in Kubacki's opinion, obtained social benefit from friendships he developed, but over time these became strained.

242. Malady believed that Student had improved academically from seventh to eighth grade in that he was able to keep up with the coursework. Nonetheless, Malady believed the Excel classes were overwhelming for Student, and did not believe Student truly comprehended the content. Although Student was eager to participate and would

raise his hand and occasionally answer correctly, his answers usually had nothing to do with the topic discussed. By contrast, Malady believed Student received academic benefit in his SDC's. He was able to comprehend the material, as the teachers used reinforcing techniques such as rewards for completion of work, verbal praise, and other positive reinforcements. Student liked his SDC teachers and the workload was more tailored to his levels.

243. Per the CIBA aide Michael Barrett, who assisted student from April 2011 until June 2011, Student was most engaged in Stephenson's SDC science class. He was less engaged in general education English class, and needed more prompting there, but with the right prompting and assistance he could complete the work.

Student's Behaviors During 2010-2011 School Year (Eighth Grade)

244. Kubacki observed that Student's behavior, which had deteriorated during seventh grade, continued to deteriorate during eighth grade. Although Student was, for the most part, not disruptive, he did have occasional outbursts and assaultive episodes, notably the events in December 2010 and April 2011 that led to the manifestation determinations. Although not all documented, Kubacki testified that other incidents such as knocking over tables, and throwing books, occurred 15-25 times during the 2010-2011 school year.

245. According to the teachers, Student was not a behavior problem in Hanson's class or in Cadet Corps. Student's behavior was controlled and controllable in Music Appreciation and PE class, although he had tendencies to pass notes and use graphic language with the opposite sex.

246. Kirby, Kubacki, and Stephenson were aware of the CIBA May 2010 FAA, and considered this document as Student's behavior plan for the 2010-2011 school year. Hanson, Norton, Wakefield, and Cook-Askins were not familiar with the document, and

had no consultations from CIBA, except one visit Wakefield recalled in the middle of the year.

247. For the eighth grade year, Wood testified Student was progressing on the goals stated in May 2010 FAA. Wood's opinion was that, from when CIBA started their supervision services in April 2010 until June 2011, Student's behaviors continually improved with both the severity and frequency of his behaviors decreasing, and no new maladaptive behaviors appearing. In Wood's opinion, the events of June 4, 2010, the outbursts described by Kubacki, and those leading to the manifestation determination meetings on January 5, 2011, and April 18, 2011, were only the most severe spikes in a steadily improving arc in Student's behaviors.

248. Malady took data regarding Student's behavior, and wrote it in CIBA forms called data collection sheets, from September 2010 until March 2011. At hearing, Malady testified that Student had improved in some respects from seventh grade. He was more restrained in his movements and would walk rather than run, and no longer "bolted." He made a friend in Hanson's general education class, which helped him a great deal, as they shared interests in computers, cartoons and trading cards, and the friend motivated Student to do class work. However, Student's social difficulties persisted and he had confrontations, engaged in name-calling, and had inappropriate social interactions. Malady testified that he had instructions from Mother and Kubacki to take away electronic gadgets from Student. When he took away Student's electronic gadgets, Student would become agitated and would be inconsolable. Nevertheless, in general education Student was not a distraction as he was only occasionally disruptive. Specifically, on average of once per week, he would make an inappropriate comment, be vulgar to girls, name call, or use curse words.

249. From April 27, 2011 onward, CIBA employees provided Student's aide support. They were trained in autism and behavioral therapies. They completed daily

summaries for Mother's information. Per CIBA aide Michael Barrett, Student was compliant in general, with prompting, and was a good student. He had the most trouble with transitions.

SPEECH THERAPY SERVICES 2009-2011

250. Angel was Student's treating speech pathologist for the 2009-2010, 2010-2011 and 2011-2012 school years. She had been a District employee for the past three years. She had been a RSP teacher and had nineteen years experience in special education. She held a Bachelor's degree and a Master's degree in special education. At the time of hearing, she was working towards her Master's degree in Speech Pathology, a four-to-five year program. She held a mild-moderate special education teaching credential. She did not yet have her clear credential to provide speech and language therapy, which required a Master's degree in speech pathology. But credible documentation from the California state credentialing agency showed that she was on a "waiver" pursuant to which she was fully authorized to provide speech pathology services, despite not having yet obtained her clear credential. Pursuant to the waiver, holders of a Bachelor's degree, like Angel, could provide speech services under the supervision of a licensed speech pathologist, while progressing toward the advanced degree. Angel met all these criteria.

251. Angel also obtained professional development over and above the training her waiver required, by attending two SELPA workshops per year relating to speech and language services, collaboration and other topics.

252. Angel's credible testimony established her competence to perform her duties under supervision, by providing direct services, developing IEP goals, and performing assessments pursuant to the waiver.

253. Student's October 23, 2009, IEP, to which Mother consented, had provided for speech and language therapy once a week for 30 minutes by a District speech

language pathologist. Angel provided these services pursuant to that IEP for the 2009-2010 school year, and continued to do so throughout the 2010-2011 school year. From August 22, 2010, until June 8, 2011, Angel's therapy notes showed that she provided Student with weekly services for 30 minutes sessions, except for the first week of October 2010.

OT SERVICES 2009-2011

254. Student received 45 minutes per week of individual OT therapy from an NPA throughout the 2009-2010 and 2010-2011 school years. His therapist, Gonzales, also collaborated with his teachers and aides, modeling for them fine motor and visual motor intervention techniques. The billing documents for OT services were inaccurate and reflected under-billing in certain months and over-billing in others, but that paperwork did not accurately reflect Gonzales' ongoing regular services.

255. Gonzales attended the May 21, 2010, IEP meeting at which she recommended continuing with weekly OT for 45 minutes through the balance of the 2009-2010 school year, and then tapering down to 30 minutes every other week in the 2010-2011 school year. She based this recommendation upon her May 12, 2010, assessment, her ongoing familiarity with Student from being his service provider, and also upon the discussion at the team meeting. Gonzales recommended that Student's aide do fine motor skills exercises with Student daily, and that Gonzales train the aide to carry out OT on a daily basis. She felt the 1:1 aide could practice these skills with Student, thus reducing the necessity of her individual services. Mother disagreed, feeling that Malady did not have the necessary skills to carry out OT services. Gonzales' recommendation to decrease OT services was never adopted by the IEP team, which continued to offer 45 minutes of individual NPA OT per week.

PROGRESS REPORTING 2009-2011

256. District generated progress reports for the 2009-2010 and 2010-2011 school years. The reports were organized into quarterly reporting periods. The progress report for 2009-2010 stated it was reporting on an IEP dated November 30, 2009, which was an addendum to the October 23, 2009, IEP. However the goals it reported on were from the October 23, 2009, IEP itself. The 2009-2010 progress report was only completed for the quarterly period ending January 15, 2010.

257. The 2010-2011 progress report referred variously to the IEP addendum dated November 30, 2009, to the IEP dated June 8, 2010, and to a nonexistent IEP dated November 30, 2010. The goals it reported on were all taken from the June 8, 2010, IEP, but it stated only eight of the 20 goals stated in that IEP. It purported to report on six of those goals for the quarterly period ending January 15, 2010, which predated the June 8, 2010, IEP and was in any event before the 2010-2011 school year. It purported to report on two goals for the quarterly periods ending October 22, 2010, January 21, 2011, and March 25, 2011.

258. Student's progress was also communicated to Mother through grades, meetings, IEP's, school work sent home, and through the log book that was required by the SA.

259. At hearing, Student's service providers and teachers confirmed that they regularly completed the log book. Malady logged Student's daily activities every day he worked, reporting what Student did in each class, what Student worked on, and his assignments, as well as logged Student's behaviors. In the 2009-2010 seventh grade school year, PE teacher Lucinda Day made entries in the log book that detailed Student's assignments, and what he had done in class that day. Quintero wrote in the log book both during Student's seventh and eighth grade years. During the 2009-2010 school year, Quintero made entries in the log book on a daily basis. During both school years,

she not only reported on Student's progress in the log book, but also wrote weekly progress reports for Mother. OT, Gonzales, testified that she completed the log book on a weekly basis for the 2010-2011 eighth grade year. Student's aide during ESY 2010, Hardrick, also wrote into the log book. Stephenson monitored Student's progress on goals through work samples, tests, quizzes, and also through IEP meetings.

260. The log book itself was voluminous, comprising many hundreds of pages, with detailed entries in the handwritings of Dawson, Malady, teachers and service providers for dates in every month from January 2010 to April 2010, June and July 2010 and from September 2010 to August 2011. From April 27, 2011 onward, CIBA employees provided Student's aide support, and they completed daily summaries for Mother's information.

ESY 2011

261. The last day of the regular school year was June 10, 2011. Neither party presented any evidence concerning Student's program during ESY 2011, except CIBA's Michael Barrett's testimony that he did provide 1:1 aide service to Student at Silverado High School from June to July during ESY 2011. The first day of the regular 2011-2012 school year was August 22, 2011.

ROLE OF THE SELPA

262. SELPA was comprised of numerous local educational agencies within a large geographical area of San Bernardino County, all of whom signed assurances to abide by SELPA's governing document, the "local plan."

263. SELPA did not enforce school districts' compliance with the local plan, and each member district was responsible for its own compliance. SELPA's role was to provide resources, training, and information to its member school districts. It encouraged, but did not mandate, that its member districts access those resources.

Thus, District staff and teachers could, but were not required to, attend SELPA training programs. SELPA services were available to those member school districts who voluntarily sought them out. SELPA personnel met with districts every year to assess their needs and develop educational programs, at the districts' request.

264. SELPA maintained a Manual of Policies and Procedures (Manual), and a website on which the Manual was posted. Among other topics, the Manual addressed assessments, eligibility, the continuum of program options, positive behavioral interventions, suspension and expulsion. The Manual contained an appendix of forms that districts could use, including forms to use at IEP meetings and in connection with assessments, behavioral services and discipline. SELPA encouraged the use of its forms, which it developed to ensure compliance with the laws and regulations that governed those procedures and services. Districts were, however, free to choose their own methodologies in order to comply with the obligation to provide students a FAPE. The evidence established that District never used any of the various forms SELPA made available for behavioral intervention, or any other SELPA forms regarding Student.

265. SELPA employed various "program specialists" and "program managers" who focused on different topics of interest to districts, such as due process filings. Program specialists were required by SELPA, as a job qualification, to hold teaching credentials. Program managers, who supervised program specialists, had no such job qualification. During the relevant time period at issue here, Denise Edge was program manager for SELPA regarding due process filings. She did not hold a teaching credential. As program manager for due process, Edge started attending Student's IEP meetings starting with the April 6, 2010, IEP meeting, due to the SA settling OAH Case No. 2009120327. She continued attending IEP meetings thereafter, due both to the SA and then the filing of OAH Case No. 2010060578 in June, 2010. Student presented no

evidence that his educational program or services were affected by virtue of Edge's credentials, or the fact she attended his IEP's, or made recommendations there.

266. SELPA did not provide any direct services to students, other than certain fee-based physical therapy services for certain students, not at issue here. In addition, it provided "workability" and transition programs to students in smaller districts whose home districts did not have their own programs; however, District did have such programs and did not use SELPA's. SELPA, therefore, did not provide any such direct workability and transition services to District's students, although those services were listed in the Manual on the website. SELPA did not provide behavioral services to any students. SELPA did not modify curriculum for particular students; use or direct districts to use certain forms; refer students for assessments; provide students with assistance to access curriculum; or fund IEE's. SELPA never received any request from Student to fund any IEE's. SELPA did not implement IEP's or behavior plans, or assign SCIA's or case managers.

267. Desert Mountain SELPA Children's Center (DMSCC) was a provider of mental health services pursuant to IEP's. It provided Student with individual counseling, and was referenced in Student's IEP's as "SELPA," "SELPA counselor," "SELPA counseling," and the like. DSMCC was not in fact, part of SELPA. It was a separate legal entity organized under the umbrella of the County. It served as a contractor. Districts contracted directly with DSMCC to comply with their obligation to provide educationally necessary mental health services pursuant to IEP's. DSMCC used SELPA as an administrative agency. Numerous references in Student's IEP's to "SELPA" all relate to counseling provided by DMSCC. Student's provider of counseling services, Jessica Martinez, was employed by DSMCC.

268. As mentioned above, SELPA entered into master contracts for each school year with NPA's who provided services to individual students residing within districts

within SELPA. These master contracts created a tripartite contractual structure between SELPA, the NPA, and the district, authorizing districts to access services and NPA's to bill SELPA for them.

269. SELPA entered into master contracts with CIBA governing their services to Student here. It also entered into master contracts with Visiting Nurse's Association, the NPA that provided OT. The master contracts, and the ISA's, despite defining SELPA as a district, or as a local educational agency contracting for services, were clearly intended to memorialize SELPA's role as merely a third part administrator for purposes of negotiating billing rates and making payments.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

DEFINITION OF A FAPE

2. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a FAPE. (20 U.S.C. §1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (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(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting

from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

3. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit. (*Ibid.*)

5. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. An IEP is “a snapshot, not a retrospective.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. The decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd.(f)(1).) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child of the parents; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(2).); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

STUDENT'S ISSUES AGAINST DISTRICT⁵

ISSUE 1 (A): AIDE SUPPORT FROM MARCH 18-26, 2010.

7. Student contends that District denied him a FAPE by denying appropriate aide support from March 18, 2010 through March 26, 2010. District contends that it provided Student with a FAPE at all times.

8. Legal Conclusions 1-5 above are incorporated herein by reference.

⁵ The issues are analyzed by chronology or grouped by topic, and may therefore be addressed out of numerical order. District's issue against Student is discussed below.

9. When a student alleges a denial of FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," meaning that "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 481 F.3d 770, 780.) "Minor discrepancies between the services provided and the services called for by the IEP do not give rise to an IDEA violation." (*Ibid.*)

10. Here, District did not deny Student a FAPE by not providing Student aide services from March 18, 2010 through March 26, 2010. This time period fell just after the parties executed the SA on March 16, 2010, but prior to the April 6, 2010, IEP, that implemented the SA. During this time period, Student's program was governed by the October 23, 2009, IEP, and the UHS BSP, providing for 1:1 aide support to be provided by a District aide. Dawson, who had served as Student's aide during the 2009-2010 school year, was replaced by Malady at or around this time. The evidence at hearing did not establish precisely when Dawson was dismissed from his assignment and precisely when Malady had been hired, but did show Malady was assigned to Student's case by the time of the April 6, 2010, IEP. There was a gap between the two aides such that Student was without an aide for several days or one week. However, during this brief period, Student was never without the support of a staff member or teacher, as he was accompanied by various substitute aides and staff members. Student only lost one class period of instruction during this time, specifically one PE class, due to lack of aide coverage, and there were no behavioral incidents during this brief gap in 1:1 aide coverage.

11. This brief gap in 1:1 aide service, and the single absence from PE, did not constitute a denial of FAPE. Student failed to establish that, during this time, District failed to provide him with access to an education that was sufficient to confer some

educational benefit upon him. The gap in coverage was, at most, a minor discrepancy between the services provided and the services outlined in the October 23, 2009 IEP, and thus, did not give rise to an IDEA violation. (Factual Findings 1-50; Legal Conclusions 1-9.)

ISSUE 1 (B): READING AND RSP SUPPORT IN MARCH AND JUNE 2010

12. Student contends that District denied him a FAPE by denying adequate reading and RSP support in March and June 2010. District contends that it provided Student with a FAPE at all times.

13. Legal Conclusions 1-5 above are incorporated herein by reference.

14. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115 (2006)⁶; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

15. RSP programs provide: instruction and services for those students with IEP's who are assigned to regular classroom teachers for a majority of a schoolday; information and assistance to students and parents; consultation, resource information, and material for parents and staff members; coordination of special education services

⁶ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

with regular school programs; monitoring of student progress and review and revision of IEP's; emphasis at the secondary school level on academic achievement, career and vocational development, and preparation for adult life. RSP programs must be under the direction of a resource specialist who is a credentialed special education teacher, or who has a clinical services credential with a special class authorization. (Ed. Code, § 56362, subds. (a) & (b).)

16. Here, Student failed to establish by a preponderance of the evidence that District denied him a FAPE by denying him reading and RSP support in March 2010 and June 2010. March and June 2010 fell within the 2009-2010 school year, student's seventh grade. During this time period, Kubacki and Quintero provided push-in RSP support to Casian's general education English Language Arts and World History classes, where Student was mainstreamed. In this time period, at the April 6, 2010, IEP, Casian reported that he was a "great student." Student also attended Quintero's SDC seventh grade SDC reading class. In this time period, at the April 6, 2010, IEP, Quintero reported that he was doing well in SDC Reading, attaining a grade of C+, with no behavior problems.

17. Also at or around this time, while preparing the May 12, 2010, psycho-educational assessment, Ms. Papez summarized Student's then-current seventh grade performance at LMS, where he was maintaining a C average. Papez interviewed Quintero and Casian. Quintero reported that Student was reading at third grade level with good fluency; Casian reported that he was reading at seventh grade level with adequate fluency, and although he struggled with word recognition, he had good reading comprehension. He enjoyed the class, listened and seemed to understand the stories that were read aloud.

18. In short, Student was attaining educational benefit in both reading and general education with RSP support in March and June of 2010, and he failed to meet

his burden of demonstrating he was denied a FAPE on this ground. (Factual Findings 1-78, 119, 126; Legal Conclusions 1-5, 14, 15.)

ISSUES 4 (A) AND (B): ELIGIBILITY CATEGORIES IN MAY 21, 2010, IEP

19. Student contends that District committed a procedural violation that resulted in a denial of FAPE in the May 21, 2010, IEP, by removing his eligibility categories of ED and Speech Language Impairment from his IEP. District contends that it committed no procedural violation, and provided Student with a FAPE at all times.

20. Legal Conclusions 1-6 above are incorporated herein by reference.

21. To be eligible for special education and related services, students must be found eligible by the IEP team, after review of the results of assessments. (Ed. Code, § 56026, subds. (a), (b) & (d); Cal. Code Regs., tit. 5, § 3030.) The IEP team must find that the student's impairment falls within certain delineated categories, and that the degree of their impairment requires special education and related services. (Cal. Code Regs., tit. 5, § 3030.)

22. For the qualifying condition of autistic-like behavior, the student must exhibit any combination of behaviors like the following: (1) an inability to use oral language for appropriate communication; (2) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) an obsession to maintain sameness; (4) extreme preoccupation with objects or inappropriate use of objects or both; (5) extreme resistance to controls; (6) peculiar motoric mannerisms and motility patterns; (7) self-stimulating, ritualistic behavior. (Cal. Code Regs., tit. 5, § 3030, subd. (g).)

23. For the qualifying condition commonly known as "serious emotional disturbance," (hereafter ED) the student must, because of a serious emotional disturbance, exhibit one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance: (1) an

inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; (5) a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (i).)

24. For the qualifying condition commonly known as "speech language impairment," a student must be assessed as having a language or speech disorder which makes him or her eligible for special education and related services when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects his or her educational performance and cannot be corrected without special education and related services. In order to be eligible for special education and related services, difficulty in understanding or using spoken language shall be assessed by a language, speech, and hearing specialist who determines that such difficulty results from articulation disorders; abnormal voice; fluency difficulties; inappropriate or inadequate acquisition, comprehension, or expression of spoken language; or hearing loss. (Ed. Code, § 56333; Cal. Code Regs., tit. 5, § 3030, subd. (c).)

25. Here, contrary to Student's contentions, the changes in categories of which he complains did not appear in the May 21, 2010, IEP, but rather in the continuation of that meeting that occurred on June 8, 2010. The May 21, 2010, draft IEP document continued to list Student's eligibility categories as ED for the primary category and autistic like behavior as the secondary, as had the October 23, 2009, IEP.

26. Papez' May 12, 2010, psycho-educational assessment recommended removing ED as a qualifying condition, and changing the primary eligibility category from ED to autistic like behavior. The April 14, 2010, speech language assessment found Student eligible under the legal criteria for Speech Language Impaired. Thus, the team

at the May 21, 2010, meeting discussed these changes, which did not actually appear on the IEP document for the first time until the continuation IEP meeting on June 8, 2010.

27. In any event, District did not commit a procedural violation by virtue of any of these proposed changes. When a student is found eligible under any category, the analysis of whether he was denied a FAPE shifts to an examination of whether his IEP was tailored to meet his unique needs. "The IDEA does not concern itself with labels, but with whether a student is receiving a [FAPE]. A disabled child's [IEP] must be tailored to the unique needs of that particular child. . . . The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [a student's] disabilities." (*Heather v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055.) In other words, once a student is determined eligible, the category of eligibility becomes irrelevant to the analysis of whether he was denied a FAPE. Thus, the removal or addition of Student's eligibility categories in and of themselves did not constitute denials of a FAPE. (Factual Findings 1-114; Legal Conclusions 1-6, 21-24.)

ISSUE 4(C): MAY 21, 2010, IEP, DISCUSSION OF PLACEMENT AND RELATED SERVICES

28. Student contends that District committed a procedural violation by failing to discuss a continuum of placement and related services in the May 21, 2010, IEP, which resulted in a denial of FAPE. District contends that it provided Student with a FAPE at all times.

29. Legal Conclusions 1-6 above are incorporated herein by reference.

30. As stated above in Legal Conclusion 14, school districts must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist

programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

31. The parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings. (34 C.F.R. § 300.501(a) & (b); Ed. Code, §§ 56500.4, 56341, subd. (b), 56341.5, subds. (a) & (b).) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

32. Here, Student failed to establish by a preponderance of the evidence that District committed a procedural violation that resulted in a denial of FAPE. The purpose of the May 21, 2010, IEP meeting was to discuss placement and services for eighth grade in the 2010-2011 school year. The evidence showed that the team discussed various options on the continuum of placements including hospital settings, residential placement, and nonpublic schools, as well as County and SELPA-run programs for students with ED and autism. District initiated a discussion about the appropriateness of removing Student from his general education classes. Mother and Student's grandfather expressed their opinions that expectations for Student should be set higher; that

Student should still benefit from and stay in general education; that a NPS was not appropriate; and that Student should stay in public school with additional services to enable him to be successful. Although the team did not reach consensus, given the extensive discussions and input from Mother, there is no merit to the contention that the team failed to discuss the continuum of placement and related services at the May 21, 2010, IEP meeting, or that Student was denied a FAPE by virtue of the discussion. (Factual Findings 1-101; Legal Conclusions 1-6, 14, 30, 31.)

ISSUES 4(D) AND 2 (J): OT

33. Student contends that District denied him a FAPE in the May 21, 2010, IEP, by not providing an appropriate amount of OT. Student also contends that District denied him a FAPE by failing to provide an appropriate amount of OT from May 2010 until May 2011. District contends that it did not deny Student a FAPE. As discussed below, Student has not met his burden of proof on these issues. Appropriate levels of OT were offered in the May 21, 2010, IEP, and were provided for the entire period from May 2010 until May 2011.

34. Legal Conclusions 1-5 above are incorporated herein by reference.

35. "Related services" include OT. (34 C.F.R. § 300.34 (a); Ed. Code, § 56363.)

36. Here, despite Student's contention that District reduced Student's OT hours, resulting in the provision of inappropriate OT services for Student, the evidence was to the contrary. Specifically, Student's October 23, 2009, IEP, provided for OT by a NPA, once per week for 45 minutes, and Gonzales provided that level of services from that point forward. Although Gonzales prepared an OT assessment report on May 12, 2010, that recommended a reduction in service, from the preexisting level down to once a month, when Gonzales made that recommendation to the May 21, 2010, IEP team, her recommendation was never implemented or accepted by the IEP team. Specifically, a reduction of OT services was not reflected in the offers of placement and services

District made in the May 21, 2010, IEP, nor in the June 8, 2010, continuation IEP. At all times, the offers for OT services remained at 45 minutes weekly by a NPA. Gonzales' credible testimony established that was at or above the level required to constitute a FAPE, and Student failed to present credible evidence to the contrary. Student, therefore, failed to establish by a preponderance of the evidence that District failed to provide appropriate OT services in the May 21, 2010 IEP. (Factual Findings 1-20, 51-56, 87-118, 254-55; Legal Conclusions 1-5, 35.)

37. In addition, Mother failed to prove that District failed to provide appropriate OT services after the May 21, 2010 IEP. Mother did not consent to the May or June 2010, IEP's, but filed for due process in OAH Case No. 20110060578. During the pendency of that due process matter, District continued to implement the preexisting services, including OT, until that matter was withdrawn in January 2011. Thereafter, District provided the same level of services, as reflected in the discussion of OT at the June 2, 2011, IEP, where Gonzales reported that she provided weekly service of 45 minutes. Moreover, notwithstanding some inaccuracies in the billing statements, Gonzales credibly testified at hearing that she actually provided OT services at the 45 minutes per week level, on an ongoing basis throughout the 2009-2010 and 2010-2011 school years. Her credible testimony established that Student received OT at or above the level required to constitute a FAPE with regard to this related service. (Factual Findings 1-20, 51-56, 87-118, 254-55; Legal Conclusions 1-5, 35.)

ISSUES 4 (E) AND 6(C): PLACEMENT AND RSP IN MAY 21, 2010, IEP, AND INCLUSION SUPPORTS IN JUNE 8, 2010, IEP

38. Student contends that District denied him a FAPE in the May 21, 2010, IEP, by offering inappropriate placement and RSP services. Student further contends that District denied him a FAPE in the June 8, 2010, IEP, by failing to offer inclusion supports. District contends that it offered Student a FAPE at all times.

39. Legal Conclusions 1-5, 14, and 174-176 are incorporated herein by reference.

40. Here, Student failed to establish by a preponderance of the evidence that District denied him a FAPE by failing to offer appropriate placement and RSP services in the May 21, 2010, IEP, and inclusion supports in the June 8, 2010, IEP. As established above, the May 21, 2010, IEP meeting did not conclude until June 8, 2010, when District made an offer of placement and services for the 2010-2011 school year. With the exception of the specific courses he would take for the 2010-2011 school year, the offer was identical to Student's October 23, 2009 IEP: combined placement in a "separate" SDC for specialized academic instruction for part of the day, and mainstreaming in general education with special education supports for the remainder. Specifically, Student was to be placed into an SDC four periods a day for English, Math, Social Studies, and Reading. The remainder of the day was in a collaboration model general education setting, with a general education teacher and a special education teacher, providing push-in RSP support for two periods daily for Science and an elective. Student was also offered general education for physical education. Pursuant to this offer, Student was to be mainstreamed 44% of his day. The setting was to be Hook Middle School, and this was to be the only substantive difference from his LMS program. Inclusion supports were to include the RSP push-in support in the general education classes, 1:1 aide services and supervision, and modifications of curriculum, instruction, and time expectations.

41. This offer did not deny Student a FAPE. Student provided no evidence at hearing regarding Hook Middle School, or why it would be inappropriate. Otherwise, except for the particular subjects, the offer was identical in terms of placement, percentage of the time in mainstreaming, and RSP services as Student had received during the 2009-2010 school year pursuant to the October 23, 2009, IEP. As addressed

in detail below in Legal Conclusions 98-100 and 193, that combination of placement, RSP and inclusion was reasonably calculated to provide Student with educational benefit for 2010-2011 school year. Student did not meet his burden of proof on these issues. (Factual Findings 1-114, 119-126, 228-243; Legal Conclusions 14, 98-100, 174-176, 193.)

ISSUE 5: COPY OF MAY 21, 2010, IEP

42. Student contends that District committed a procedural violation that resulted in a denial of FAPE by failing to provide Parent with a copy of the May 21, 2010, IEP, until June 29, 2010. District contends that it did not deny Student a FAPE.

43. Legal Conclusions 1-6 above are incorporated herein by reference.

44. Parents are legally entitled to be provided with a copy of the IEP at no charge. (Ed. Code, § 566341.5, subd. (j); Cal. Code Regs., tit. 5, § 3040, subd. (b).) The IDEA or California law do not provide a time frame within which parents are entitled to receive copies of IEP's.

45. Here, Student failed to show that District took an unreasonable amount of time to provide him with a copy of the IEP. More importantly, Student presented no evidence that the short delay interfered with Mother's right to participate in IEP team decisions or resulted in any substantive denial of FAPE. The May 21, 2010, offer, finalized on June 8, 2010, was intended to govern Student's program for the following eighth grade 2010-2011 year, which would not commence until August 2010. Therefore, Mother received the documents in sufficient time to consent if she chose, or to take any other action with respect to the offers that she felt was appropriate, prior to their scheduled implementation. Student has thus established neither a procedural nor a substantive denial of FAPE, from the timing of receipt of these documents. (Factual Findings 87-116; Legal Conclusions 1-6, 44.)

ISSUE 6(A): DEVELOPMENT AND CONTENTS OF JUNE 8, 2010, IEP

46. Student contends that District committed a procedural violation that resulted in a denial of FAPE by failing to comply with State standards in developing, and improperly writing, the June 8, 2010, IEP. Specifically, Mother argues that there was insufficient detail in the description of modifications and accommodations offered, and that the IEP did not include frequency, duration, and start and end date for modifications and accommodations. District contends that it committed no procedural violations, and did not deny Student a FAPE.

47. Legal Conclusions 1-6 above are incorporated herein by reference.

48. When developing an IEP, the team must consider: the student's strengths; the parents' concerns; the results of assessments; the academic, developmental, and functional needs of the child; and in the case of a pupil whose behavior impedes his or her learning or that of others, must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (Ed. Code, § 56341.1.)

49. An IEP is a written statement that includes the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects the student's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).)

50. An IEP must also contain a statement of measurable annual goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general curriculum, and to meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320 (a)(2); Ed. Code, § 56345, subd. (a)(2).)

51. Further, the IEP must include a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports on the

progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. (20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320 (a)(3); Ed. Code, § 56345, subd. (a)(3).)

52. The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

53. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student to enable the student to advance toward attaining the annual goals, and to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

54. Only the information set forth in Title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

55. The June 8, 2010, complied substantially with all these procedural requirements. The team, evidenced by the discussions held at the IEP meeting, considered Student's strengths, Mother's concerns, assessments, and Student's academic, developmental, and functional needs. In addition, the team considered behavioral interventions and supports, and other strategies, to address Student's behavior. The IEP document included PLOPS, including the manner in which Student's disability affected his involvement and progress in the general education curriculum. It

stated 20 annual goals that addressed all of Student's identified areas of need, and stated how each was to be measured. It linked the PLOPS to the goals. It included a statement of the special education and related services to be provided, including: a projected start date for services; and, the anticipated frequency, location and duration of services. Although the IEP did not state a specific frequency, duration, location, start and end date for modifications or accommodations, it described those more generally by indicating that curriculum, instruction, and time expectations would all be modified, and that Student would be provided with a separate copy of work presented on the chalkboard. The document clearly indicated that the frequency, duration, location, start and end date for these modifications would be the entire school year and in all of Student's academic classrooms. Thus, Student has not established a violation of IEP procedural requirements or a denial of FAPE. (Factual Findings 87-114; Legal Conclusions 1-6, 48-54.)

ISSUES 9(A) (B) AND (C): IMPLEMENTATION OF JUNE 8, 2010, IEP OFFER REGARDING OT, SPEECH, AND NPA DURING ESY

56. Student contends that District denied him a FAPE by failing to implement the June 8, 2010, IEP with regard to OT and speech services from August 22, 2010 until June 8, 2011. Student further contends that District denied him a FAPE by failing to implement the June 8, 2010, IEP, with regard to NPA services during ESY 2010. District contends it did not deny Student a FAPE.

57. Legal Conclusions 1-5 above are incorporated herein by reference.

58. In general, a parent may consent to some IEP services, but not others. Education Code section 56346, subdivision (e), provides: "If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program,

those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.”

59. Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); 56505, subd. (d).) This is referred to as “stay put.” For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

60. Here, as an initial matter, the evidence shows that except for ESY, Mother did not consent to the offer made in the June 8, 2010, IEP, but rather filed for due process, and then wrote a partial consent letter which could not be construed as agreeing to the implementation of the related services offered in the June 8, 2010, IEP. Thus Student’s contention that District denied Student a FAPE by failing to implement the services offered in the June 8, 2010, IEP, fails because the services were never consented to.

61. Furthermore, Student’s contentions regarding OT and speech services are factually without merit. After Mother served the complaint on June 8, 2010, District implemented the preexisting October 23, 2009, IEP, in accordance with the law of “stay put.” Thus, during the period at issue, August 2010 through June 2011, District implemented OT services according to the offer made in the October 23, 2009, IEP, which was exactly the same as that made in the May-June IEP’s. The same was true of speech services. The credible testimony of service providers Gonzales and Angel established that these service levels were actually provided and were appropriate to Student’s needs. Thus, for all the above reasons, with regard to OT and speech therapy services per the June 8, 2010, IEP, Student failed to establish that District failed to

implement these services. (Factual Findings 1-20, 51-56, 87-118, 250-255; Legal Conclusions 1-5, 58 -59.)

62. As for ESY, Mother did consent to the offer made in the June 8, 2010, IEP, which provided for 10 hours monthly supervision services by CIBA. District implemented those services during ESY. This was established at hearing by the credible testimony of District aide, Hardrick, bolstered by the credible testimony of Wood, and her supervision notes from summer 2010, that demonstrate that the services were delivered. For these reasons, Student failed to establish that District denied him a FAPE with regards to NPA supports for ESY 2010 per the June 8, 2010, IEP. (Factual Findings 87-118, 127-37; Legal Conclusions 1-5, 58 -59.)

ISSUES 7, 8 AND 25: PROGRESS REPORTS

63. Student alleges District committed procedural violations that resulted in a denial of FAPE because District failed to monitor his progress from June 8, 2010, through June 8, 2011; failed to provide quarterly progress reports for the quarterly period beginning August 2010; monitored goals in the June 10, 2010, progress report that were not stated in the June 8, 2010, IEP; and failed to give parent a copy of the June 2011, IEP progress report. District contends it did not commit any procedural violations, and that it did not deny Student a FAPE.

64. Legal Conclusions 1-6 above are incorporated herein by reference.

65. As stated above in Legal Conclusions 50-51, an IEP must contain a statement of measurable annual goals, a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. (20 U.S.C. § 1414(d)(1)(A)(i)(II) & (III); 34 C.F.R. § 300.320 (a)(2) & (3); Ed. Code, § 56345, subd. (a)(2) & (3).)

66. The October 23, 2009, May 21, 2010, and June 8, 2010, IEP's stated that the method of reporting progress toward goals would be by progress reports mailed each semester or trimester, and through the use of annual goal sheets, report cards, parent conferences, and IEP meetings.

67. District failed to comply with one of these reporting methods, namely the semester or trimester progress reporting. The progress reports it did complete appeared incomplete, and were not meaningful. However, District complied with the other reporting mechanisms stated on the IEP's, namely report cards, parent conferences, IEP meetings, and the copious notes of the log book, all of which provided Mother with a complete picture of Student's progress for purposes of participation in making decisions about Student's program.

68. Thus, there was no procedural violation; the IEP's stated how they would report on progress and District's compliance with at least some of those methods kept Mother fully apprised of Student's progress throughout both 2009-2010 and 2010-2011. Moreover, Student failed to show at hearing how any loss of educational benefit or denial of a FAPE resulted. Thus Student has failed to establish any procedural violation or any denial of FAPE. (Factual Findings 15, 90, 106, 256 -260; Legal Conclusions 1-6, 50-51.)

ISSUES 10 AND 11: AUGUST 25, 2010, INCIDENT

69. Student contends that on or around August 25, 2010, and in the IEP addendum of that same date, District denied Student a FAPE by failing to appropriately respond to, and address, an incident with another student and an aide. District contends it did not deny Student a FAPE.

70. Legal Conclusions 1-5 are incorporated herein by reference.

71. Here, Student's contentions are without factual support. During the first week of the 2010-2011 school year, when Student transitioned back to Malady from

Hardrick's aide services during ESY, Student accused Malady of not helping Student in class, being mean, and petting Student's arm. The allegations were appropriately investigated through the team's questioning of Student and Malady at an IEP meeting on that same day. The overall consensus at the meeting, including one of Student's family members who attended the meeting, was that Student's accusations were unfounded, and that no further action was necessary. Student failed to establish that Malady actually behaved improperly or that any change in placement or services was warranted as a result of this unsubstantiated accusation. Therefore, Student has failed to meet his burden of persuasion regarding this incident. (Factual Findings 142-146; Legal Conclusions 1-5.)

ISSUE 12: SEPTEMBER 2010 ALLEGED REVEALING OF CONFIDENTIAL INFORMATION

72. Student contends that in or around September 2010, District denied Student a FAPE when Malady informed another student that Student had autism. District contends that no such event actually occurred, and that there was no denial of FAPE.

73. Legal Conclusions 1-5 are incorporated herein by reference.

74. Except where disclosure is specifically permitted by law, students generally have a right to confidentiality with respect to their education records or personally identifiable information contained therein, unless disclosure is consented to in writing by parents. (20 U.S.C. § 1232g; Ed. Code, § 49076.)

75. Here, Student failed to establish Malady disclosed any confidential information concerning Student. When Student accused Malady of revealing his autism to others, Principal, Gregory Johnson, credibly conducted an investigation during which he interviewed Malady, Student, and two other students. The investigation revealed no evidence that Malady had disclosed any of Student's personal information, and Malady credibly established at hearing that he never revealed Student's diagnosis. Given the

above, Student failed to establish that he was denied a FAPE. (Factual Findings 151-153; Legal Conclusions 1-5, 74.)

ISSUE 13: TRANSITION SERVICES

76. Student contends that District denied Student a FAPE by failing to offer transition services from December 2010 until July 2011 regarding Student's transition to high school. District contends it did not deny Student a FAPE.

78. Student failed to put on any evidence to support this contention. The relevant time period in contention covers the period during which the December 2010 discipline and January 2011 manifestation determination occurred, followed by Mother's requests for mainstreaming and Cadet Corps, followed by the disciplinary events in April and the manifestation determination in that month, and concluding with the June 2, 2011, IEP, and ESY thereafter. During that entire time frame, the only point at which transition services to high school, if necessary to provide a FAPE, should have been offered was at the June 2, 2011, IEP. This was the IEP addressing Student's upcoming ninth grade, or his first year of high school. Significantly, at that IEP, Mother's contention was that Student should be retained in eighth grade at LMS. It was District, particularly Papez, who presented the research on retention and opined that Student had made progress and should matriculate to the next grade level.

79. Although the placement was in dispute, District at that IEP offered full-time 1:1 NPA aide service and supervision for the upcoming school year, transportation, counseling, and NPA OT.

80. At hearing, Student presented no evidence as to what other transitional services should have been part of District's offer. For all the above reasons, Student has failed to establish a denial of FAPE as a result of District's failure to offer transition services to facilitate his transition to high school. (Factual Findings 1-260; Legal Conclusions 1-51.)

ISSUE 15(B): TRANSITION PLAN

81. Student contends that District committed a procedural violation that resulted in a denial of FAPE by failing to offer a transition plan in the January 2011, IEP. District contends it did not deny Student a FAPE.

82. Legal Conclusions 1-6 are incorporated herein by reference.

83. Beginning not later than the first IEP to be in effect when the student is 16 years of age, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP shall include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills; and the transition services, including courses of study, needed to assist the pupil in reaching those goals. (20 U.S.C. § 1414 (d)(1)(A)(i)(VIII); Ed. Code, §§ 56345, subd. (a)(8); 56043, subd. (g)(1).) "Transition services" are defined as a coordinated set of activities designed within an results-oriented process, focused on improving the academic and functional achievement of the individual to facilitate movement from school to postschool activities, including postsecondary education, vocational education, integrated employment, including supported employment, continuing and adult education, adult services, independent living, or community participation. Transition services are to be based upon individual needs, taking into account individual strengths, preferences, and interests. Transition services include instruction, related services, community experiences, development of employment and other postschool adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. Transition services may be special education or related services. (Ed. Code, § 56345.1, subd. (a); 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(b).) The failure to properly formulate a transition plan may be a procedural violation of the IDEA that warrants relief only upon a showing of a loss of educational opportunity or the denial of

a FAPE. (*Board of Education v. Ross* (7th Cir. 2007) 486 F.3d 267, 276 [despite transition plans being a mandatory component of an IEP, notation in IEP that the transition plan would be “deferred” was a procedural violation]; *A.S. v. Madison Metro School Dist.* (D. Wis. 2007) 477 F.Supp.2d 969, 978 [allegation of inadequate transition plan treated as a procedural violation].)

84. Here, the three January, 2011 IEP meetings at issue in this contention were addenda IEP meetings to address particular topics, namely discipline, mainstreaming, and Cadet Corps for the then-current eighth grade school year. They were not annual IEP meetings intended to address an upcoming offer of placement and services. Therefore the relevant time period for an IEP team to address a transition plan, if appropriate, would have been the annual IEP on June 2, 2011. At that time Student was 13 years old.

85. There was no IEP team consensus about his placement for the upcoming year or about his longer-term prospects. Whereas Mother wanted Student to be retained at LMS and proceed on to a high school diploma and college, even if that meant keeping him in school past the age of 18, District’s focus was on whether he had peaked and required access to a functional skills curriculum. This evidence shows that developing measurable postsecondary goals would have been premature. The IEP team’s views of Student’s middle and high school objectives were still in flux. Opinions differed significantly about what his postschool adult living objectives and functional vocational prospects were. In the absence of IEP team agreement to the contrary, the law does not mandate transition planning for students under the age of 16. There was no such agreement that a transition plan for this 13 year old student was appropriate, nor does the evidence support Mother’s contention that it would have been. Thus, the lack here of a transition plan or transition services for this younger Student did not

constitute a procedural violation of IDEA. (Factual Findings 1-260; Legal Conclusions 1-6, 83.)

ISSUE 23 (A): PREDETERMINATION OF JUNE 2, 2011, IEP OFFER

86. Student contends that District committed a procedural violation that resulted in a denial of FAPE by predetermining the offer of placement and services it made at the June 2, 2011, IEP. District contends that it did not predetermine the offer and did not deny Student a FAPE.

87. Legal Conclusions 1-6 and 31 are incorporated herein by reference.

88. An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, *S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification." (citing *Target Range, supra*, 960 F.2d at p. 1484)].)

89. Here, Student failed to establish that District predetermined its June 2, 2011, IEP offer. As District members credibly testified at hearing, District members had not, as a team, made a determination at the staff meeting prior to the IEP meeting. In addition, Mother attended the June 2, 2011 IEP meeting, expressed disagreement, and requested revisions. Although Mother's requests were ultimately rejected by District, it did not mean the IEP team did not consider her concerns. For example, the evidence shows that the team discussed, at length, Mother's proposal that Student should be

retained at LMS. In addition, District's placement offer evolved as the meeting progressed. Specifically, the offer started out as an Excel-type model with 63% mainstreaming, with modified core curriculum based on state standards and leading to a high school graduation, as reflected on the cover page of the IEP.

90. However, during the meeting, the resulting final offer contained no general education, except for PE. In short, District did not present only one placement option at the meeting, indicate unwillingness to explore other options, or merely present the offer to Mother for ratification. For these reasons, Student failed to establish that District committed a procedural violation by predetermining its offer at the June 2, 2011 IEP team meeting. (Factual Findings 195-226; Legal Conclusions 1-6, 31, 88.)

ISSUE 2 (A): PROFESSIONAL DEVELOPMENT

91. Student contends that from the spring of 2010, and continuing through the end of the 2010-2011 school year, District denied Student a FAPE by failing to provide professional development to teachers, speech therapist, occupational therapist, and aides from March 17, 2010, until June 2011. District contends it did not deny Student a FAPE.

92. Legal Conclusions 1-5 are incorporated herein by reference.

93. Under California law, each school district must operate under a "local plan." (Ed. Code, § 56195.1.) Local plans must provide policies and procedures governing the provision of FAPE. (Ed. Code, § 56205.) They must contain provisions for making staff development programs available to staff, teachers, special education teachers, service providers and others. (Ed. Code, § 56240-45.)

94. Here, Student has failed to establish any legal basis for this claim. The local plan provisions of California law governing making professional development available do not mandate attendance, do not affect what does or does not constitute FAPE, and do not create a right for parents to enforce the local plan through special education due

process complaints. Nevertheless, the evidence shows that Kubacki, Gonzales, Malady, Quintero, Stephenson, Kirby, and Angel all availed themselves of professional development opportunities through SELPA, or obtained other trainings through their schooling. Student has failed to establish that he was denied a FAPE by virtue of District's failure to provide professional development opportunities to teachers, speech therapist, occupational therapist, or aides from March 17, 2010 until June 2011. (Factual Findings 10, 43, 53, 126, 235, 238, 250; Legal Conclusions 1-5, 93.)

ISSUES 2(G), 2(H), 2(I): EDUCATIONAL SUPPORTS, EDUCATIONAL THERAPY,
"EDUCATIONAL LEARNING TREATMENT PLAN," CURRICULUM MODIFICATIONS

95. Student contends that District denied him a FAPE by failing to provide him with "educational supports" from May 2010 through July 2011; failing to modify Student's curriculum from May 2010 through July 2011; and by failing to provide individual "educational therapy" or an "educational learning treatment plan." District contends it provided Student with a FAPE at all relevant times.

96. Legal Conclusions 1-5 and 14 are incorporated here by reference.

97. Here, Student has failed to present any credible evidence to support his contentions. Specifically, in regard to "educational supports," Student argued that he was not provided with appropriate RSP services. However, during the 2009-2010 school year, when Student was in seventh grade, Kubacki and Quintero provided push-in RSP support to Casian's general education English Language Arts and World History classes, where Student was mainstreamed. During the 2010-2011 eighth grade school year, Student attended general education English Language Arts and World History classes with teacher Kathleen Hanson, supported by RSP teacher Banae Kirby and Music Appreciation with general education teacher Norton, supported by RSP teacher Tosh Stephenson. Student presented no credible evidence to demonstrate that the level of

RSP services was insufficient or inappropriate. (Factual Findings 40, 60, 62, 119-126, 197, 201, 228-243; Legal Conclusions 1-5, 14.)

98. With regard to curriculum modifications, during 2009-2010 school year, when Student was in seventh grade, Casian modified Student's curriculum in general education, Day modified his curriculum in PE, and Quintero modified his curriculum in SDC Reading. For example, Quintero read questions aloud to him and tailored individualized instruction to the level at which he tested. In addition, in April, 2010, District specifically granted Mother's requests for particular modifications in Casian's general education Excel class, including more time for written assignments, and reduced homework. In eighth grade, Hanson, Norton, Wakefield, Stephenson, and Kirby all modified the curriculum for Student. They read vocabulary words aloud, posted corresponding pictures and definitions, color-coded words to indicate the parts of speech, limited the amount of content Student was responsible for, modified his tests, broke instructions down into smaller steps and gave extra time on assignments. They used repetition, step-by-step analysis, and sequential teaching techniques, and used modified written materials. They also re-taught concepts, proceeded at a slower pace, skipped the harder parts, adjusted their pacing and used visual aids and graphic organizers. These factors demonstrated that District provided Student with appropriate modifications to the curriculum. (Factual Findings 40, 60, 62, 119-126, 197, 201, 228-243; Legal Conclusions 1-5, 14.)

99. Student also contends that District denied him a FAPE by failing to agree to Mother's request in the January 5, 2011, IEP for "educational therapy," and by failing to provide him with an "educational learning treatment plan." However, Student failed to present any evidence at hearing establishing what, if anything, constituting a "learning treatment plan" was missing from his educational program that denied him a FAPE. Student has therefore failed to meet his burden of persuasion with respect to any

alleged denial of FAPE as a result of the absence of these services. (Factual Findings 1-261; Legal Conclusions 1-5, 14.)

100. Furthermore, the evidence shows that Student received educational benefit in both grades. Specifically, in seventh grade, as of the April 6, 2010, IEP, Student's SDC teacher Alsina reported that Student was highly motivated, and did well in class. In addition, Quintero reported that in SDC Reading, Student had performed well, and attained a grade of C+. Moreover, Casian reported that in his general education Excel class, Student was a "great student." Also, as of the May 12, 2010, psycho-educational assessment, Quintero had reported to Papez that Student read in a third grade level book with good fluency and comprehension, while Casian reported that he read in a seventh grade level book with adequate fluency and good comprehension, participated, and was a "very valuable contributor to class." In eighth grade, the evidence shows that Student read well in the SDC Reading in the computer lab using reading programs Reading Plus and Lexia, read independently at the fourth grade level, and had improved his spelling to the fourth grade level. He also performed well in the areas of rhyming and poetry. His writing was difficult to read, but had improved. In addition, in SDC math, he performed at the 4.5 grade level, and could perform problems with formulae, as well as multi-step problems, with prompting. He knew basic calculations and verbally mastered the multiplication tables up to ten. He could verbalize many mathematical formulae although he had difficulty when they were on paper. Also, in Hanson's general education Excel classes, he performed well with peer support and assistance, participated in class discussions and lessons, enjoyed social studies and performed well with visual aids. Given the educational progress Student demonstrated in seventh and eighth grade, Student has failed to meet his burden of persuasion that the absence of educational supports, educational therapy, an "educational learning treatment plan," or curriculum modifications resulted in a denial of

FAPE. (Factual Findings 40, 60, 62, 119-126, 197, 201, 228-243; Legal Conclusions 1-5, 14.)

ISSUE 24: ASSISTANCE TO ACHIEVE JUNE 2, 2011, IEP GOALS

101. Student contends that District denied Student a FAPE by failing to assist Student to achieve the goals set forth in the June 2, 2011 IEP. District contends it provided Student a FAPE at all times.

102. Legal Conclusions 1-5 and are incorporated here by reference.

103. The June 2, 2011, IEP, made an offer of placement, services, goals, and modifications and accommodations for the 2011-2012 school year. Student did not consent to that offer but filed for due process in the instant matter on July 29, 2011. During the relevant time period for this contention, from June 2, 2011 until July 29, 2011, no portion of the June 2, 2011, IEP, governed Student's educational program because it had never been consented to by Mother. District cannot be faulted for not providing assistance to implement goals that were not consented to. Accordingly, Student's claim that he was denied assistance to achieve them fails. Student failed to show a denial of a FAPE on this ground.

104. At hearing in this matter, Student presented no evidence with respect to Student's program after the June 2, 2011, IEP, except that CIBA's Michael Barrett confirmed that he provided 1:1 aide service to Student at Silverado High School from June-July during ESY 2011. As the party with the burden of persuasion on this issue, Student failed to establish his burden of proof demonstrating that District denied him a FAPE by failing to provide assistance to achieve the goals set forth in the June 2, 2011, IEP. (Factual Findings 195-227, 261; Legal Conclusions 1-5.)

ISSUES: 3, 4(F), 6(B), 14, 18(B), 19, 20, 21, 18(C), 22, 26, 2(B), 2(D), 2(E), 2(C), 2(F): BEHAVIORAL SUPPORTS, SERVICES, AND ASSESSMENTS; DISCIPLINE AND MANIFESTATION DETERMINATIONS ⁷

Issue 3: May 15, 2010, FAA

105. Student contends that District committed a procedural violation by not performing an appropriate FAA in May 2010, which resulted in a denial of FAPE. District contends that the FAA was appropriate, and that it did not deny Student a FAPE.

106. Legal Conclusions 1-6 are incorporated herein by reference.

107. Both before and after discipline or serious behavior incidents, whenever a child's behavior impedes his learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

108. Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior

⁷ These issues, including the corresponding contentions, will be presented in separate sections below.

interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149; *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028.

109. When behaviors rise to the level of "serious behavior problems," California law imposes more formal requirements for addressing them, even when they have not yet resulted in formal discipline. "Serious behavior problems" means the individual's behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/ behavioral approaches specified in the student's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (ab).)

110. A FAA shall occur after the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) A FAA must be conducted by, or be under the supervision of a person who has documented training in behavior analysis. FAA personnel shall gather information from direct observation, interviews with significant others, and review of available data such as assessment reports prepared by other professionals and other individual records. Prior to conducting the assessment, parent notice and consent shall be given and obtained. A FAA procedure shall include: systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity; systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; systematic observation and analysis of the consequences following the display of the behavior to determine the function and communicative intent the behavior serves for the individual; ecological analysis of the settings in which the behavior occurs most frequently; review of records for health and medical factors which may influence

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

111. Following the assessment, a written report of the assessment results shall be prepared and a copy shall be provided to the parent. The report shall include: a description of the nature and severity of the targeted behavior(s) in objective and measurable terms; a description of the targeted behavior(s) that includes baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs; a description of the rate of alternative behaviors, their antecedents and consequences; and recommendations for consideration by the IEP team. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2).) Upon completion of the FAA, an IEP team meeting shall be held to review results and, if necessary, to develop Behavioral Intervention Plan.

112. Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3); Ed. Code, § 56320, subds. (e), (f).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

113. "Behavioral intervention plan" (BIP) is a written document which is developed when the individual exhibits a "serious behavior problem" that significantly interferes with the implementation of the goals and objectives of the individual's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (g).) The BIP shall include: (1) a summary of relevant and determinative information gathered from a functional analysis assessment (FAA); (2)

an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); (3) the individual's goals and objectives specific to the BIP; (4) a detailed description of the behavioral interventions to be used and the circumstances for their use; (5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors; including specific criteria for discontinuing the use of the intervention for lack of effectiveness or replacing it with an identified and specified alternative; (6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; (7) those behavioral interventions which will be used in the home, residential facility, work site or other non-educational settings; and (8) specific dates for periodic review by the IEP team of the efficacy of the program. (Cal. Code Regs., tit. 5, § 3001, subd. (g).)

114. BIP's shall be based upon a FAA, and shall be used only in a systematic manner. (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) The IEP team shall facilitate and supervise all assessment, intervention, and evaluation activities related to an individual's BIP. BIP's shall only be implemented by, or be under the supervision of, staff with documented training in behavior analysis, including the use of positive behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subds. (a)(1) & (2).)

115. Evaluation of the effectiveness of BIP shall be reviewed as appropriate at scheduled intervals determined by the IEP team. If the IEP team determines that changes are necessary to increase program effectiveness, additional FAA's shall be conducted and, based on the outcomes, changes proposed to the BIP. (Cal. Code Regs., tit. 5, § 3052, subd. (f).) The BIP shall become a part of the IEP and shall be written with sufficient detail so as to direct its implementation. (Cal. Code Regs., tit. 5, § 3052, subd. (c).)

116. "Behavior Support Plan" (BSP) is not a term that is defined by law or regulation.

117. The evidence showed that CIBA's May 15, 2010, FAA, was not properly conducted. Specifically, it gathered insufficient information from observation, interviews and review of available data, and not sufficiently comprehensive to identify all of Student's special education and related service needs with regard to his behaviors. During CIBA's five observations of Student in April and May, 2010, it witnessed no challenging behaviors. CIBA's Wood therefore identified the five target behaviors the FAA addressed (running away; teasing; refusal or noncompliance; trading; and repetitive talk) from reports by Student's aides. She did not include physical aggression, threats, or insults as target behaviors, although these had been addressed in the UHS BSP, because from her interviews, she determined that these behaviors did not occur often enough to be identified as current target behaviors. The FAA also did not include sexual conduct as a target behavior, even though an aide had noted it as an area of recent concern. Consequently, the FAA resulted in a mis-identification and non-identification of Student's most problematic behaviors. Without proper identification of target behaviors, the FAA could not serve its intended uses. It could not define or describe the behaviors it intended to address, determine their antecedents or consequences, or determine their function or communicative intent.

118. CIBA never obtained a release from Mother allowing it to review confidential information, and did not review any of Student's medical records, prior assessments nor discipline records. Thus CIBA had not reviewed the prior assessments from regional centers, service providers and Student's prior districts of residence that reported a history of physical aggression, tantrums, threats, insults, fighting, defiance, disobedience and noncompliance. Nor did it see the five incident reports Dawson filed

between February 18, 2010, and February 25, 2010, regarding altercations between Student and others.

119. Moreover, Wood did not learn from Kubacki that during seventh grade, Student caused very large disruptions from acting out, yelling, and knocking items off his desk; that these occurred approximately 20 times; that Student had to be removed from class by Kubacki or the aide on approximately eight or ten occasions during the second half of seventh grade; and that during seventh grade, Kubacki filed approximately 20 incident reports regarding disruptions by Student. She also did not learn from Day that Student picked fights with other students.

120. CIBA also was unaware of the results of Papez' then-ongoing psycho-educational assessment, including the BASC, and Conners-3, that showed some "clinically significant" scores in areas of aggression, oppositional defiance, acting out and "atypical" threatening behaviors that could endanger Student or others.

121. As a result of the FAA's deficiencies, there was insufficient information to identify the function and communicative intent that Student's most problematic behaviors served. As such, the FAA was inappropriate, and, therefore, a procedural violation on the part of District. (Factual Findings 1-126; Legal Conclusions 1-6, 107-120.)

122. In order to prove a denial of a FAPE from the deficiencies in the FAA, Student must demonstrate that they impeded Student's right to a FAPE; significantly impeded the opportunity of Mother to participate in the decision-making process regarding the provision of a FAPE; or caused a deprivation of educational benefits to Student. Here, as of the time of its creation and in the immediately ensuing May 21, 2010, IEP, the FAA's procedural deficiencies did not result in any denial of educational benefit. The FAA's recommendations, for ten hours per month supervision services by CIBA to be used for consultation and training, were appropriate at the time they were

offered by the IEP team at the May 21, 2010, IEP. These were the same services that had first been recommended in CIBA's December 20, 2009, five hour report, which were then agreed to in the SA and the April 6, 2010, IEP, and implemented thereafter. An IEP is evaluated in light of information available at the time it was developed, i.e. as of May 21, 2010; it is not judged in hindsight. Therefore the deficiencies of the FAA did not deprive Student of educational benefit. (Factual Findings 1-126; Legal Conclusions 1-6, 107-121.)

123. However, the inappropriate FAA did significantly impede the opportunity of Mother to participate in the decision-making process regarding the provision of a FAPE. As a result of the FAA's deficiencies, all parties had insufficient information to identify the function that Student's most problematic behaviors served, and all of their decision-making was significantly impeded regarding what Student's individual needs were, and what positive behavioral interventions were appropriate to address them. For this reason, Student has established that he was denied a FAPE on this issue. (Factual Findings 1-126; Legal Conclusions 1-6, 107-122.) Student's remedy for this denial of a FAPE will be discussed separately below.

Issue 4(f): May 21, 2010, IEP Offer of FAA's Recommendations

124. Student contends that District denied Student a FAPE by failing, in the May 21, 2010, IEP to offer the recommendations of the CIBA FAA. District contends that it did not deny Student a FAPE.

125. Student's contentions are factually inaccurate. Although the May 21, 2010, IEP meeting did not conclude on that day, District's offer as of the May 21, 2010, IEP included what the FAA recommended: ten hours per month supervision services by CIBA to be used for consultation and training. Therefore, because the evidence showed District offer of behavior services was consistent with CIBA's recommendation, Student failed to establish a denial of FAPE on this ground. (Factual Findings 79-99; Legal Conclusions 1-6.)

Issue 6(b): June 8, 2010, IEP's Offer of Behavioral Services and Supports

126. Student contends that District denied Student a FAPE in the June 8, 2010, IEP because NPA aide support was only offered temporarily, for 60 days, while District aide Malady received training. District contends that it did not deny Student a FAPE.

127. Legal Conclusions 1-6 and 107-116 are incorporated herein by reference.

128. Here, the evidence showed that the District's offer was appropriate at the time. Between the May and June IEP meetings, on June 4, 2010, Student had a behavioral incident after a dispute over money with another student, where he had become extremely agitated, yelled obscenities, acted physically out of control, threw chairs, and could not be de-escalated, after which school security guards and Mother were called. To address this, District appropriately changed the behavioral services offered as of the June 8, 2010, IEP, to full-time NPA aide support, consisting of two aides, on different days of the week, one for Monday, Wednesday and Friday, and the other for Tuesday and Thursday, as a temporary measure for 60 days, while Malady received training, plus ten hours monthly supervision services by CIBA. After the elapse of 60 days, the NPA services were scheduled to be replaced by District aide services. This was the first time NPA aide service had been offered.

129. Although she did not specifically state at the June 8, 2010, IEP meeting, Wood clearly thought that the June 4, 2010, incident could have been either avoided by, or more appropriately handled by, an aide with more training and experience than Malady had at that time, since he was just embarking upon the training program envisioned by the SA. As such, the offer represented a reasonable, and more comprehensive, change in the services that District had previously provided. Student presented no evidence to suggest the offer was unreasonable at the time, or that providing NPA aide services on a temporary basis, and then subsequently transferring to District aide services once the District aide was better trained by CIBA, would have

prevented Student from obtaining educational benefit. An IEP is evaluated in light of information available at the time it was developed, i.e. as of June 8, 2010; it is not judged in hindsight. Thus, Student has failed to establish that at the time of the June 8, 2010, IEP, the offer resulted in a substantive denial of FAPE. (Factual Findings 1-114; Legal Conclusions 1-6, 107-128.)

Issue 14: FAA/BIP after January 5, 2011, Manifestation Determination

130. Student contends that District denied Student a FAPE at and after the January 5, 2011, manifestation determination meeting, by failing to conduct a FAA and create a BIP. District contends it did not deny Student a FAPE.

131. Legal Conclusions 1-6 and 107-116 are incorporated herein by reference.

132. If a child is removed from his or her current placement for 10 days or more for disciplinary reasons, a "manifestation determination" meeting must be held in which relevant personnel determine whether or not the conduct is a manifestation of the child's disability. (20 U.S.C. § 1415(k)(1)(E).) The meeting must occur within 10 days of the decision to change the child's placement; and the District must provide parents with procedural safeguards. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(h).) Specified parties shall convene and review relevant information in the student's file to determine if the conduct in question "was caused by, or had a direct and substantial relationship to, the child's disability" or the child's conduct "was the direct result of the local educational agency's failure to implement the IEP." (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(h).)

133. If the conduct is determined to have been a manifestation of the child's disability, the IEP team must either conduct a functional behavioral assessment, unless one had been conducted before the behavior that resulted in the change of placement occurred, and implement a BIP for the child; or if a BIP already has been developed, review the BIP, and modify it, as necessary, to address the behavior. (20 U.S.C. § 1415(k)(1)(E)&(F); 34 C.F.R. § 300.530 (f).)

134. Here, the evidence shows that in the discussion of the FAA at the May 21, 2010, IEP, Wood made references to a "behavior plan." Although testimony at hearing established that both District and CIBA intended to offer Student some sort of behavior plan based on the FAA, there was no clarity regarding what the plan was to be. Specifically, both Papez and Wood testified that the "goals" in the last pages of the FAA report constituted Student's "behavior plan." However, the FAA itself did not so state, and not all of Student's teachers and service providers knew the document existed. Quintero, and aides Hardrick and Dawson, did not recognize the FAA. Surprisingly, at hearing, CIBA supervisor Fischer who oversaw Student's program in the 2010-2011 school year, also did not recognize the FAA. Although Kirby, Kubacki and Stephenson were aware of the FAA, and considered it to constitute Student's behavior plan for the 2010-2011 school year, Hanson, Norton, Wakefield and Askins were not. In addition, the "goals" in the FAA were not incorporated into the 18 goals of the May 2010 IEP or into the 20 goals of the June IEP. Additionally, Lubbers, CIBA's owner, stated at hearing that, at most, those pages of the FAA contained "suggested interventions that could inform" a behavior plan.

135. The evidence established that as early as the April 2010 SA, and then after the FAA was written and discussed at the May-June, 2010, IEP meetings, CIBA's services were not in fact governed by any document. Although the FAA and its "goals" pages existed, it did not actually serve as the roadmap for the services. From ESY 2010 up through the January manifestation determination, CIBA improvised, both with respect to the behaviors they targeted and the interventions they used, and these evolved over time without reference to the FAA. For example, Wood created some recommendations in summer 2010 that she told Hardrick to implement, including a self-management checklist or contract, and a "friends vs. not my friends" program, which District carried through into the 2010-2011 school year, but were not in the FAA document. Also, in the

fall of 2010, Wood told Fischer to target blurting out in class, and obscenities, as target behaviors, even though these target behaviors were not in the list of target behaviors in the FAA. Neither CIBA nor District modified the FAA to include them.

136. Once the January 5, 2011, manifestation determination was made, District was legally obligated to create a BIP. It did not do so. This constituted a procedural violation. District did not modify the behavior plan portion of the FAA, and failed to develop a legally-compliant BIP at this time. Although the June 8, 2010, IEP, following the June 4, 2010, incident, had represented that Student had a BIP in place, there was not at that time nor in January any such document, other than the May 2010 FAA and its "goals" pages. If the final "goals" pages of the FAA did constitute a behavior plan, it did not comply with the law's stringent requirements for BIP's following manifestation determinations. Specifically, it did not describe the behavioral interventions to be used and the circumstances for their use; schedules for recording the frequency of the use of the interventions; criteria for discontinuing the use of the intervention or fading it out, nor did it set specific dates for periodic review by the IEP team of the efficacy of the program. It was not written with sufficient detail so as to direct its systematic implementation, as required.

137. Following the manifestation determination, District did not modify the FAA in light of the maladaptive behaviors that had emerged since CIBA had prepared it. District argues that a FAA was recommended as a result of the January 5, 2011, manifestation determination. This is contrary to all the evidence, which shows that although an FAA was created in April of 2011, it was not as a result of the manifestation determination meeting on January 5, 2011. As of January 2011, the FAA was not modified to include Student's outburst on June 4, 2010, or his increased use of profane sexual language, and distributing prescription pills, that led to the December 2010 discipline. Also, by this time, per Kubacki's testimony at hearing, Student knocked over

tables, and threw books, 15-25 times during the 2010-2011 school year. In addition, per teacher reporting in this school year, Student had tendencies to pass notes and use graphic language with the opposite sex, and per Malady, on average of once per week Student made inappropriate comments, was vulgar to girls, or used curse words. Also, when Malady took away electronic gadgets from Student, Student became inconsolable. Because District did not modify the FAA, neither the antecedents nor the function and communicative intent of these behaviors were understood.

138. There also appears to have been a disconnect between District and CIBA over how well Student actually functioned. Although Student's aides Hardrick and Malady had been instructed to take data, no evidence was presented at hearing that the data were ever analyzed. As discussed above, Kubacki and Malady thought Student's maladaptive behaviors had escalated during the 2010-2011 school year. Wood, in marked contrast, considered the behaviors of June 4, 2010, and the events of December, 2010, to be "spikes," but overall felt that for the eighth grade 2010-2011 year, Student's behaviors continually improved, that negative behaviors decreased in both the severity and frequency, and that no new maladaptive behaviors had appeared. In Wood's opinion, there was a steadily improving arc in Student's behaviors. Consequently, CIBA did not believe new maladaptive behaviors were emerging, and did not modify the FAA or its "behavior plan" to address them, with the exception of Wood's statement at the January 5, 2011, manifestation determination meeting that CIBA "had some new protocols that they are attempting to implement." Although District and CIBA were not on the same wavelength regarding the presence of Student's maladaptive behaviors, and the fact that Student's behaviors had escalated, District wholly relied on CIBA for guidance on how to address Student's behaviors. District's failure to revisit the FAA after the manifestation determination, and create a legally compliant BIP, resulted in a procedural violation. The fact that CIBA services were implemented pursuant to the SA

did not absolve District of its responsibility to ensure the provision of FAPE; the SA did not prospectively release District of its duty to follow IDEA procedures and provide a FAPE.

139. The procedural violation resulted in the loss of an educational opportunity, impeded Student's right to a FAPE, and caused a deprivation of educational benefits. On January 5, 2011, Student placement and services consisted of District's implementation of "stay put" pursuant to the October 23, 2009, IEP, as supplemented by the SA and the resulting April 26, 2010, IEP, namely a District aide with CIBA supervision services for ten hours per month. Obviously, if these new, more severe behaviors that were a manifestation of Student's disability were interfering with Student's education, District was required to address them through a BIP. The following month, Fischer's observation notes for February 18, 2011, mention an "updated behavior plan for [Student's] behaviors that occur during school sessions." There is no such document. Thus these notes appear to refer to ongoing oral conversations between Wood and Fischer regarding strategies to implement. At and following the manifestation determination, there was no BIP in place, no systematic implementation of behavioral interventions, and no schedule in place to evaluate their effectiveness. Student required more effective behavioral interventions at this time, yet District made no change in its offer of behavioral supports and services. The services that were in place had failed to meet Student's unique needs, and were no longer reasonably calculated to provide him with educational benefit. Therefore, the failure to modify Student's behavioral program constituted a denial of FAPE. (Factual Findings 1-261; Legal Conclusions 1-6, 107-133.) To the extent Student is entitled to a remedy, it will be discussed separately below.

Issues 18 (b) and 19: Aide Support March 21-25, 2011; Behavioral Supports
Following April 6, 2011, Events

140. Student contends District denied Student a FAPE by failing to provide appropriate aide support from March 21, 2011 through March 25, 2011. Student also contends that during and subsequent to an incident on or around April 6, 2011, District denied Student a FAPE by failing to provide appropriate behavioral supports, resulting in a 12-day suspension, and denial of access to campus on April 12, 2011. District contends it did not deny Student a FAPE.

141. Legal Conclusions 1-6 and 107-116, 132-133 are incorporated herein by reference.

142. A school district's breach of a mediated settlement agreement that results in a denial of FAPE, is a proper subject for a due process hearing. (*Pedraza v. Alameda Unified Sch. Dist.*, 2007 WL 18 949603 (N.D. Cal. 2007).)

143. Here, the changes in Student's aide personnel at or around Spring break 2011 were in violation of the SA. District reassigned Malady to a different student immediately before or immediately after spring break (which was from Monday, March 26, 2011, until Friday, April 1, 2011, with school resuming on Monday, April 4, 2011). He was replaced with aides who had not received the CIBA or CESA training that Malady had received since April 2010 pursuant to the SA. Student had several different substitute aides, with a number of changes in personnel, and was without an aide for a short time, so Quintero or SDC staff had to supervise him. On April 5, 2011, Student's aide was Dawson, the same aide who had served during the 2009-2010 school year prior to the SA, and whom Malady had replaced. Dawson had no specific training working with students with autism, and only informal behavioral intervention training. When he had served as Student's aide before the SA, Wood had observed him in December 2009 in connection with the CIBA five-hour report and found he lacked the skills to work through challenging behaviors, and invaded Student's space.

144. Dawson's lack of training and skills appear to have either created or exacerbated the events of April 2011. Immediately after the transition of spring break and Malady's change of assignment, Dawson attempted to search Student's backpack, and then called Mother and family to do so. Student escalated into an incident in which he became extremely agitated, verbally violent, shouted obscenities, hit and punched cabinets and the walls with his fists and head, and attempted to hit others, which resulted in District calling security guards and the police. The antecedent and function of such behaviors was unknown, given the inadequacies of the behavioral assessment. But it is reasonable to conclude that the transition from one familiar, trained aide to an unfamiliar, untrained one, combined with a search of Student's possessions, triggered Student.

145. Previously, after the June 4, 2010, incident, Wood had appropriately suggested a NPA aide while Malady received training, apparently believing that Student's escalations then could have been avoided by more skilled aide assistance. The same analysis applies here. Overall, the evidence established that District's failure to provide appropriately trained aides as required by the SA either caused or escalated the April events.

146. Although of brief duration, the events of April 2011 were significant both in intensity and in the long-term effect on Student's educational program, resulting as they did in the suspension, the extension of the suspension, the proposed expulsion, and the manifestation determination. The evidence overall suggests that thereafter, when the District members of the June 2, 2011, IEP team suggested a more restrictive placement, it was based, at least in part, on the severity of Student's April behaviors. Moreover, the April behaviors were Student's most severe behaviors that the evidence revealed. Overall, although of brief duration, District denied Student a FAPE by its failure to provide appropriate aide support at and after Spring break, 2011, and by its failure to

provide appropriate behavioral supports, resulting in a 12-day suspension, and denial of access to campus on April 12, 2011. (Factual Findings 1-261; Legal Conclusions 1-6, 107-145.)

Issue 20: Prior Written Notice of Cancellation of April 12, 2011, IEP meeting

147. Student contends that District committed a procedural violation resulting in a denial of FAPE by failing to give prior written notice of cancellation of an IEP meeting scheduled for April 12, 2011. District contends it committed no procedural violation, and did not deny Student a FAPE.

148. Legal Conclusions 1-6, 107-116, and 132-133 are incorporated herein by reference.

149. Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including (1) notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322 (a).)

150. A parent must be provided "written prior notice" when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) The notice must include a description of the action proposed or refused by the school district, an explanation of why the district proposes or refuses to take the action, a description of each evaluation procedure, test, record, or report used as a basis for the proposed or refused action, a description of any other factors relevant to the district's proposal or refusal, a statement that the parents have protection under the procedural safeguards of IDEA, and sources for the parents to contact to obtain assistance. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

151. A “change of placement” is a fundamental change in, or elimination of, a basic element of a child’s educational program. (34 C.F.R. § 300.536(a).) Expulsion or suspension for more than 10 days is a “change of placement.” (*Honig v. Doe* (1988) 484 U.S. 305.)

152. As stated above in Legal Conclusions 132-133, if a child is removed from his or her current placement for 10 days or more for disciplinary reasons, a “manifestation determination” meeting must be held in which relevant personnel determine whether or not the conduct is a manifestation of the child’s disability. (20 U.S.C. § 1415(k)(1)(E).) The meeting must occur within 10 days of the decision to change the child’s placement; and the District must provide parents with procedural safeguards. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(h).) Specified parties shall convene and review relevant information in the student’s file to determine if the conduct in question “was caused by, or had a direct and substantial relationship to, the child’s disability” or the child’s conduct “was the direct result of the local educational agency’s failure to implement the IEP.” (20 U.S.C. § 1415(k)(1)(E)(i); 34C.F.R. § 300.530(h).)

153. The law provides no specific requirements for notice of cancellation of IEP team meetings. Cancellation of an IEP meeting is not, in and of itself, a proposal to change the identification, evaluation, or educational placement of the child. Thus it is not one of the events requiring formal prior written notice. While regrettable, the failure to advise IEP team members that a meeting was cancelled did not constitute a procedural violation of any applicable law or regulation.

154. Nevertheless on or about on or around April 12, 2011, District recommended Student for expulsion. That recommendation did constitute a proposal to change Student’s placement, of which prior written notice is required. District did not provide prior written notice of this proposed change in placement. This technically constituted a procedural violation.

155. The lack of prior written notice did not deny Student a FAPE, result in a deprivation of educational benefit, nor did it impede Mother's opportunity to participate in the decision-making process. Although prior written notice of the proposed change of placement was not given, District convened the manifestation determination meeting that was required to discuss it. There it followed the required procedures within the required time frames. Thus the failure to give prior written notice prior to April 12, 2011, did not result in harm, did not result in a denial of FAPE, and did not deny Mother the right to participate in the decision-making process about Student's program. (Factual Findings 1-261; Legal Conclusions 1-6, 107-154.)

Issues 21 and 18(c): April 18, 2011, IEP, Offer of Aide Support; Behavioral Supervision Hours from April-August 2011

156. Student contends that District denied Student a FAPE at the April 18, 2011, manifestation determination meeting, by failing to offer full-time NPA aide support. Student also contends District denied Student a FAPE by failing to provide behavioral supervision hours from April 2011 until August 2011. District contends it did not deny Student a FAPE.

157. This issue arises from Mother's misunderstanding of the offer that District made at the April 18, 2011, manifestation determination meeting. The team recommended that District aide Dawson be replaced with a NPA aide through CIBA. Except for the offer of sixty days of NPA 1:1 aide service that had been made at the June 8, 2010, meeting to cover Malady's training period (an offer to which Mother did not consent), this was the first time that NPA 1:1 aide services had ever been recommended, and it was appropriate to the circumstances leading up to the discipline and meeting. The team recommended a temporary CIBA aide at first, while CIBA located and hired a permanent employee to serve as the NPA aide throughout the balance of the school year. Mother misunderstood this, thinking that the offer was for a temporary NPA aide

only. She therefore signed consent, stating that she agreed with the NPA aide but disagreed with its being temporary only. In fact, the offer was not for a temporary but for a permanent NPA aide.

158. There was no denial of FAPE arising out of the offer of aide support at the April 18, 2011, meeting. The offer was appropriate. NPA aide services were in fact implemented thereafter, for the balance of the 2010-2011 school year. CIBA appointed various persons and then Michael Barrett from CIBA came on at the end of April, 2011, and served as Student's aide for two months until the end of the school year in June 2011, and ESY, during which time there were no further behavioral incidents. (Factual Findings 1-261; Legal Conclusions 1-6, 107-157.)

159. Student presented no evidence that supervision hours were not also provided. Thus, as the party with the burden of persuasion on this issue, Student has failed to establish any denial of FAPE regarding supervision hours from April to August 2011. (Factual Findings 1-261; Legal Conclusions 1-6, 107-158.)

Issues 22 and 26: FAA and BIP Following April 18, 2011, Manifestation Determination; IEP Meeting Following June 10, 2011, FAA

160. Student contends that, after Mother consented to a FAA at the April 18, 2011, manifestation determination meeting, District committed procedural violations which resulted in a denial of FAPE by failing to timely conduct the FAA, failing to hold an IEP team meeting within the required timeframes, and failing to develop a BIP. Student also contends District committed a procedural violation by failing to hold an IEP team meeting to discuss the FAA that CIBA completed on June 10, 2011. District contends it did not commit any procedural violations, and did not deny Student a FAPE.

161. Legal Conclusions 1-6, 107-116, 132-133 and 151 are incorporated herein by reference.

162. A school district or local educational agency is required to conduct an assessment and convene an IEP meeting within 60 days of receiving parental consent to assessment. Days between regular school sessions or terms are not counted in the calculation. (Ed. Code, §§ 56344, subd. (a) & 56043, subd. (f).)

163. Here, at the manifestation determination meeting of April 18, 2011, the team determined that Student's conduct on April 6, 2011, had been a manifestation of his disability, and District, as a result, offered a new FAA. Pursuant to the legally required timelines, District was obliged to ensure the completion of the assessment, as well as hold an IEP meeting to discuss it, by or before 60 days from April 18, 2011, i.e., by June 17, 2011. However, the last day of the regular school year was June 10, 2011.

164. Therefore the procedural requirement would be to hold the IEP meeting within 7 days of the beginning of the next regular school term. The first date of the 2011-2012 school year was August 22, 2011. However, Student filed his complaint in this matter on July 29, 2011, before the District's maximum time to conduct the IEP team meeting had expired. Moreover, Student offered no evidence regarding whether a subsequent IEP meeting was ever convened during the first 7 days of the 2011-2012 school year to discuss the FAA. As the party with the burden of persuasion on this issue, Student failed to establish a procedural violation within the relevant time period for this contention prior to the filing of the due process complaint on July 29, 2011. (Factual Findings 1-261; Legal Conclusions 1-6, 107-164.)

Issues 2(b), 2(d), 2(e): Behavior Assessment, Services, and Behavior Plans Generally, from March 2010-July 2011

165. Student generally contends that for the entire time period from the signing of the SA until the filing of the complaint, District denied him a FAPE by failing to provide appropriate behavior services and failing to refer Student for appropriate

behavioral services and/or assessments; and from May 2010 through July 2011, by failing to develop a behavior plan. District contends it did not deny Student a FAPE.

166. Legal Conclusions 1-6, 107-116, 132-133 and 151 are incorporated herein by reference.

167. Here, the law and facts pertaining to each of these issues has been addressed in detail above, given that Student's issues for hearing have covered the multitude of possible denials of a FAPE during this period. As discussed above, Student prevails only on those contentions addressing specific time periods, i.e. the FAA as of the time it was written (Issue 3), then the manifestation determination meeting of January 5, 2011, when no FAA, BIP or change to existing services was offered (Issue 14), then the aides provided in April 2011 (Issue 18(b)). These were the only time periods during which District's procedural errors with regard to Student's FAA and BIP, or its behavioral services, substantively denied Student a FAPE. Therefore, Student has failed to meet his burden of persuasion that he was denied a FAPE generally by virtue of the behavior assessments, services, and behavior plans from March 2010-July 2011. (Factual Findings 1-261; Legal Conclusions 1-6, 107-167.)

Issues 2(c) and 2(f): Forms

168. Student contends that District committed procedural violations that resulted in a denial of FAPE by failing to complete appropriate SELPA forms for behavioral intervention from March 16, 2010 until July 21, 2011; and by allowing entry of behavior data on NPA forms by unauthorized personnel from May 2010 until March 2011. District contends it did not commit any procedural violations, and did not deny Student a FAPE.

169. Here, the evidence established that District never used any of the various forms SELPA made available for behavioral intervention, or any other SELPA forms,

regarding Student. Student presented no authority to support the proposition that school districts are mandated to use SELPA forms.

170. The evidence also shows that Malady took data, and wrote it in CIBA forms called data collection sheets, from September 2010 until March 2011. Student offered no support for the contention that District employees are prohibited from entering behavior data on NPA forms, and even if they were, how such entries constitute a procedural violation of any sort. To the contrary, behavior programs are data driven and require such input.

171. Moreover, Student failed to put on any evidence establishing that the failure to use SELPA forms, or the use of CIBA forms by non-CIBA employees, resulted in an impediment of the Student's right to a FAPE; a significant impediment of Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE; or caused a deprivation of educational benefits. (Factual Findings 1-261; Legal Conclusions 1-6, 107-171.)

DISTRICT'S ISSUE 1; STUDENT'S ISSUES 15 (A), 16, 17, 18 (A), 23 (B): PLACEMENT IN THE LRE⁸

Issue 15 (a): Requests for Mainstreaming in January 2011, IEP's

172. Student contends that District denied him a FAPE in the January 2011, IEP, by failing to offer placement in the LRE. Specifically, Student contends that at the two Parent Request IEP meetings on January 5, 2011, and January 18, 2011, where Mother requested that Student be 100% mainstreamed, District should have changed Student's placement accordingly. District contends it did not deny Student a FAPE.

173. Legal Conclusions 1-5, above, are incorporated by reference.

⁸ These issues, including the corresponding contentions, will be presented in separate sections below.

175. In providing or arranging for the provision of nonacademic and extracurricular services and activities, children with disabilities are entitled to participate with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in nonacademic settings. (Ed. Code, § 56364.2, subd. (b); 34 C.F.R. § 300.117.)

176. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, the court established a four-part test that provides guidance on the question of whether a placement is in the LRE. The four factors are: 1) the educational benefits of placement full time in a regular class; 2) the non-academic benefits of such placement; 3) the effect the child will have on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact specific inquiry. (*Daniel R.R. v. State Bd. of Educ., supra*, 874 F.2d at p. 1048.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

177. Here, Student has failed to meet his burden of establishing that 100% mainstreaming was appropriate for him. The nature and severity of his disabilities was such that 100% education in regular classes full-time, even with the use of supplementary aids and services, could not be achieved satisfactorily. As discussed in more detail below, Student obtained some educational benefit from general education, and some participation in general education was appropriate. However, applying the four-factor test for the appropriateness of full-time general education, full time placement in general education would not have been appropriate for Student.

178. With regard to the first factor, addressing the academic benefits of general education, the evidence showed that Student had difficulties accessing the curriculum even in his seventh and eighth grade SDC classes, with their modified curriculum and slower pacing. In his general education classes, although he was an eager participant, his questions and answers were often off-topic. He had difficulty with multi-step directions, figurative or abstract concepts and non-concrete thinking. He could not follow figurative language or idioms, even with prompting and RSP support. He was reading far below average and at a slow rate, struggled with speed and intonation, and had trouble decoding. He also had difficulties with the sentence structure of complex sentences and paragraphs. In abstract classes such as music appreciation, Student could retain almost none of the information even with modifications. Student had trouble with material with ambiguities or non-specific answers. His challenges were staying on task and learning to think abstractly. He could not retain enough to be able to master eighth grade standards, even with modified curriculum. In addition, Stephenson credibly testified that educational benefit from ninth grade general education would be minimal for Student, because ninth grade would be more difficult and would build on past learning foundations which Student did not have.

179. With regard to the second factor, considering the non-academic benefits of the general education setting, the evidence showed that although some of Student's non-academic performance might improve with more focused behavioral interventions, Student significantly struggled in the area of his social skills in the general education environment, even with 1:1 aide assistance. Specifically, Student's friendships in seventh and eighth grade became strained and his social functioning deteriorated, which caused tensions that escalated into conflicts. Student talked to others who did not want to interact, did not take turns talking, stole, lied, and used negative language, insults and curse words. He struggled with social skills when interacting with peers, especially girls; struggled with following directions and required multiple prompts to return to task; exhibited impulsivity in his thoughts and actions; lied to avoid getting into trouble; and had difficulties with organization. He alienated others by means of accusations. Thus, the non-academic benefits of general education do not favor of 100 percent mainstreaming.

180. The third factor, the effect on teachers and other children, was minimal overall. Student's more severe behaviors appear not to have occurred in the academic classrooms, thus according to his teachers, Student was not a behavior problem in Hanson's class or in Cadet Corps in eighth grade. Student's behavior was controlled and controllable in Music Appreciation and PE class, although he had tendencies to pass notes and use graphic language with the opposite sex. Per Malady, when Student was in general education classes, he was not a distraction, and was only occasionally disruptive. On average of once per week he would make an inappropriate comment, be vulgar to girls, name call or use curse words. These behaviors, while inappropriate, were not shown to have been disruptive of the classroom.

181. As for the fourth factor, the costs associated with mainstreaming Student, neither party presented any evidence in that regard, other than Anderson's opinion that Student required tremendous amounts of support.

182. Overall, after applying the four-factor test, Student fails to meet his burden of establishing that full-time general education placement was the appropriate environment for him. Therefore, as discussed in further detail below with respect to the offer made at the June 2, 2011, IEP, the LRE analysis requires determining whether he was mainstreamed to the maximum extent that was appropriate in light of the continuum of program options. As addressed in detail in Legal Conclusions 95-99 and 183-201, Student's placement in January 2011 consisted of a combination of general education with RSP support and SDC's that was reasonably calculated to provide Student with educational benefit. Therefore, Student failed to meet his burden of establishing that District denied him a FAPE in the January 2011, IEP, by failing to offer placement in the LRE. (Factual Findings 1-261; Legal Conclusions 1-6, 95-99, 174-201.)

Issues 16, 17, 18(a): Cadet Corps

183. Student contends that District, in the February 16, 2011, IEP, failed to offer appropriate placement in the LRE by failing to offer Student "Cadet Corps." Student further contends that District denied him a FAPE in the March 21, 2011, IEP, by failing to offer appropriate related services to enable Student to attend "Cadet Corps" five times per week. Student also contends that District denied him a FAPE by denying appropriate reading services from March 2011 until June 2011 by not giving him an alternate reading class schedule when he was pulled from his SDC reading class in order to attend Cadet Corps twice weekly from March 2011 until June 2011. District contends that it did not deny Student a FAPE.

184. Legal Conclusions 1-5 and 174-176 above are incorporated herein by reference.

185. Mother first requested Cadet Corps in January 2011. Initially, District rejected Mother's request, because Cadet Corps was a military elective that was offered only at the same period as Student's eighth grade SDC reading class with Quintero. Ultimately, in March 2011, District compromised and permitted Student to miss two weekly periods of SDC reading in order to attend two weekly sessions of Cadet Corps. Mother agreed to that compromise and signed the March 22, 2011, IEP amendment to that effect. The compromise was implemented for the rest of the 2010-2011 school year.

186. Mother insisted at the time, and at hearing, that Student's schedule should be modified to afford him the opportunity to attend both Cadet Corps and SDC reading class five times per week each. To that end, she wanted Student to be pulled from Quintero's SDC eighth grade reading class and placed in another reading class that met at another time, specifically Quintero's seventh grade SDC reading class. District did not agree, as that class was not appropriate to Student, who was at a higher academic level than that class addressed. Moreover, as Quintero credibly testified, because the class was interactive, modifying its curriculum for Student's level would have required adding a second teacher.

187. None of District's actions with regard to Cadet Corps denied Student a FAPE in the LRE. The LRE analysis applies to whether a student should be placed within or outside the mainstream general education, not to whether he was offered a particular class. Applying the LRE analysis by analogy to these facts, Student was afforded the maximum amount of participation in Cadet Corps that was appropriate to Student's individual needs, given the nonexistence of an alternate appropriate eighth grade reading class during that particular period, and the costs of creating an alternate reading program for him. Under these facts and circumstances, it was not a denial of FAPE in the LRE for District not to offer Cadet Corps five times weekly. (Factual Findings 1-261; Legal Conclusions 1-6, 95-99, 174-182.)

188. Similarly, it was not a denial of FAPE for District to refuse to rearrange Student's reading class to permit him to attend both Cadet Corps and a different SDC reading class five times weekly. As addressed in detail in Legal Conclusions 95-99 and 183-201, the evidence shows that Student was afforded educational benefit in the LRE from the placement and services he attended, even with Cadet Corps only twice a week and SDC reading only three times a week. Thus, he was not denied a FAPE. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, and here it was adequate. A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (Factual Findings 1-261; Legal Conclusions 1-6, 95-99, 174-187.)

District's Issue 1, Student's Issue 23 (b): June 2, 2011 IEP

189. Student contends that District denied him a FAPE in the June 2, 2011, IEP by failing to offer appropriate placement in the LRE. District contends that in the June 2, 2011, IEP, it offered Student a FAPE in the LRE. District seeks an order allowing it to implement its offer without parental consent.

190. Legal Conclusions 1-5 and 174-176 above are incorporated herein by reference.

191. Here, Student met his burden of establishing that the June 2, 2011, IEP did not offer him a FAPE in the LRE, while District did not meet its burden of showing that the offered placement was the LRE. The June 2, 2011 IEP offered Student a placement that would result in removing Student entirely from general education except for PE. After applying the *Rachel H* factors, although full time general education was inappropriate for Student, it was equally inappropriate to propose removing him entirely. The LRE analysis requires determining whether the child has been

mainstreamed to the maximum extent appropriate in light of the continuum of program options. District's June 2, 2011, IEP offer did not do so.

192. The testimony of District's witnesses that Student did not obtain *any* educational benefit from placement in the general education setting was not persuasive, and was outweighed by the more credible testimony of his teachers. Specifically, for seventh grade, Papez opined that Student did not receive *any* educational benefit from his general education classes, and that the curriculum modifications that would be necessary for Student would be so extensive as to make the general education curriculum not meaningful. Similarly, Kubacki's opinion was that although Student did receive some educational benefit from general education during seventh grade, in the form of taking notes and being in a classroom, it was negligible, and Kirby echoed this opinion for eighth grade. In addition, Anderson opined Student went through "the motions" for eighth grade, felt that he had not retained anything, and that his participation in class was not meaningful. To the extent that general education teachers Casian and Hanson expressed a different view, Papez and Anderson discounted their views as overly optimistic.

193. However, the contemporaneous observations of Student's actual general education teachers Casian in seventh grade and Hanson in eighth grade, and Hanson's testimony at hearing, were more credible and showed that in the immediately proceeding school years, Student was able to successfully participate and obtain educational benefit from inclusion in some general education classes. Specifically, in seventh grade, as of the April 6, 2010, IEP, Casian reported that Student was a "great student." As of the May 12, 2010, psycho-educational assessment, Casian reported that he had good reading comprehension, enjoyed class, listened and seemed to understand the stories that were read aloud, participated and was a "very valuable contributor." Although Casian wrote a contrary written report for the May 21, 2010, IEP that

advocated a more restrictive environment, Casian's contemporaneous prior observations were more persuasive. Similarly, in eighth grade, Hanson observed that Student meaningfully participated in, and received educational benefit from her classes, albeit with support. He retained information, and was not simply prompted by his aide. At hearing, she credibly disagreed with opinions that his participation was rote, not meaningful or a waste of time. Hanson's actual observations of Student in class were more credible and persuasive than the opinions of the special education administrators who did not actually teach him.

194. Given these factors, the offer to remove Student entirely from general education except for PE did not comply with the IDEA's mandate for inclusion in general education to the extent appropriate. Consequently, the June 2, 2011, IEP did not offer Student a FAPE in the LRE, because given the facts, it did not offer to mainstream Student to the maximum extent appropriate in light of the continuum of program options.

195. As for the offer of two periods a day in the Perspectives program, District appeared to have focused on Student's proposed eligibility category and on the designation of Perspectives as District's "autism program." But the evidence shows that academically, Student performed at a higher level than appropriate for the Perspectives program. Specifically, Inzunza credibly testified that Perspectives was geared toward students who were academically topping out at third grade level. The students in Perspectives were not expected to read for comprehension, and they were not expected to perform academic math skills. The evidence shows that Student's strengths, PLOPS and goals, in the June 2, 2011, IEP, indicated higher academic functioning. Specifically, Student could independently access computer reading programs, and maintain good comprehension. He could spell at the fourth grade level. In math, he worked at the third or fourth grade level, up to grade level 4.5, knew basic calculations, and could verbally

master his multiplication tables up to ten. He could also read independently at the fourth grade level and could understand verbal and visual concrete ideas in text. In fact, Goal 13 of the June 2, 2011 IEP stated that Student should progress toward reading aloud materials that were at the fifth grade level. In sum, Student's academic performance in reading, writing, and math, was at approximately a fourth grade level, higher than the levels for which Perspectives was geared.

196. For adaptive skills, Inzunza testified that he would expect Perspectives students, to fall within the significantly/extremely low, or very deficient range on the Vineland-II, which measured adaptive behavior. Student's results from the May 2010 assessment, on the Vineland-II, were higher than Inzunza would expect for Perspectives. Student fell in the mild-to-moderate developmental delay range.

197. Moreover, every IEP, as well as Gonzales' OT assessment from May 2010, stated that Student had no needs in the area of self-care or daily living skills

198. Anderson's view was that despite his progress, Student required access to a functional life skills curriculum including money management, safety, recreation and functional academics. She relied heavily on his cognitive levels, which did fall within the cognitive range Inzunza stated was appropriate for Perspectives students, i.e. mildly-moderately intellectually disabled up through the lower borderline range. However, the other information about Student does not support the offer of placement there, even for a partial day program. Nothing in Student's profile indicated propriety of Perspectives' circle time at the beginning of the day, nor the end-of-day cleaning-up, vacuuming, washing dishes, cleaning tables and blackboards, cooking or other aspects of the "domestics" component that District offered.

199. Student's OT PLOPs and Goals (stating that Student arrived at school in an over-responsive state, requiring supervision and redirection to enter his first class in a calm alert state for learning; that Student should follow a sensory diet; and that he could

get over ramped up), may have warranted the sensory exploration incorporated in the Perspectives program. Student's OT PLOPS and Goals do indicate his need for a sensory diet and a transition into each school day. But these OT needs, and a transition into a school day, could be addressed by a less restrictive offer of placement and services.

200. As for Student's behaviors, the evidence did not show that they justified his entire removal from mainstreaming. From the May 21, 2010, IEP onward, District reacted to pivotal events in Student's behaviors either with discipline or more restrictive offers of placement, rather than with a more focused program of behavioral intervention. Thus, the June 4, 2010, behaviors led to the discussion at the June 8, 2010, IEP of the autism program that was expected to be in place the following year. The December 2010, discipline led not to a FAA and BIP at the January 5, 2011, manifestation determination meeting, but to District's invitation of Inzunza to attend the January 5, 2011, IEP meeting to discuss Perspectives. The April 2011 discipline yielded the suspension and expulsion, which was then reversed by the April 18, 2011, manifestation determination. That ultimately resulted in the June 2, 2011, offer which proposed removing Student from the mainstream entirely. As discussed above, Student's behavioral needs could be addressed without resort to the change in placement proposed by District.

201. Given the above, Student met his burden of establishing that the June 2, 2011, IEP did not offer him a FAPE in the LRE, while District failed in its burden. In short, the June 2, 2011, IEP did not offer Student appropriate placement and services in the LRE. (Factual Findings 1-261; Legal Conclusions 1-200.) Student's remedy for this denial of a FAPE is discussed separately below.

STUDENT'S ISSUES AGAINST SELPA; ISSUES 27-55

202. Student makes numerous contentions that SELPA denied him a FAPE through alleged actions and inactions pertaining to his assessments, IEP's, program and

services. Applying the statutes that define the role of the SELPA, and considering the facts presented at hearing, there is no merit to any of these contentions.

203. Legal Conclusions 1-6 above are incorporated herein by reference.

204. Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) A "public agency" is defined as "a school district, county office of education, special education local plan area, . . . or any other public agency under the auspices of the state or any political subdivisions of the state providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.)

205. Under California law, each school district must operate under a "local plan." If of sufficient size, a district may create its own local plan. (Ed. Code, § 56195.1, subd. (a).) Otherwise, districts generally join with other districts to create a "local plan." (Ed. Code, § 56195.1, subd. (b).) The service area covered by the local plan is known as the special education local plan area. (Ed. Code, § 56195.1, subd. (d).) The SELPA administers the local plan. (Ed. Code, § 56195.)

206. Local plans must provide policies and procedures governing the provision of FAPE. (Ed. Code, § 56205.) They must contain provisions for staff development programs for special education teachers. (Ed. Code, § 56240-45.) They must also provide a governance structure and any necessary administrative support to implement the plan; establishment of a system for determining the responsibility of participating agencies for the education of each individual with exceptional needs residing in the special education local plan area; designation of a responsible local agency with respect to distribution of funds, provision of administrative support, and coordination of the implementation of the plan (Ed. Code, 56195.1, subd. (b).)

207. None of these provisions affects what does or does not constitute FAPE, or creates a right for parents to enforce the local plan through special education due process complaints. Parents have the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) This limited jurisdiction does not include jurisdiction over claims alleging a failure by a SELPA to enforce a local plan. Nor does it include jurisdiction over claims alleging a school district's failure to comply with a local plan.

208. Here, SELPA did not provide, and was not legally obligated to provide, any special education or related services to Student, who was, during all relevant time periods, served by his home school district. SELPA did not control or direct District's decisions regarding Student. Although SELPA was a "public agency," and by virtue of Edge's attendance at Student's IEP meetings, SELPA was "involved in" decisions regarding Student, there is no factual or legal basis for Student's contentions against SELPA. Specifically, Student presented no evidence that Edge's credentials, or the fact she attended his IEP's meetings, or fact that she made recommendations at the meetings with which Mother disagreed, impacted Student's educational program in a negative way. Student presented no evidence or legal argument that SELPA's failure to offer Student a workability program, for which he was not eligible because District had its own workability program, resulted in a denial of FAPE. The evidence shows that SELPA had no involvement in modifying Student's curriculum; providing inclusion specialists for him; coordinating his special education services; using particular forms relating to Student; coordinating educational strategies pertaining to Student; referring Student for assessments; responding to requests for IEE's pertaining to him; placing Student in particular classrooms or dealing with overcrowding there; implementing his

IEP's; implementing his behavior plans; assigning SCIA case managers to Student; giving Student's aides support; providing him with behavior intervention support; referring him for behavioral assessments; following NPA behavior assessment procedures with regard to him; providing reading outlines or reading instruction to Student; providing or denying him access to the California Reading Initiative; providing RSP services to him; ensuring proper credentials or licensure for his teachers or service providers; ensuring his IEP meetings were timely; using outdated forms for his IEP's; performing his assessments or ensuring appropriate testing accommodations; offering him inclusion support; developing his behavior intervention plans; assigning a Behavior Intervention Case Manager to his case; denying or ensuring Parent meaningful participation in IEP's; providing copies of IEP's to Student or Mother; coordinating autism therapy for him; ensuring that he was assessed timely following consent; ensuring the development of BIP; providing Student with a "consortium of schools;" or providing him with an appropriate emergency behavior plan.

209. To the extent Student contends that SELPA denied him a FAPE: from September through December 12, 2009, by failing to coordinate the CIBA five-hour observation to determine autism services that had been requested on August 30, 2009; from March 2011 to August 2011, by failing to coordinate NPA supervision consultation hours; and from January 2010 until June 2011, by failing to provide NPA OT for 45 minutes per week, his claims fail for the same reasons. Applying the above statutes that define the role of the SELPA to the facts presented at hearing about the implementation of Student's program, SELPA merely acted as the payor for services District was required to provide in order to offer its special education Students a FAPE. This relationship does not make SELPA into the public agency responsible to provide Student a FAPE.

210. In sum, the evidence at hearing failed to show that SELPA was the public agency responsible for providing Student with a FAPE, or that District's membership in

SELPA created any such duty. Thus, all of Student's claims against SELPA have no merit. (Factual Findings 1-261; Legal Conclusions 202-209.)

REMEDIES

211. As established above, District denied Student a FAPE by performing an inappropriate FAA on or around May 21, 2010 (Student's Issue 3); failing, at and after the January 5, 2011, manifestation IEP, to conduct a FAA and create a BIP (Student's Issue 14); failing to provide appropriate aide support from March 21 through 25, 2011 (Student's Issue 18(b)); failing to provide appropriate behavioral supports during and subsequent to an incident on or around April 6, 2011, resulting in a 12-day suspension and a denial of access to campus on April 12, 2011 (Student's Issue 19); and failing to offer an appropriate placement in the LRE in the June 2, 2011 IEP (Student's Issue 23(b); District's Issue (1)). Student seeks numerous remedies for these denials of a FAPE including placement, services, assessments, and compensatory education.

212. Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996, 2005].) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would

have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

213. Based upon the equitable considerations and the Factual Findings of this decision, District will be required to place Student into a SDC four periods a day for core subjects based upon state standards. The remainder of the day shall be in a collaboration model general education setting, with a general education teacher and a special education teacher providing push-in RSP support, for two periods daily for a core subject and an elective. Student shall also be placed in general education for physical education. Student shall be mainstreamed 44% of his day. Based upon his October 23, 2009, IEP and the offer made the following year at the June 8, 2010, IEP, as well as the discussion at the June 2, 2011, IEP, this placement is reasonably calculated to provide Student with educational benefit in the LRE.

214. As Papez opined, Student had been making progress in his behavior and social skills, and should move on to high school. Therefore his placement for the 2011-2012 school year will be his home high school unless the parties agree otherwise.

215. Except for OT as discussed below, the related services that were offered in the June 2, 2011, IEP were appropriate and may be implemented: speech and language once a week for 30 minutes; counseling three times per month for 30 minutes; full-time 1:1 NPA aide services plus ten hours a month supervision, both from CIBA; and ESY with these related services, and transportation.

216. The modifications and accommodations that were discussed at the June 2, 2011, IEP were also appropriate and shall be implemented. Some of the items discussed were not clearly defined and cannot be implemented Therefore the remedy is specified as the following, which were clearly stated in the IEP: alpha smart software, a portable keyboard; a digilock for PE, extra time for assignments, tests and quizzes; use of graphic organizers; preferential seating; and prompting as necessary and consistent with goals.

217. With regard to PLOPS, goals, and related services other than OT, the offer made at the June 2, 2011, was appropriate and shall be implemented. The responsible persons listed on that IEP to accomplish some goals include "Excel" staff. Since Excel is a model that exists only at LMS, for those goals District may replace "Excel" staff with general education teachers, RSP teachers and Student's NPA aide.

218. Since Student's sensory needs were to be addressed at Perspectives, the offer of OT was not appropriate and must be modified to address Student's Goals numbered 1-2, 5 and 16-17 in the area of OT. Previously, OT had been provided by and NPA 45 minutes per week, and this continues to appear appropriate.

219. For the time being, the most appropriate behavior plan that District can systematically implement is the UHS BSP. It shall serve as Student's behavior plan pending a new FAA that must be conducted and a new BIP that must be developed and implemented.

220. Based on Student's individualized needs, this is the appropriate equitable remedy, as it is reasonably calculated to provide the educational benefits Student would have likely accrued from the special education placement and services that District should have provided Student. (Factual Findings 1-269; Legal Conclusions 1-219.)

ORDER

1. Student's placement for the 2011-2012 school year shall be his home high school unless the parties agree otherwise.

2. Student shall be mainstreamed at least⁹ 44% of his day.

⁹ The wording of this paragraph in this Corrected Decision has been corrected from the wording as it originally appeared in the Decision issued on March 12, 2012.

3. For two periods daily for a core subject and an elective, District shall place Student in a collaboration model general education setting, with a general education teacher and a special education teacher providing push-in RSP support.

4. Student shall receive general education PE;

5. District shall place Student into a SDC for the balance of¹⁰ the school day for core subjects based upon state standards.

6. Except with regard to OT, the related services that were offered in the June 2, 2011, IEP shall be implemented, as follows: speech and language once a week for 30 minutes; counseling three times per month for 30 minutes; full-time 1:1 NPA aide services plus ten hours a month supervision, both from CIBA; ESY with these related services, and transportation.

7. The following modifications and accommodations shall be implemented: alpha smart software, a portable keyboard; a digilock for PE, extra time for assignments, tests and quizzes; use of graphic organizers; preferential seating; and prompting as necessary and consistent with goals.

8. The goals stated in the June 2, 2011, IEP were appropriate and shall be implemented. For those goals stating "Excel," District may replace "Excel" staff with general education teachers, RSP teachers and Student's NPA aide.

9. OT shall be provided by an NPA 45 minutes per week and shall address Goals numbered 1-2, 5 and 16-17.

10. Within 45 days of the date of this decision, District shall conduct a new FAA to target the behaviors of: physical aggression (including assaults, knocking over tables, throwing books; fighting); threats; insults (including teasing or name-calling);

¹⁰ The wording of this paragraph in this Corrected Decision has been corrected from the wording as it originally appeared in the Decision issued on March 12, 2012.

tantrums, disobedience (including refusal, defiance, or noncompliance); running away/bolting; blurting out in class; repetitive talk; trading (including giving away contraband, selling or stealing); lying; and inappropriate sexual conduct (including cursing, obscenities, profanity in oral or written form, and vulgarity or harassment toward females) which shall be completed and an IEP meeting convened within legally required timelines. At that IEP, the team will develop a BIP. Pending a new FAA and BIP, the UHS BSP shall be implemented.

11. If Mother does not consent to the FAA, the relief granted in this Decision shall be null and void.

12. For purposes of stay put, the above orders shall constitute Student's current educational placement.

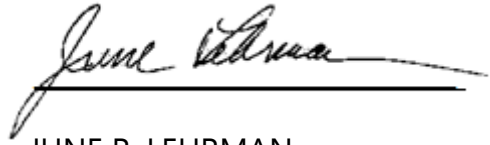
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on the following issues: Student's 3; 14; 18(b); 19; 23 (b); and District's Issue (1). District prevailed on the following issues: Student's 1(a)-1(b); 2(a)-2 (j); 4 (a)-4(f); 5; 6(a)-6(c); 7; 8; 9(a)-9(c); 10; 11; 12; 13; 15(a)-(b); 16; 17; 18(a); 18(c); 20; 21; 22; 23(a); 24; 25 and 26. SELPA prevailed on all issues against it, Student's 27-55.

RIGHT TO APPEAL THIS DECISION

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

Dated: March 26, 2012

A handwritten signature in black ink, reading "June R. Lehrman", is positioned above a solid horizontal line.

JUNE R. LEHRMAN

Administrative Law Judge

Office of Administrative Hearings