

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

EL CENTRO ELEMENTARY SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2012100380

PARENTS ON BEHALF OF STUDENT,

v.

EL CENTRO ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2012080113

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, from the Office of Administrative Hearings (OAH), State of California, heard this matter on February 26, 27, and 28, 2013, and March 4, 5, 6, 7, and 8, 2013, in El Centro, California.

Michelle Ortega, Esq. and Advocate Heyman Hakimi represented Student and Student's parents (Student).¹ Student's mother (Mother) was present for the entire hearing. Student's father was present for much of the hearing. Student was not present.

¹ Ms. Ortega became ill after February 28, 2013. Although the ALJ offered to continue the hearing until Ms. Ortega was able to return, Student chose to proceed with

Jack B. Clarke, Jr., Esq. represented the El Centro Elementary School District (District). Mr. Clarke was assisted by Dina Harris, Esq. Janice Lau, the District's Director of Special Education, was present for the majority of the hearing.

On August 3, 2012, Student filed with OAH a request for due process naming the District in case number 2012080113. On October 9, 2012, the District filed its due process request naming Student, in case number 2012100380. On October 15, 2012, OAH consolidated these two cases and ordered that the District's case would be the primary case for determining the timeline for the decision. On October 31, 2012, OAH granted the parties' joint motion for continuance. On January 2, 2013, OAH granted Student's motion to amend his complaint, resetting all applicable timelines in the consolidated cases.

At the close of the hearing, the parties requested and received a continuance in order to file written closing briefs in lieu of oral closing arguments. The ALJ continued the matter to April 12, 2013 in order to receive the briefs. Student timely filed his opening brief on March 22, 2013. The District timely filed its brief on April 5, 2013. Student timely filed his reply to the District's brief on April 11, 2013. The matter was taken under submission as of April 12, 2013.

ISSUES PRESENTED

STUDENT'S ISSUES:

- 1) Did the District commit procedural and substantive violations of the Individuals with Disabilities Education Act (IDEA), thereby denying Student a

the hearing represented solely by Mr. Hakimi. Mr. Hakimi capably represented Student for the remainder of the hearing.

free appropriate public education (FAPE) for the 2011-2012 school year and extended school year, by failing to:

- a. Offer an appropriate placement and supports;
 - b. Offer an appropriate placement in the least restrictive environment;
 - c. Offer appropriate frequency, duration, and type of designated instructional services;² and
 - d. Devise appropriate measurable and meaningful goals and objectives in all areas of suspected need?
- 2) Did the District commit procedural and substantive violations of the IDEA, thereby denying Student a FAPE for the 2012-2013 school year and extended school year, by failing to:

- a. Offer an appropriate placement and services;
- b. Offer an appropriate placement in the least restrictive environment;
- c. Offer appropriate frequency, duration, and type of designated instructional services; and
- d. Devise appropriate measurable and meaningful goals and objectives in all areas of disability?

DISTRICT'S ISSUES:

- 3) Did the District's offer to Student of placement and services in its August 27, 2012 individualized education program (IEP) as amended on December 12, 2012, provide a legally sufficient FAPE to Student?³

² Designated instructional services are also known as related services. The terms are used interchangeably here.

- 4) If the District offered FAPE, may the District implement the offer of placement and services without parental consent if Student's parents want special education and services for Student from the District?

CONTENTIONS OF THE PARTIES

The primary focus of this case is whether Student should be placed in a general education classroom with full time support from a one-to-one aide trained in Applied Behavioral Analysis (ABA), or whether his unique needs require a more restrictive placement. Student also contests the scope of the goals in his IEP's and the amount of occupational therapy and speech and language services provided to him under his IEP's.

Student is a little boy with Down's syndrome. He attended preschool for a very short time in what was designated a general education classroom in a preschool chosen by his parents which was not part of the District's program. When Student's parents first registered him to attend Kindergarten in the District, they chose to enroll Student in a dual immersion general education classroom where instruction occurred in Spanish for 90 percent of the time. The District members of Student's IEP team did not believe that Student's unique needs could be addressed either in the dual immersion classroom or in any type of general education classroom. Rather, they believed that Student initially needed full-time placement in a special day class (SDC), which is the placement primarily offered by the District during the time period of this case. Later, after Student had attended Kindergarten for a year and his parents chose to have him repeat Kindergarten, the District believed that Student's unique needs could be met by placing Student in a general education classroom for part of his school day and in an SDC for

³ During the course of the hearing, the parties stipulated that the District's issues for hearing would encompass its December 12, 2012 IEP offer and whether that offer was still appropriate at the time of the hearing.

the other part. The District believes that its offers of placement and services for Student over the two school years at issue in this case would have provided Student with a FAPE.

Student disagrees. He believes that the District should have dissuaded his parents from enrolling him in a dual immersion class. Student believes that the least restrictive environment (LRE) for him is in an English only general education classroom with one-on-one support from an aide trained in ABA. Student believes that the placements offered by the District were not in the LRE, that the District failed to provide him with adequate behavioral supports, that it failed to develop adequate goals for him, and that the amount of occupational therapy (OT) and speech and language (SL) services offered were inadequate to meet Student's needs.

For the reasons discussed in the Legal Conclusions below, this Decision finds that the District's offers of placement and services, and the IEP's it developed for Student for the 2011-2012 and 2012-2013 school years, offered Student a FAPE in the least restrictive environment, with the exception of the occupational therapy services initially provided to him. Student has not prevailed on any other issue presented.

FACTUAL FINDINGS

EVENTS PRIOR TO THE 2011-2012 SCHOOL YEAR

1. Student is a little boy who is presently seven years old. He is primarily eligible for special education and related services due to an intellectual disability resulting from Down's syndrome. Student presently also has a secondary eligibility of speech or language impairment (SLI). He is a happy and engaging child. Student now attends Kindergarten at the District's Harding Elementary School in an English only general education classroom. During all times relevant to this case, Student lived with his parents and three older siblings within the District's boundaries.

Regional Center Assessment

2. Student began receiving services from the Imperial Valley Branch of the San Diego Regional Center when he was just months old, based on his diagnosis of Down's syndrome. He participated in early intervention infant-toddler programs and also received in-home programming from the Regional Center. Student received speech therapy services through the infant-toddler program. Student's participation in the infant-toddler program was sporadic at times.

3. The Regional Center referred Student for a psychological assessment⁴ by Dr. Christine Trigeiro in September 2008 in order to determine Student's ongoing eligibility for Regional Center services. Student was just over two-and-a-half years old at the time. Dr. Trigeiro did not testify at the hearing in this case.

4. Dr. Trigeiro administered a cognitive testing assessment to Student. His scores on that test indicated that Student's composite cognitive score was 70 and his language composite score was 68. Both scores placed Student a little over a year behind his chronological age. Dr. Trigeiro also assessed Student's adaptive behaviors. In communication, daily living skills, and socialization, Student lagged from about one year to about a year-and-a-half behind his typically developing peers. The results on the adaptive behavior portion of the assessment indicated that Student's motor skills were only six months behind his chronological age.

5. Student communicated with both signs and words. He knew and used about 20 signs at the time and was also able to say a few words correctly. Student's receptive language was slightly better than his expressive language.

⁴ The term "assessment" is used primarily in California statutes and regulations. Federal statutes and regulations primarily use the term "evaluation." The terms are used interchangeably in this decision.

6. During the assessment process, Student demonstrated strengths in the areas of imitation and in creative play skills.

7. Dr. Trigeiro recommended that Student participate in a developmental preschool program that provided opportunities for growth in Student's speech and language skills, social interaction, and self-help skills. She also recommended that Student receive a speech and language evaluation.

8. In preparation for Student exiting the early intervention program and entering an elementary school program, the Imperial County Schools administered a speech and language assessment to him in December 2008, just before Student's third birthday. The speech therapist who administered this assessment did not testify at the hearing.

9. The assessment found that Student had some low muscle tone present in his lips and tongue, but that his oral structure appeared adequate for speech purposes. The assessment also found that Student's language comprehension was at 23.25 months and his language expression was at a level of 18 months. Based on the results of this assessment, the speech therapist also recommended that Student attend a structured preschool and that he have goals in the areas of expressive and receptive language.

10. Student was referred to the District for speech and language therapy services in December 2008. However, his parents did not begin taking Student to the sessions until late February, 2009. On March 3, 2009, Student's parents gave consent for the District to hold an IEP meeting for Student. The District convened the IEP meeting the same day. This IEP is not at issue in the instant hearing.

March 9, 2009 IEP Meeting

11. Based upon the assessments of Student, the District IEP team members determined that Student's limited expressive and receptive language might negatively

impact his ability to express ideas and Student's wants and needs in a preschool setting. The District IEP team therefore developed a language goal for Student and offered speech and language therapy services to him.

12. At the time of this IEP, Mother indicated that Student could feed himself, drink from a cup, take off his pants, and incorrectly put on shirts. Student was not toilet trained and would only let his mother know that he needed to use the bathroom when he had to defecate. However, based upon the results of the Regional Center assessments, the IEP team determined that Student should attend a general education preschool rather than a special day class preschool. Although not totally clear from the March 3, 2009 IEP or testimony at hearing, it appears that the District did not have a general education preschool. Student's parents therefore had placed him on a waiting list for a Head Start preschool. Mother believed Student would begin the Head Start program in August 2009.

13. Student's IEP also offered consultation between a District speech and language specialist, Student's parents and Student's preschool teacher regarding strategies to promote Student's overall language skills. However, the consultation would only take place if Student began attending preschool.

14. Mother signed this IEP.

15. For reasons not clarified at hearing, Student did not begin attending the Head Start preschool. Nor did Student's parents enroll him in any other preschool at this time.

16. The speech and language services offered in Student's March 3, 2009 IEP were provided to Student, as with all other students, during normal school hours. Mother works outside the home. Student's grandmother provides childcare to Student and his siblings. However, Mother encountered several scheduling difficulties with

leaving work to take Student to his SL sessions. Mother also did not believe that the SL therapy was benefiting Student.

17. The District convened an IEP for Student on September 25, 2009. At that time, Student's parents decided to withdraw Student from speech and language therapy and to revoke consent for Student to receive special education services from the District. The District informed Parents that revocation of consent would mean that Student would no longer be eligible for special education or any related services and that he would no longer be considered a child with a disability. Parents revoked consent in spite of being advised of the consequences.

November 2010 Speech and Language Assessment

18. Parents did not contact the District again until approximately November 2010 when they requested that the District administer a speech and language assessment to Student for a new determination of special education eligibility. Student did not attend any preschool or receive speech and language therapy between the time his parents revoked consent for special education and the time they requested a new assessment. Because Parents had revoked consent for special education, their new request for assessment was considered an "initial" request.

19. The assessment was administered by District speech and language pathologist (SLP) Jezelle Riven. Ms. Riven did not testify at the hearing.

20. Ms. Riven administered the following standardized assessments: The Goldman-Fristoe Test of Articulation-2 (GFTA-2); the Receptive One-Word Picture Vocabulary Test (ROWPVT); the Expressive One-Word Picture Vocabulary Test (EOWPVT); and the Preschool Language Scale-4 (PLS-4) in both English and in Spanish.

21. The GFTA-2 measures an individual's articulation of the consonant sounds of Standard American English. The raw scores on the test are determined by counting the total number of articulation errors the individual makes while naming the test

pictures. Student made many sound substitutions on the test (such as substituting a “k” sound for an initial “d” sound) and made several omissions of sounds (such as omitting initial “s’s.”) Student’s raw score of 24 placed him in the 11th percentile.

22. The ROWPVT measures a person’s ability to understand the meaning of single spoken words by asking the student to point to a given picture from a field of four. Student’s raw score of 11 placed him under the first percentile on this test.

23. EOWPVT measures a person’s ability to name objects, actions and concepts pictured in illustrations. Student’s raw score of 17 placed him in the first percentile on this test.

24. The PLS-4 measures auditory comprehension of language and expressive communication. The auditory comprehension subtest of the PLS-4 evaluates a child’s receptive language skills in the areas of attention, understanding of vocabulary and concepts, understanding of morphology (pattern of word formation) and syntax (rules for the formation of grammatical sentences). On the English version of this test, Student’s scores placed him in the first percentile in all subtests. Student was so distracted during the administration of the auditory comprehension subtest of the Spanish version of this test that the therapist was unable to obtain a basal level for him. On the Spanish expressive communication subtest, Student scored in the first percentile as he had on the English version of the subtest.

25. Ms. Riven determined from the results of the assessment that Student had significant delays in receptive and expressive language as well as in articulation in both English and Spanish. She concluded that Student met the criteria for eligibility for special education as a child with a speech and language impairment. Ms. Riven recommended that Student receive speech and language therapy outside of the general education environment.

December 3, 2010 IEP Meeting

26. The District convened an IEP meeting for Student on December 3, 2010. Since Parents had previously revoked consent for special education eligibility for Student, this was considered an "initial" IEP for him.

27. Student's IEP team added SLI as a secondary eligibility for Student. The team continued to find that Student should attend a general education preschool. Parents indicated that they intended to place Student in a state-funded general education preschool program offered by the County Office of Education known as a "Proposition 10" or "Prop 10" program. The program was designed for preschool children who were from low income families or otherwise considered "at risk." Student was on a waiting list for the program. Parents were aware of this program because Mother is a credentialed teacher who works for the County Office of Education as a trainer of teachers. Father is also employed by the County in a non-teaching position.

28. Mother informed the IEP team that Student inconsistently could identify numbers one to 10, that he could recite the alphabet but was unable to identify letters, and that he was able to say his name and age. She stated that Student spoke in one to two word sentences and also used gestures and signs to express himself, but that she could often not understand his speech. Mother did not express any specific concerns about Student's educational progress.

29. Mother and Ms. Riven agreed that although Student often mixed English and Spanish in his speech, his primary language was English.

30. Mother did not report any concerns with Student's gross motor development or with his behavior. She did not report any issues with his fine motor development or report any sensory needs she had observed in Student.

31. Based upon Ms. Riven's assessment and Mother's input, the District developed three goals for Student in the areas of expressive and receptive language and articulation.

32. Student's IEP team again determined that FAPE for Student was a general education preschool with supporting SL therapy, along with consultation between Student's SL therapist, his preschool teacher, and Parents. The District offered Student 50 sessions of speech and language therapy a year, for 30 minutes a session, either in a small group or individual sessions. This amounted to approximately one hour per week of services during the school year.

33. Mother agreed to the placement and related service recommendations and signed the IEP.

34. An opening in the Proposition 10 preschool did not become available for Student until sometime in April, 2011. After Student began attending the preschool, he also started receiving speech and language therapy. The therapy was provided by District SLP Courtney Holbrook and a speech and language assistant. There were three children in Student's SL group. Therefore, the instruction was almost individualized because there was a two adult to three student ratio. The preschool instruction ended in early June that same year. Therefore, Student attended approximately eight weeks of preschool. This was the entire amount of preschool education he received prior to starting Kindergarten.

SCHOOL YEAR 2011-2012

Student's Enrollment in the Dual Immersion Kindergarten Class

35. Student's parents and siblings are bilingual. His grandmother does not speak much English. Parents decided that they wanted to focus on teaching Spanish to Student so that he too would be fully bilingual. The District developed a dual immersion

Kindergarten classroom for the first time for the 2011-2012 school year. The class was developed to be a half-day Kindergarten program, lasting approximately three hours every school day. Parents decided to enroll Student in this class.

36. The enrollment papers for the dual immersion class informed parents and students that the program was intended as a long-term commitment and that it would take from five to seven years for children to benefit from the program. Participants were also informed that the class would concentrate primarily on teaching reading and writing in Spanish and that English would not be added until second grade. Participants were required to acknowledge these factors when they signed the enrollment papers.

37. Student's December 3, 2010 IEP had identified him as a general education student. Therefore, the District treated Student as any other general education student when it reviewed his application for placement in the dual immersion Kindergarten class. The District did not refuse to enroll Student in this class and did not attempt to counsel parents or otherwise dissuade them from enrolling Student in the class because it believed to do so outside of the IEP process would be an act of discrimination in violation of Student's rights under section 504 of the Rehabilitation Act (29 U.S.C. § 794) and under the Americans with Disabilities Act (42 U.S.C. § 12111, et seq). The District accepted Student into the dual immersion Kindergarten class for the 2011-2012 school year, which was to begin in late August 2011.

38. As discussed below, Student's independent assessors subsequently agreed that placement in such a program was not beneficial for Student. Student contends that the District should have informed Parents that it was not advisable to enroll a child with Student's disabilities, particularly his language deficits, in a dual immersion classroom. Student also contends that the District never explained to Parents that continued enrollment in the dual immersion program was inadvisable. The evidence does not support Student's contentions.

39. The brief notes to Student's IEP's developed during the 2011-2012 school year do not contain specific references to the detriments of Student's attendance in the dual immersion Kindergarten. However, most of Student's IEP team members credibly testified that the IEP teams discussed the dual immersion class in the context of addressing what the IEP teams believed to be an appropriate placement for Student. District SLP Courtney Holbrook assessed Student in August 2011. She testified at the hearing. She recalls discussing the detriments of the dual immersion class at various IEP's she attended for Student during the 2011-2012 school year, beginning with the amendment IEP meeting convened for Student on June 6, 2011. Jesus Preciado, the District school psychologist who assessed Student in August 2011, and Special Education Director Janice Lau, who both testified credibly at the hearing, recalled the conversations as well. A program specialist named Kim Cantua from the Imperial County Special Education Local Plan Area (SELPA) who observed Student in his dual immersion placement also recommended against it. As discussed below, her observation was discussed at an IEP for Student on August 29, 2011, just after Student began attending the bilingual class. Additionally, as discussed below, another behavior specialist employed by the SELPA named Louise Brenes observed Student in October 2011. In her report, which was discussed at Student's November 4, 2011 IEP team meeting, indicated that Student responded more positively and engaged in less disruptive behaviors when taught in English rather than in Spanish.

40. Mother, who was generally a credible witness, did not recall conversations during the IEP meetings specifically addressing the dual immersion class. However, the content of the District's assessments and observation reports as well as the District's actions support the testimony of District staff on this point. As will be discussed in more detail below, the District thought that Student's unique needs could not be served in a general education dual immersion class, so it offered placement to Student in a special

day class taught in English. When Parents rejected the SDC placement again in November 2011, the District was so concerned about the inadvisability of Student's continued enrollment in the dual immersion class that it offered to place Student in a general education English language based Kindergarten class with an aide as an interim placement. Although the District did not believe a general education placement to be appropriate, it believed that it was more important to move Student out of the dual immersion classroom so that he could concentrate on improving his language skills in English. As discussed below, Parents inexplicably rejected the District's offer.

41. Additionally, in a prior written notice to Parents dated January 18, 2012, the District informed Parents that it could not implement the three English language arts goals it had proposed for Student because the goals followed English language curriculum standards and could not be implemented in a classroom taught primarily in Spanish. The weight of the evidence therefore supports the District's contention that it discussed the detriments of the dual immersion class with Parents during the IEP meetings and addressed its belief that the placement was not appropriate for Student by offering alternate placements.

IEP Meeting of June 6, 2011

42. The District convened an amendment IEP team meeting for Student on June 6, 2011, specifically to address his placement for the 2011-2012 school year. Parents both attended the meeting. Also present was Ms. Lau; Student's teacher from the Proposition 10 preschool class; SLP Courtney Holbrook; and special education teacher Laine McFadden who teaches the District's mild to moderate SDC class for children in Kindergarten and first grade. Ms. McFadden testified at this hearing. Her classroom is located at the District's Lincoln Elementary School. It is the only mild to moderate SDC that the District operates for Kindergarten and first grade children. Also present was a general education teacher from Lincoln.

43. Prior to the IEP meeting, Ms. McFadden observed Student two times at his preschool. She noted that Student had difficulty sustaining attention in the class. He required a significant amount of redirection and guidance. Student was still not toilet trained although he was five-and-a-half years old at the time. His preschool teacher indicated that Student would become attached to her and would not leave her proximity. Ms. Holbrook added that Student's expressive and receptive language skills remained significantly below average. The general education teacher explained the pre-academic skills children needed to be successful in Kindergarten. A child entering Kindergarten was expected to be ready to sit and listen, follow at least one-step instructions, line up, wait their turn, and have some exposure to pre-academic skills. The District team members expressed concerns that Student did not have sufficient Kindergarten readiness skills because he had spent so little time in preschool and therefore not only lacked the pre-academic skills, but also lacked experience with school structure and expectations. They believed that placement in a Kindergarten class with 30 or more other children would cause Student to shut down. They also believed that Student did not have the fine motor skills necessary to copy, trace, and engage in other activities expected of Kindergarten students. The general education teacher also explained to Student's parents that her classroom worked together with Ms. McFadden's SDC to provide numerous mainstreaming opportunities for the children in the SDC.

44. After discussing a variety of placements, including general education, the dual immersion classroom, and Ms. McFadden's SDC class, the District offered placement to Student in the SDC. The District team members explained that the SDC was a full day rather than half day class, and that the longer program, which included specialized academic instruction, would be more beneficial to Student than a half day program. The team also explained that Student would have mainstreaming opportunities throughout his school day because Ms. McFadden's class worked together

with the general education Kindergarten class that was right next door. The District team believed that Student's lack of readiness skills, lack of knowledge of school structure, his inattentiveness, and his language deficits, all indicated that a general education classroom was not appropriate for him. The team believed that the structure of the SDC, the language-rich environment of the classroom, the high adult to student ratio, and the longer school day, would permit Student to make progress that he would not be able to make in a general education environment.

45. Parents rejected the recommendation of the District IEP team members for the SDC placement. They stated they preferred that Student attend the dual immersion class at Harding and intended to place Student there. Since Parents had already consented to the previous IEP, Student's speech and language services would continue despite Parents' rejection of the SDC placement.

46. The District also offered Student placement in a four-week Kindergarten readiness program offered during the summer at Harding. The class was taught by Maria Gradillas, the same teacher who would be teaching the dual immersion Kindergarten class in which Parents had enrolled Student. Ms. Gradillas did not testify at the hearing.

47. Student only attended a few days of the summer school class. At hearing, Mother testified that Ms. Gradillas contacted her every day saying that she could not handle Student in the summer school class. Mother therefore withdrew Student from summer school. Mother did not contact anyone at the District to discuss Student's problems in the summer school class before she decided to withdraw him.

District's August 2011 Psychological Assessment

48. The District determined that it would be prudent to assess Student again in order to obtain a better understanding of his needs since Student had not attended a

District school, had only attended preschool for about two months, and the District therefore had very little information about him. Parents signed the assessment plan.

49. The District assessment team consisted of Ms. McFadden, Ms. Gradillas, Ms. Holbrook, Mr. Preciado, and a school nurse. The psychological assessment, which was in effect a psycho-educational assessment, included the following standardized testing instruments: the Brigance, which assessed school readiness and basic knowledge; the Wechsler Preschool and Primary Scale of Intelligence –Third Edition (WPPSI-III); the Differential Ability Scales- Second Edition (DAS-II); the Wide Range of Visual Motor Abilities (WRAVMA); the Behavior Assessment System for Children – Second Edition (BASC-II); and the Vineland Adaptive Behavior Scales – Second Edition (Vineland-II).

50. Mr. Preciado obtained his master’s degree in counseling, with an emphasis on school psychology, in 2002. He obtained his pupil personnel services credential as a school psychologist the same year. He has been employed by the District as a school psychologist since 2003. Mr.Preciado has received extensive training in school psychology, with significant emphasis on bilingual and cross-cultural issues. He is bilingual in English and Spanish and conducted his portion of Student’s assessment in both languages since Student was brought up in a bilingual home and had just started attending a Spanish dominant classroom.

51. Ms. McFadden administered the academic portion of the assessment. She has a master’s degree in education and has a multiple subjects teaching credential in addition to her special education credentials. Ms. McFadden has been a special education teacher for over 27 years. She has taught at the District since 1991 and has taught at Lincoln since 1998. In addition to her education, Ms. McFadden has attended over 30 professional development courses in a wide variety of areas, including the inclusion of special needs children in general education classes. At hearing, she presented as an extremely dedicated teacher whose prime interest is the education of

her students. It was apparent from her testimony that she has an in-depth knowledge of special education issues and how to best educate children with special needs and how to focus on their strengths.

52. Ms. Holbrook administered a separate speech and language assessment to Student. Ms. Holbrook has two master's degrees: one in speech pathology and the other in audiology. She has rehabilitative services credential in language, speech, and hearing. Ms. Holbrook has worked for the District for almost 10 years.

53. There is no contention that the District assessors were not qualified to perform their assessments or that the testing instruments they used were inappropriate or improperly administered.

54. Mr. Preciado initially observed Student two times during the summer when Student attempted to attend the pre-Kindergarten summer program. The first day, the school principal had to escort Student out of the restroom because Student wanted to continue using the sink. Ms. Gradillas told Mr. Preciado that Student had limited independence. Student sought adult support for things that the other children did independently, such as drinking water, eating, and putting things away in his cubby. Student would often get up and wander the classroom to see what others were doing during instruction periods and hands-on activities. Student's teacher had limited success in redirecting him. Student would not return to his seat until the teacher guided him to it. The teacher praised him for sitting down; Student, however, continued to get up from his seat during the entire school day.

55. Student did not socialize much with his peers, although he would smile at them and dance around the room as if to entertain them. On the playground, an aide demonstrated to Student how to use the drinking fountain. Student then remained at the fountain playing with it until another child asked to use it. Student responded by spitting water in the child's face. Student also demonstrated frustration during recess.

He wanted to use the swings. The School Principal, who was present during recess, encouraged Student to walk over to the swings by himself. Student became frustrated. He yelled and struck the Principal's chest with both hands. Student calmed down quickly when the Principal asked him to stop.

56. After recess, the children were put into groups for activities. Student would not remain with his group. The teacher had to stop what she was doing to lead Student back to his table by the hand. Student continued to get up every time he was redirected to his table. At one point, he picked up a bell that he found at the front of the class and began to ring it. Ms. Gradillas told Mr. Preciado that even when she sat down next to Student she had difficulties keeping him seated.

57. During his second observation, Mr. Preciado kept a tally of Student's off-task behaviors. Student left his seat 24 times. He became visually distracted, disengaging from the class activity, 20 times. Student also became distracted by noises 28 times. In each case, either the teacher or the aide had to re-direct Student. Mr. Preciado's observation lasted only 30 minutes.

58. Ms. McFadden also observed Student during the few days he was in the summer school pre-K class. She also noted that Student did not follow directions, was constantly trying to leave the classroom, constantly went underneath the desk and hid under tables, bothered peers who were working on tasks, scribbled on and destroyed the work being done by peers, and could only attend to a given task for 30 seconds to a minute. On the playground, Ms. McFadden observed Student running in front of swings and trying to leave the playground through the gates. She did not believe that Student was safe in the general education environment.

59. Mr. Preciado conducted his formal assessment of Student over two days in August, 2011. Student required much redirection during the testing. He was distracted by testing items, such as blocks, and other objects in the testing area. Mr. Preciado gave

Student a break every 10 minutes. He also reinforced Student's participation by giving Student crackers, "high five's", and verbal praise. Student was most distractible during verbal tasks on the assessments and when the work became more difficult. Student would put his head down, fail to respond, get up from his seat, attempt to turn sheets on the testing easel, and walk away from Mr. Preciado. Student also would dance around. During one of the breaks, Student ran into his classroom, which was close by, before Mr. Preciado could reach him. Student danced around the classroom as his teacher, Ms. Gradillas, was instructing the class. Student then ran back to the testing area. He only stopped this behavior when Mr. Preciado ate some of the crackers and told Student he would not get any more of them if he did not finish the testing.

60. During the second testing session, Student's interest in the assessment process lessened after 15 minutes. He did not respond to one of the subtests at all, choosing instead to ignore Mr. Preciado. Student demonstrated a pattern of initially being interesting in the testing but then becoming indifferent and unresponsive as tasks became more difficult. Mother was present during the second session and attempted to encourage Student to put forth his best efforts, but she was unsuccessful in redirecting him.

61. Mr. Preciado divided his report on Student's assessment results into three areas: learning skills, achievement/school readiness, and adaptive skills. In the area of learning skills, the assessment tools addressed auditory processing, visual processing, visual motor development, and sensory motor development. In auditory processing, although Parents reported that Student could follow up to two-step instructions at home, Student could only follow one-step instructions when tested by Ms. McFadden.

62. Various subtests of the DAS-II and WPPSI-III assessed Student's visual processing skills. Student demonstrated relative strengths in his ability to identify like-features, performing in the low average range. However, in all other areas of visual

processing, Student's scores were in the significantly below average range. On the WRAVMA, Student's scores for visual-motor integration skills were also significantly below average. His scores for visual-spatial integration were in the significantly below average or extremely low ranges. His visual discrimination and visual figure ground were also in the extremely low range.

63. The two significant areas tested in sensory motor development were gross motor and fine motor skills. Student's gross motor skills were fairly age appropriate, although he could not hop or skip. However, Student's fine motor skills were significantly below average. He had limited mastery of writing. Student had not developed a pencil grip with which he was comfortable, which was influencing his ability to produce more than scribbles.

64. Student's intellectual capacity was assessed using the WPPSI-III and the DAS-II. The two instruments were used in order to compare results and identify with more accuracy Student's strengths and weaknesses. Student's cognitive level on the WPPSI-III was a mean standard score of 46, placing him in the significantly below average range of intellectual development. The District assessors were not able to obtain processing speed scores however because Student did not have the pencil-holding skill that would allow him to perform paper and pencil tasks under the time limits of the tests. On the DAS-II, Student's general cognitive ability score was a mean standard score of 48, similar to his scores on the WPPSI-III, also in the significantly below average range. Student's verbal scores did not yield any areas of relative strength or weakness.

65. Student did show strengths in non-verbal reasoning. His mean standard score on the DAS-II in this area was 71, in the below average range. On the picture similarities subtest, Student scored in the low average range, much higher than he did in any other area.

66. Ms. McFadden assessed Student in academic achievement/school readiness. Student did not recognize colors and could not read the color names from a list. He could state his first name but not his last name. He did not know lower case or upper case letters and did not know letter sounds. Student had difficulty matching and sorting and did not know his shapes. He struggled with the concept of little, big, different, and same. Student could copy lines and a circle but could not copy his name. He could not write numbers independently. Although Student could count to five, he could not match numbers to a quantity.

67. Student demonstrated a low level of knowledge in other areas as well. For example, he did not know colors, could not do any visual discrimination tasks or visual memory tasks, and only could identify one of 11 body parts from an image. Student knew only two of 18 directional or positional terms (such as up and down), and could not articulate any of 28 sounds given to him. Student could not identify any upper case or lower case letters, could not recite the alphabet, did not recognize any numbers from one through 10, and did not know basic shapes, days of the week, money facts, or time. Student required much support from the teacher to complete the tasks of the assessment.

68. The Vineland-II measures the personal and social skills of individuals. It assesses what a person actually does on a day-to-day basis rather than what that person is actually capable of doing. The assessment measures communication, daily living skills, socialization, and motor skills. Parents completed the Vineland-II scales. Their ratings indicated that Student has an adaptive behavior composite score in the moderately low range. Their scoring placed Student's communication skills in the low range and his socialization and daily living skills in the adequate range. With regard to motor skills, Parents indicated more concern with Student's fine motor abilities, which they rated as

low. However, they rated Student's gross motor skills as adequate. Parents did not indicate that Student had any behavior challenges.

69. Student's Kindergarten teacher Ms. Gradillas completed the BASC-II rating scales. Scores that are in the clinically significant range suggest a high level of maladjustment. Scores that are in the at-risk range indicate a significant problem that may not be severe enough to require formal treatment or, conversely, may indicate a problem that needs to be monitored.

70. Ms. Gradillas rated Student as clinically significant with regard to behavior symptoms of attention and withdrawal. She also rated Student as clinically significant for hyperactivity. Her scores found Student at-risk for atypicality, aggression, depression, and in social skills and functional communication.

71. After analyzing the assessment results, Mr. Preciado recommended that Student would benefit from a highly structured environment to address his academic and behavior challenges. To increase Student's level of attention and effort, Mr. Preciado recommended that Student's instruction be at a level that permits him to process information both linguistically and cognitively. Mr. Preciado further recommended that Student would benefit from a learning environment that allowed him minimal opportunities for off-task behavior in a classroom that had very little whole class instruction, which would lead to off-task behaviors. Mr. Preciado also felt that the dual immersion class was not appropriate for Student, an opinion he expressed during Student's various IEP meetings during the 2011-2012 school year. As will be discussed below, Mr. Preciado's findings and recommendations were very similar to those of Student's independent assessors.

District's August 2011 Speech and Language Assessment

72. District SLP Courtney Holbrook assessed Student in August 2011. She was assisted by another District SLP who is bilingual in English and Spanish. They determined

that Student should be assessed in both languages given his bilingual household and the fact that he was enrolled in a Spanish immersion classroom.

73. Ms. Holbrook used the following standardized tests instruments to assess Student: The EOWPVT, the ROWPVT, the PLS-3, and the GFTA-2. Except for the fact that Ms. Holbrook used the PLS-3 instead of the PLS-4, these were the same assessments administered to Student by Ms. Riven in November 2010.

74. Student's scores on the English version of the EOWPVT, which assesses speaking vocabulary, placed him in the less than first percentile. The SLP's attempted to administer the EOWPVT in Spanish as well, but they were unable to get a basal score⁵ from Student. Student's score on this assessment decreased from his scores in November 2010.

75. The ROWPVT tests receptive or hearing vocabulary. Student's scores on the English version of this assessment placed him in the 13th percentile, which is in the low average range. Student's scores on the Spanish version of this assessment, however, placed him below the first percentile. These scores were generally higher than Student's scores on the November 2010 administration of this assessment.

76. The PLS-3 measures auditory (or receptive) comprehension of language as well as expressive communication. Student's scores on both portions of the PLS-3 were in the first percentile for both the English and Spanish assessments. These scores were the same as those he achieved in November 2010 on the PLS-4.

77. As stated above, the GFTA-2 measures articulation of consonant sounds. Student's score on this administration of the test placed him in the fifth percentile,

⁵ A "basal" score is the number of correct responses on a test required to find the starting point at which to test a child on that particular test.

which was lower than his score in November 2010. Student's scores indicated he had significant articulation errors in both English and Spanish.

78. Ms. Holbrook did not administer a separate phonological processes assessment to Student because syntax is assessed as part of the PLS-3 and the data provided by the GFTA-2 gives the same results as a specific phonological test. In other words, the same information is provided by the GFTA-2. Student contends that Ms. Holbrook should have administered a specific phonological test at this time because Dr. Susan Fosnot, Student's independent assessor, later chose to do so. However, the fact that another assessor administered an additional test does not invalidate Ms. Holbrook's assessment particularly since the assessments she used covered all areas of Student's known or suspected speech deficits. Additionally, as will be discussed below, Student's scores on Dr. Fosnot's assessment were very similar to his scores on Ms. Holbrook's assessment. Student does not dispute the validity of Ms. Holbrook's assessment; rather, he disputes the extent of the goals she developed for him and the amount of SL services she recommended. As discussed below, the District's recommendations for speech and language goals and extent of SL therapy offered Student a FAPE.

79. Ms. Holbrook also did an oral motor examination of Student. This examination consisted of looking at the definition of Student's mouth, looking at his tonsils to see if their size was appropriate, and having Student do a series of exercises with his tongue. Ms. Holbrook determined that the structure and function of Student's mouth and tongue appeared adequate at the time for the purpose of producing speech.

80. Ms. Holbrook administered her assessment to Student prior to the start of the 2011-2012 school year. She therefore did not have an opportunity to observe him in a classroom setting. However, she did discuss Student's progress with his Proposition 10 preschool teacher the previous spring while Student was attending preschool because Ms. Holbrook was his SL therapist at the time.

81. Based upon Student's assessment results, Ms. Holbrook concluded that Student continued to qualify for special education as speech or language impaired. She believed that his deficits could not be addressed through his regular curriculum. Rather, Ms. Holbrook believed Student required specific speech and language therapy sessions outside of the classroom setting.

82. Ms. Holbrook recommended that Student receive group therapy rather than individual therapy. She believed that the group therapy was more beneficial for two reasons. First, in her experience, it made the sessions more interesting and fun for the children. Second, it gives the children an opportunity to use each other as language models, particularly for purposes of vocabulary development. In her experience, the group setting provides opportunities for social communication as well. Ms. Holbrook has found that there is an increase in spontaneous appropriate and meaningful speech when the children interact in group sessions. In any case, she has an SL assistant and her group classes consist of only two to three students. In Student's case, there were often less than three children in the sessions. At times, Student was the only child present because there were no other children with whom he could be grouped.

Kim Cantua's Observations of Student

83. On August 26, 2011, shortly after the beginning of the 2011-2012 school year, a program specialist named Kim Cantua from the Imperial County SELPA went to observe Student in his dual immersion Kindergarten general education classroom. The class met for approximately three hours in the mornings. Although taught by Maria Gradillas, the afternoon Kindergarten teacher, Elizabeth Molina, often co-taught the class to assist Ms. Gradillas.

84. Although Student did not have a one-on-one aide specifically assigned to him, there was a classroom aide assigned to Ms. Gradillas's class. The aide was assigned to the class specifically because Student's behaviors and educational challenges could

not be addressed solely by Ms. Gradillas. During the entire time Ms. Cantua observed the class, the aide primarily assisted Student. The aide met Student when he was dropped off at school by his grandmother. The aide had to remain at Student's side to prevent him from engaging in inappropriate behavior. For example, when she left him for a minute, Student, who had been sitting in his chair, stood up on the chair to try to touch a hanging triangle. The aide and Ms. Cantua had to provide physical prompts in order for Student to respond to their directions. Although both the aide and Ms. Cantua tried to get Student to sit with the other children during carpet time, Student insisted on sitting on the aide's lap. At one point, Ms. Cantua and the aide had to take Student outside because he would not respond to prompting to return to his chair. When they returned to the classroom, they had difficulty having Student engage in writing activities. Student ran to the other side of the classroom rather than do the activity.

85. During free time in the classroom, Student tried taking blocks from another child. Student then threw blocks at a structure other children were building. At one point, he kicked another child, albeit without causing injury. The aide sat with Student and helped him build things. However, the other children moved away from them.

86. Ms. Cantua observed that there were many times that Student did not appear to understand her verbal interactions with him or when he did not understand his teachers. Student also had difficulty transitioning between activities even with prompting from the aide, from Ms. Cantua, or from the classroom teachers. Student would often refuse to sit, would play on the floor, or would go to other areas of the room.

87. Ms. Cantua noted that Student needed to be taught a procedure for each task. She found that Student appeared more productive when provided with visual aids. She suggested that differentiated instructional strategies and behavioral supports

should be discussed when his placement was determined. Ms. Cantua noted that although Student spoke Spanish at home, his instructional language was English. Given his language delays, she felt that his instruction in Spanish could create more delays. Finally, Ms. Cantua noted that Student often needed physical prompts, such as repositioning his body, in order for him to understand what was being asked of him.

88. Ms. Cantua memorialized her observation in a report. She did not testify at hearing.

August 29, 2011 IEP

89. The District convened a triennial IEP for Student on August 29, 2011, almost immediately after the start of the 2011-2012 school year. All required IEP members were present.

90. The IEP team reviewed the results of Student's psychological and speech and language assessments, as well as the academic testing done by Ms. McFadden. The team also reviewed Ms. Cantua's observation report. All of these assessors were present at the IEP meeting to discuss their reports. Student's teacher, Ms. Gradillas, also discussed Student's challenges in her class. She discussed the fact that Student frequently would not remain in his seat and needed verbal and physical prompts to sit for whole group instruction and during the activity center time. Student disliked writing and would sometimes refuse to participate in the activity.

91. The IEP team determined Student's present levels of performance using the information from all the assessments and input from Ms. Gradillas. The team then developed seven goals for Student based on Kindergarten standards. Two goals were in the area of English Language Arts (ELA). The object of the first goal was to teach Student to identify upper and lower case letters. Student was unable to identify any letters at that time. The team also developed an ELA goal for Student to learn to print his name. At the time, he would only attempt to color rather try to write words.

92. The team developed two math goals for Student. One goal addressed teaching Student to identify numbers zero to 10, something he could not do consistently. The other math goal was directed at teaching Student to match quantities to numbers zero through 10 as well.

93. At the time of the IEP meeting, Student required physical prompting to follow one-step instructions in the classroom. The IEP team developed a behavior goal for Student with the object of teaching Student to follow one-step instructions with less prompting.

94. The IEP team also developed two speech and language goals for Student. One goal addressed his articulation deficits. Since Student continued to have multiple articulation errors, the objective of the goal was for Student correctly to produce initial consonant sounds while naming pictures or objects. The goal listed 11 sounds for Student to learn to pronounce.

95. Although the second SL goal only specified expressive language as Student's area of need in the title of the goal, the descriptive baseline indicated that Student had both expressive and receptive language delays and that he primarily used gestures and single words to communicate. The objective of this goal was to have Student use three word utterances in response to verbal prompts when answering a question about a picture or object. Student contends that his IEP team should have also developed a specific receptive language goal for him at this time. However, as Ms. Holbrook explained at hearing, the expressive language goal encompassed receptive language because it required Student to expressively respond to oral directions. Additionally, Student's other goals, particularly his behavior goal, required him to respond to verbal directions and prompts; receptive language would therefore be addressed by those goals as well.

96. Parents did not contest the goals at this IEP meeting or ask that additional goals be developed for Student.

97. The IEP team discussed the full continuum of possible placement options available for Student, including a general education classroom with supports and a non-public school placement. Based upon the totality of Student's profile, including his need for constant redirection, his need for visual supports, his inability to attend and engage in classroom instruction and activities, even with the aide in the classroom, his inability at times to understand what was asked of him, and the fact that the dual immersion classroom was not appropriate given Student's language delays, the District IEP team members offered Student placement in the mild to moderate special day class at Lincoln Elementary School taught by Ms. McFadden. The District team believed that Student required a very structured, small group setting in order for him to access his education program academically, socially, and behaviorally. Student struggled to access the academic curriculum in the Kindergarten class and struggled to interact and engage appropriately during class. For these reasons, the District team members did not believe Student would progress in a general education class even with the assistance of an aide.

98. The District did not offer any other SDC classroom for consideration because Ms. McFadden's class is the only mild to moderate SDC for Student's age group which is available at the District. The District did not offer a county-run SDC because its IEP team members believed that the children in that class were much more severely impacted than was Student and the program would therefore not be appropriate for him.

99. The District IEP team continued to offer Student a total of 50 sessions a year of group speech and language therapy for 30 minutes a session.

100. Parents requested that the District assess Student in the areas of occupational therapy, behavior, and adapted physical education. Parents believed that

Student presented with significant sensory and fine and gross motor issues. The District agreed to perform the assessments.

101. Parents did not consent to any portion of the IEP at this IEP meeting. Instead, by letter to the District through their attorney, Parents informed the District that they believed that Student's appropriate placement was in his present dual immersion general education classroom with the support of an ABA trained aide. They also indicated that they thought Student required more speech and language therapy. Parents did not indicate how much SL therapy they believed Student required. Parents did not ask Student to be removed from the dual immersion class and placed in an English only classroom.

Parents' Request for IEE's

102. Parents requested that the District provide Student with psycho-educational and speech and language independent education evaluations (IEE's). The District agreed to provide the IEE's and provided Parents with a list of assessors approved by the Imperial County SELPA. One of the SELPA's requirements for IEE's was that the assessors be located within the SELPA's boundaries. Student's parents instead chose a psychologist located in Orange County and a speech and language pathologist located in the northern part of Los Angeles County.

103. Although the District originally objected to the independent assessors chosen by Student due to their distant location from El Centro, the District eventually agreed to fund the IEE's with Student's choice of assessors. Student chose Dr. Shirin Ansari to administer his psycho-educational IEE and Dr. Susan Fosnot to administer his speech and language IEE. The independent assessments began in early November 2011, with projected completion dates of January 20, 2012.

District's Occupational Therapy Assessment

104. District Occupational Therapist Patty McDonald assessed Student in OT on September 27, 2011. Ms. McDonald has a bachelor's degree in therapeutic recreation and a master's degree in occupational therapy. She is licensed by the State of California as an occupational therapist and has only obtained her certification in sensory integration and praxis testing. In addition to her formal education, Ms. McDonald has participated in multiple of continuing education trainings and seminars, many of them addressing sensory integration and sensory processing issues. She has worked as an occupational therapist for over 20 years. She has worked for the Imperial County Office of Education since 1999 and provides OT to students attending District schools.

105. Ms. McDonald focused her assessment on determining Student's fine motor deficits. At the time of her assessment, she felt that there was little indication that Student was demonstrating gross motor or sensory issues. As discussed below, by the time Ms. McDonald completed her assessment, there was sufficient information regarding Student's sensory seeking behavior that should have alerted Ms. McDonald to a possible sensory deficit. Student's sensory needs should have therefore been assessed at this time.

106. As part of her assessment, Ms. McDonald observed Student in his classroom for an hour. During her observation, Student participated in circle time and small group activities. Ms. McDonald noted that Student needed an average of five prompts every 10 minutes to stay on task. Student attempting to play with the child next him during circle time, coughing in the face of a child on purpose, and playing with the leg of the desk after leaving his seat to sit on the floor. Ms. McDonald noted that Student responded well to redirection by the classroom aide. During small group instruction, Student sat on the table at one point and at one point sat in his chair and leaned back and looked at the ceiling.

107. Ms. McDonald also worked one-on-one with Student for 30 minutes. Student was pleasant, cooperative, and willing to attempt all tasks requested. In this one-on-one environment, Student was able to attend to the tasks given him for the entire 30 minutes.

108. Ms. McDonald reviewed Student's handwriting skills. She noted that he had a functional albeit not perfect pencil grip. Although somewhat resistive to hand-over-hand writing assistance during a classroom assignment, if left to write on his own, Student became distracted and either scribbled or drew faces. During the classroom observation, Student was not able to write or trace any lines, letters, or numbers. When working one-on-one with Ms. McDonald, Student was able to trace highlighted lines, simple shapes and simple letters within approximately a half inch of the target line, although Student's letter formation was poor. Student was able to copy lines in one of three attempts. He colored part of a picture but could not stay within the lines.

109. The Developmental Test of Visual Motor Integration (VMI) is a standardized test that assesses the ability to transfer a perceived visual image into a motor act, such as copying letters. Student's standard score on this test was a 61, placing him in a percentile of less than one percent. His age equivalent on this test was three and three-tenths years. Student was five years, nine months old at the time of the OT assessment. Ms. McDonald thought it important to use an age equivalent score to explain that Student might have difficulty accomplishing writing tasks above his age equivalency level on the VMI. As explained by Ms. McDonald in her testimony, and as noted by various professionals that assessed Student, Student has more than mild cognitive deficits that place his cognitive abilities a few years below his chronological age. Student's results on the VMI were consistent with his cognitive levels.

110. Ms. McDonald assessed Student's fine motor skills using a testing instrument called the Peabody Developmental Motor Scales –Second Edition (PDMS-2).

The test is comprised of six sub-tests that measure interrelated abilities in early motor development. It is designed to assess gross and fine motor skills of young children. Ms. McDonald administered the portions of this test that measure grasping and visual-motor skills. Student's scores on this test indicated that he was functioning below age level in both grasping and visual motor skills. His grasping skills were in the fifth percentile, at an age equivalent of three point five years. His visual-motor integration skills, which measured Student's ability to use his visual perceptual skills to perform eye-hand coordination tasks such as reaching and grasping objects and using building blocks, was in the first percentile, at an age equivalent of two years. Student's combined fine motor quotient was in the less than one percentile range.

111. Ms. McDonald concluded that Student would benefit from an individualized occupational therapy program due to his fine motor deficits.

112. Ms. McDonald, who, as stated above, is certified in Sensory Integration and Praxis Test (SIPT) and has significant training in the area of sensory integration and sensory deficits, did not observe any sensory issues during the time she observed Student or assessed him. In any case, based on her SIPT training, she did not believe that the Sensory Integration and Praxis Tests or other sensory assessment was appropriate for Student due to his cognitive deficits. However, as discussed below, Student does have sensory needs which the District eventually acknowledged in later IEP offers. These needs were apparent at the time Ms. McDonald assessed Student and were discussed during Student's November 4, 2011 IEP meeting. For example, District staff already was reporting that Student often licked objects and people, often touched people inappropriately, such as touching their ears, was constantly making noises, and fidgeted in his seat. These things should have alerted Ms. McDonald to possible sensory deficits that should have been assessed at the time.

District's Behavioral Assessment

113. Louise Brenes conducted the District's behavioral assessment on October 20 and 21, 2011. Ms. Brenes has been employed as a Behavior Intervention Case Manager for eight years by the Imperial County SELPA. She has a master's of science degree in counseling and has a credential in school psychology. In addition to her degrees, Ms. Brenes has attended several training sessions in the areas of functional analysis, behavior management, crisis intervention, and addressing the needs of students with behavior disorders. She is herself a trainer and has presented numerous workshops on a variety of topics, including behavior strategies and behavior support plans. She was a credible witness who appeared to know her subject matter and gave thoughtful consideration to Student's behavioral needs.

114. Ms. Brenes first observed Student during one of his speech and language therapy sessions. The therapy is presented in English. The therapy that day consisted of four activities. In the first, the therapist concentrated on reviewing with Student how to write his name on a worksheet. Student required two verbal redirections and four hand-over-hand assists to complete the task. During the activity, Student interrupted the therapist three times by placing his hand over her mouth. During the activity, Student began to whine and put his hands over his eyes. When he did this, the therapist turned Student's chair toward a "no whining" icon on the wall for two seconds. She then immediately returned Student to the task. Instead of participating, he put his head on the table and had to be verbally redirected to the task.

115. The second activity was to write the letter "B." Student would not respond to cues to pick up his pencil so the therapist had to attempt to do the activity hand-over-hand. Even with this, Student started playing with his binder and had to be redirected with a visual cue. At one point he placed his feet on the desk and had to again be redirected. The third activity required Student to listen to a story. He did so

with a couple of prompts. The last activity required Student to pick an item that started with the letter "B." Student successfully chose a small ball. Student then happily played ball with the therapist although he later again put his hand over her mouth when they were counting stickers he had earned during the therapy session.

116. Ms. Brenes observed Student for over three hours in his dual immersion Kindergarten class. This consisted of the entire instructional day for the class. Ms. Brenes gathered data in five-minute increments. The majority of the instruction was in Spanish.

117. The first activity of the day was roll call. Student responded appropriately to his name being called for roll call by raising his hand. However, once music was turned on during the activity, he invaded the space of other children and had to be redirected to his own square on the carpet six times. Student required three redirections to remain in his square after that.

118. Student continued to move around the room. When the class was directed to sit down, Student stood up. He continued to move into the space of the other children. The classroom aide used verbal redirections, physical redirection, and a "sit" icon in attempts to have Student remain seated. Student would initially sit, and then he would again move around the room. If the aide sat near him, Student would attempt to lean against her. If she moved away from him, he would follow her around the room.

119. During the course of the three hour school day, Student engaged in much of the same behavior. He would make noises such as clicking sounds. He licked his hands. He would lie down on the carpet. When directed to his desk, Student crawled on top of the desks in his area. He clapped his hands in front of other children and clapped his hands in their ears. During a writing activity, the aide tried to help Student with hand-over-hand assistance. Student pushed her hand away. Student would also scoot away from his desk to avoid writing tasks. He would only complete them with physical prompts and hand-over-hand assistance. At one point he pushed another child's hand

for no reason, causing the child to drop a paper he was holding. The aide used the incident as a “teachable moment” to cue Student on how to say he was sorry. She also appropriately used the incident to review classroom rule icons with Student.

120. When transitioning to another activity, Student wanted the aide to push in his chair rather than doing it himself. He also made barking noises and blew air into the ears of other children. During another writing activity, Student kept dropping his pencil and licking his paper and the table. The aide remained with Student in order to prompt him to do the activity. When lining up after completing this activity, Student placed his arms around another child. Physical prompts and an icon modeling proper behavior were used to remind Student to keep his hands to himself. During the next writing activity, Student required hand-over-hand assistance to do the assignment and physical prompts to have him lift his head off the table. Student was distracted and unfocused during the activity. During the activity, Ms. Brenes observed Student sticking his tongue out at the aide and making noises. When the aide presented him with an icon depicting being quiet, Student pushed her away.

121. The classroom has an area toward the back of the room which is called the “buddy room.” It is used as a place for time outs for children if necessary. While a child is in the area, which removes the child from the class activity, the teacher or aide reviews the class rule that the child did not follow. Student had to be taken for timeouts several times during Ms. Brenes’s observation. During the few minutes Student was in the buddy room, the aide reviewed class rules with him.

122. During recess and snack time, Student appropriately went outside, ate his snack, and put away his lunch pack before going to play. Student did not appear to know how to pump to use a swing by himself and ended up swinging on his stomach. However, Student needed several prompts to transition back to the classroom. The aide had to take Student by the hand in order to get him to return to class. During the

remainder of the school day, Student continued to require verbal, physical, and visual prompts to stay on task. During a group transition between activities, Student ran around the room and jumped over chairs. He made loud noises and purring sounds. At one point, Student lay down on the carpet when he was supposed to be in his chair. He then got up and ran to the front of the classroom. He also continued to invade the space of other children, including trying to touch them.

123. Ms. Brenes observed that Student had several strengths. He was able to raise his hand when his name was called. He was also able to zip up his lunch pack and back pack independently. He appeared very happy and focused during the English instruction both in speech therapy and during English language instruction in his classroom. He liked music, was able to transition to recess, and appeared comfortable in the side by side instruction he received during speech therapy.

124. Ms. Brenes noted several behavior concerns. Student was easily distracted. He made various types of noises throughout the class day. He had difficulty keeping his hands and feet to himself. He invaded the space of the other children by touching them and clapping directly in front of their faces. Student licked his hands, the table, and his papers during instruction times. He would lay down on the carpet during instruction. He threw school supplies on the floor. Student also required constant cues, prompts, and gestures for redirection during both whole class and small group instruction. Although Student was not engaging in behavior that was physically harmful to property or to himself or others, Ms. Brenes concluded that Student's behaviors were impeding his learning. Ms. Brenes observed that Student's disruptive behaviors occurred primarily when he was being taught in Spanish and not during his speech and language therapy sessions, which were taught in English.

November 4, 2011 IEP

125. The District attempted to convene a follow-up IEP meeting in late September to discuss Student's needs due to the concerns about the District's offer of placement and services that Parents had clarified through letters from their attorney to the District. Parents had not yet consented to any portion of the August 29, 2011 offer and the District therefore could not implement the offer, which included several new goals. Parents initially declined to schedule a meeting. They wanted to await the results of the IEE's before meeting again. They eventually agreed to meet on November 4, 2011, to discuss the results of the District's adaptive physical education,⁶ OT and behavioral assessments.

126. The IEP team consisted of Student's parents and all required District team members. The team reviewed Student's progress to date on goals. Student had made only minimal academic progress at school. He could name three of 11 colors and could identify one letter of the alphabet. He also could identify one of eight shapes. However, Student still could not match any sounds to letters, identify any numbers or count. He could not identify left or right, say the days of the week or follow words from left to right. Student was still unable to print or copy any letters of the alphabet. Student had not met his academic benchmarks for the reporting period.

127. In speech and language, Student showed progress in learning to properly articulate some phonemes in single words. Student continued to show more language strength in English than in Spanish. His receptive language continued to be stronger than his expressive language, but Student still needed prompting to follow basic directions such as "get your binder."

⁶ Adapted physical education is not at issue in this case.

128. The IEP team reviewed Ms. Brenes's behavioral assessment. Ms. McFadden, Ms. Lau, and Mr. Preciado had also observed Student in his classroom in order to assist Ms. Brenes in formulating a behavior support plan (BSP) for Student. They gathered data on Student's behaviors over more than three weeks in October 2011. Ms. McFadden supervised and monitored the behavior data recording and collection.

129. Although District staff reported that Student was a happy little boy who loved music, recess, and assemblies, he was not making much academic progress because his behavior was interfering with his learning. Ms. Brenes and Ms. McFadden noted that Student needed an average of almost 100 verbal or visual prompts in a three-hour period. At times, Student was averaging five "time-outs" a day due to non-compliant behavior. Ms. Brenes noted that Student's disruptive behavior included touching and tapping his peers, interfering with work materials of peers, rubbing his ears and the ears of peers, invading the personal space of others, throwing materials and taking materials from the teacher, making noises, putting his fingers in his mouth, and laying down on the carpet during group instruction.

130. Student's behaviors caused him to be unavailable for instruction because he was distracted, unfocused, on time-outs, or engaging in behavior disruptive to his learning and that of his peers. His behavior often resulted in his teacher having to stop instruction in order to implement behavior interventions. The behaviors required full adult attention during the school day. Because Student also invaded the space of the other children, often touching them or their work, the other children had become hyper-vigilant around Student, which also interfered with their learning.

131. The District IEP team members believed that Student engaged in many of the behaviors in order to avoid tasks he found too difficult, too boring, and not meaningful to him. The BSP noted that the environmental factor causing Student's behavior was the fact that he was not able to access the classroom curriculum because

the level and length of instruction, as well as the fact that instruction was in Spanish, was too difficult for Student. To address these factors, the BSP provided that Student would spend more time on tasks than his peers, that he would be provided with breaks after short instructional intervals, that there would be a focus on teaching Student the concept of "personal space" and that small group instruction would be used more for him. The plan also called for Student to receive a modified curriculum teaching him discreet skills and that there would be more use of visual schedules and rules and routines.

132. To address Student's behaviors, the BSP proposed that Student be taught replacement behaviors using the "if/then" strategy. The BSP proposed using picture cards to direct Student to the desired behavior, such as a card for "hold hands." As positive reinforcement, the BSP proposed that instructional staff would use verbal praise, physical praise such as "high-fives," and tangible praise such as notes to home to praise good behavior. If Student persisted in the behavior, the BSP directed staff to prompt Student to switch to the appropriate behavior by reminding him of what was required of him through the use of the cue cards. If Student did not respond to the cards or to a gentle "no," then Student would be given a time-out. Once the brief time-out ended, instructional staff would review with Student the reason for the time-out and would then ask Student if he was ready to return to the class instruction.

133. The BSP also included a functionally equivalent replacement behavior goal. The goal was based upon all the information gathered by the District staff over the 10 or so weeks Student had been in school. The goal substituted for the behavior goal in Student's August 29, 2011 IEP. The BSP also included a communication section that noted that staff would make daily reports in Student's behavior log and that behavior cards would be sent home daily to Parents. Student's behavior goal was re-written to address

134. Parents declined to consent to the BSP. To date, they have not consented to any BSP proposed by the District for Student.

135. In addition to re-writing Student's behavior goal, the District IEP team developed a fine motor goal to address Student's deficits in writing and using scissors based upon Ms. McDonald's OT assessment. The IEP team continued Student's math goals. It updated one of his ELA goals based upon new information, and added two more. The IEP team also added a specific receptive language goal with the objective of having Student learn to follow two-step instructions.

136. The IEP team had additional information concerning Student's strengths and deficits by the time of this IEP meeting based upon the new assessments and based upon information from Student's teacher regarding his academic performance in class. Given the new information, the team developed four new goals for Student: two in ELA, one to address his fine motor needs, and one for receptive language. The team was therefore considering Student's needs each time it obtained more information about him. In all, the November 4, 2011 IEP contained 11 goals to address Student's needs.

137. Finally, the IEP team discussed a number of placement possibilities for Student. Because Student's behavior had such an impact on his ability to access his learning, the District team members felt even more keenly that Student required the supports of a special day class. The District therefore recommended again that Student move to Ms. McFadden's SDC. Along with placement in the SDC, the District continued to offer Student two, 30 minute small group speech and language sessions.

138. To address the deficits determined from Ms. McDonald's assessment, the District offered Student one, 45-minute OT session per week. Parents voiced concerns that the amount of OT was not sufficient. They also believed that Student had sensory issues. Ms. McDonald stated that based on her observation of Student in the classroom, she did not believe that Student had any sensory issues that were impacting his

behavior in class. She believed Student's issues with regard to OT were all based on his fine motor deficits. Ms. McDonald believed therefore that 45 minutes a week was sufficient, in addition to work by the classroom teacher and aide, to address Student's fine motor needs. As discussed below, this amount of time was insufficient to meet Student's needs.

139. Parents continued to believe that Student should remain in his general education dual immersion classroom but with stronger aide support. They did not want to consider the SDC placement. The District, after hearing from all the staff that had worked with Student and/or observed him at school, felt very strongly that the dual immersion classroom was not appropriate for Student. Although it did not believe that a general education classroom was the LRE for Student, it made an alternative offer of placement. The District offered to move Student to a general education English only classroom with classroom aide support as an interim placement in order to get Parents to consent to the new IEP, with its additional goals and OT services, and to see if Student's ability to access the curriculum would improve in an English only classroom with aide support.

140. At this IEP meeting, Parents indicated that they would consider the District's offer of the interim placement. However, although this is the placement they contend the District should have offered Student during the 2011-2012 school year, Parents inexplicably never agreed to it during the 2011-2012 school year. At hearing, when asked why she would not agree to the interim placement, Mother offered various reasons. First, since the English only Kindergarten was full at Harding, where Student attended the dual immersion class, Student would have to transfer to another school. Mother said she did not want Student to transfer during the school year because she thought it would be too disruptive for him. Mother also wanted to wait for the results of the IEE's before considering placement changes for Student. Finally, Mother did not like

the fact that the English only classroom offered was at Lincoln and the class was located next to Ms. McFadden's SDC class. Mother believed that if Student misbehaved, he would be sent to Ms. McFadden's class. Mother acknowledged that she had no concrete basis for this belief. Ms. McFadden credibly testified that her classroom was not used as the time-out room for children from other classes who misbehaved.

141. Parents did not fully consent to the IEP goals or to the implementation of OT services until December 27, 2011.

142. Parents also requested IEE's in the areas of OT and behavior. Again, they chose assessors located in Orange County rather than assessors from the SELPA's list. The District eventually acceded to Student's choice of assessors.

Dr. Fosnot's Speech and Language IEE

143. Student selected Dr. Susan Meyers Fosnot to conduct his speech and language evaluation. Dr. Fosnot assessed Student on November 5, 2011. However, Student's IEP team did not review her report until February 27, 2012, due to difficulties Student had scheduling his neuropsychological IEE. Student's parents took him to Dr. Fosnot's office in Woodland Hills, California for the assessment. The assessment took approximately two hours.

144. Dr. Fosnot has practiced as an SLP for over 30 years. She has a master's degree in speech pathology and a doctorate degree in communication disorders. She is licensed as an SLP in California and has her national certificate of clinical competence in speech and language. Dr. Fosnot's specialty is the psychosocial and psycholinguistic aspects of fluency development and related disorders. She spent several years doing research in her field and teaching at the university level. Dr. Fosnot also has received numerous grants to fund her research. Dr. Fosnot has published multiple publications. The majority of the publications address the speech patterns and deficits of people who stutter or who demonstrate other speech fluency deficits. Dr. Fosnot spent five years

working as a speech and language clinician for a school district in the late 1970's. She has maintained a private practice since 1975 in which she evaluates and treats people of all ages who have various communication disorders.

145. Dr. Fosnot administered the following assessments to Student: the PLS-4, the ROWPVT, the EOWPVT, the GFTA-2, and the Khan-Lewis Phonological Analysis-2. She also took a language sample analysis using the Systematic Analysis of Language Transcript.

146. The results that Dr. Fosnot obtained for Student on all assessments mirrored the results obtained by the District on its previous speech and language assessments of Student. His receptive language scores were again higher than his expressive language scores. Other than his score in the fourth percentile of the ROWPVT, Student scored at or below the first percentile in all assessments Dr. Fosnot administered, consistent with the scores obtained by the District. It is therefore unnecessary to review each of Dr. Fosnot's assessment results.

147. Dr. Fosnot did not review Student's IEP's as part of her assessment process. She did not speak with any of Student's past or present teachers. She did not ask to observe his present classroom or to observe the SDC proposed by the District. When asked at hearing why she did not do any observations, Dr. Fosnot was somewhat at a loss for words. She could merely state that no one had specifically asked to do any observations as part of her assessment.

148. The significant differences between Dr. Fosnot's assessment and those of the District were her recommendations for language goals and for services. Based upon Student's significant speech and language deficits, Dr. Fosnot recommended that the District implement some 23 separate speech and language goals for Student. She broke down receptive goals into 10 parts, including goals for discriminating environmental sounds, understanding pronouns, listening to negatives in a sentence, understanding

sentences that include a noun and two modifying adjectives, understanding time and other quantitative concepts, identifying categories, understanding picture analogies, understanding expanded sentences, understanding qualitative and shapes and concepts, and adding vocabulary skills.

149. To address Student's expressive deficits, Dr. Fosnot developed four goals for Student to address the use of plurals, the use and understanding of morphemes, increase his sentences to three to seven word utterances, and to add 30 new words to Student's vocabulary so that Student could access the curriculum from all academic subjects.

150. Dr. Fosnot also developed a goal for oral motor therapy for Student. However, it is unclear why she believed Student had an oral motor deficit.

151. Dr. Fosnot developed a goal to address Student's sensory system for speech exercises and to stimulate movement, as well as for Student's respiration, vocalization and vocal awareness. Finally, Dr. Fosnot developed a goal for articulation and a specific goal to address phonology and the intonation of Student's voice.

152. Dr. Fosnot concluded that Student required augmentative communication devices to assist him in accessing communication in a timelier manner. She therefore recommended a goal for augmentative communication. Student, however, did not raise the lack of augmentative communication devices in his IEP as an issue for this hearing.

153. Dr. Fosnot concluded that Student required a visual learning approach to facilitate his classroom instruction. She concluded that he required organized lessons that track his progress on goals and that can be modified or customized for him.

154. To implement these goals, Dr. Fosnot strenuously believes that Student requires five hours a week of speech and language therapy.

155. Although Dr. Fosnot has impressive credentials with regard to the areas of fluency of language, her recommendations were ultimately unpersuasive. She did not

review any of Student's cognitive testing or IEP's and did not observe Student in the classroom. Her recommendations therefore were made in a total vacuum without an understanding of Student's cognitive abilities, classroom behavior, or classroom performance. Nor do her recommendations appear to be educationally based. Rather, they are based on what an SLP might hope to accomplish in a clinical setting or based on Student's medical needs, which are not the responsibility of the District. The position of Ms. Holbrook that Student's level of understanding was such that Dr. Fosnot's goals were above Student's abilities is therefore more persuasive. Ms. Holbrook also believed that the language rich environment of the SDC would provide the additional exposure to language development that Student required. Given that Student was communicating primarily through gestures in the classroom, was responding primarily to visual cues, was unable to follow more than one step instructions, and was basically making one-word utterances, demonstrates that many of Dr. Fosnot's goals were too complex for Student at the time she developed them in November 2011.

156. Additionally, as discussed in this Decision, the District made its offer of speech and language services in the context of its offer of placement for Student in a special day class that Ms. McFadden credibly described during her testimony as a "language rich" environment. There is constant consultation between the SLP and Ms. McFadden on how to imbed language goals into the curriculum of the children in the class. Had Student attended the class, many of the goals proposed by Dr. Fosnot would have been imbedded in Student's curriculum and there would not be a necessity for five hours of SL therapy a week. In any case, many of Dr. Fosnot's goals were already addressed by the District in Student's math goals, his English language arts goals, his behavior goals, his speech and language goals, his fine motor skills goal, and later by the inclusion of a sensory diet for him.

Dr. Ansari's Neuropsychological / Academic IEE

157. Student chose Dr. Shirin Ansari to conduct his neuropsychological / academic IEE. Dr. Ansari has a master's degree in special education and school psychology and a doctorate in clinical psychology. She worked first as a resource specialist and then as a school psychologist for another school district, for a total of 10 years. She thereafter opened a private practice dedicated to the assessment, diagnosis and intervention development of children with learning disabilities and psychological issues. Dr. Ansari has maintained her private practice since 1999. She simultaneously works as the director of a learning center at a parochial school and periodically teaches doctoral level courses in psychology at Alliant International University. She has published a few articles in peer-reviewed journals, primarily on issues dealing with attention deficit. Dr. Ansari's doctoral dissertation was a study on the reading skills of children with Down's syndrome.

158. Dr. Ansari assessed Student during November and December 2011, and January 2012. She first reviewed the psychological assessment administered to Student by Dr. Trigeiro in 2008. She then reviewed Student's IEP from August 29, 2011. Parents did not give her any of Student's other IEP's to review. Nor did they give her Student's speech and language assessments.

159. Dr. Ansari administered a comprehensive and in-depth assessment to Student. Parents brought Student to Orange County for each of the seven assessment sessions it took for Dr. Ansari to assess Student. She and her team administered several cognitive assessments including some subtests of the WPPSI-III, the cognition component of the Southern California Ordinal Scales of Development (SCOSD), the cognition component of the Developmental Assessment of Young Children, the Universal Non-Verbal Intelligence Test, and the Woodcock Johnson-III Tests of Cognitive Abilities.

160. Dr. Ansari did not administer enough subtests of the WPPSI-III to obtain a full scale intelligence quotient (IQ), a verbal IQ or a performance IQ. However, based on the subtests she did administer, Student's cognitive abilities fell in the very significantly impaired range.

161. The SCOSD looks at three areas of development, including the development of problem solving, classification processes, and linguistic and intellectual processes. It is a criterion-based assessment rather than a norm-referenced test. The scoring of the test takes into account the quality as well as the quantity of responses. It is considered a test that is effective with all children, but is especially useful with assessing children with cognitive impairments and learning disorders. Student's basal level on this test – that is, concepts and skills that he had mastered and generalized to his environment, was at a level of 18 to 24 months. Student's functional level – tasks he could complete 66 percent of the time, was also at the 18 to 24 months range. Student's ceiling level – emerging skills that he had not mastered, was at the two to four years range.

162. The cognition component of the Developmental Assessment of Young Children measures skills and abilities that are conceptual in nature, such as attention, memory, purposive planning, decision making, and discrimination. Student's score on these subtests were in the fourth percentile, placing him significantly below average.

163. The Universal Nonverbal Intelligence Test is especially helpful in measuring cognitive levels of children who have language deficits and whose scores on language based intelligence assessments may underestimate the children's actual cognitive levels. All parts of this assessment are non-verbal. Directions are given by modeling and with gestures. Student was not able to understand the gestural directions, even after several attempts to engage him in the tasks. Student became frustrated, asked for his mother,

and would not complete the attempted tasks. Therefore, Dr. Ansari could not obtain a score for Student on this assessment.

164. The cognitive portions of the Woodcock-Johnson-III are used to determine patterns of strength and weaknesses in different cognitive areas to explain the nature of specific processing issues. Student was unable to complete any of the portions of the test due to his difficulty understanding the directions and his high frustration level.

165. Dr. Ansari administered the Developmental Neuropsychological Assessment (NEPSY-II) in order to measure Student's different brain functions that are necessary for successful learning in school and functioning in society. The memory and learning subtest measured Student's ability to take in, store, and remember information. Student scored in the significantly below average range on this subtest. On the sensorimotor subtest, which measures the ability to control hand movements, Student scored in the average range. The language subtests measure the understanding and use of words and sentences to communicate with others. Student's scores were below the first percentile, placing him in the significantly below average range. The visuospatial processing subtests measure general visual processing skills. Student's scores were in the second percentile, placing him in the below average range.

166. Dr. Ansari administered the communication subtests of the SCOSD, which are designed to assess oral and gestural expressions and comprehension skills. Student's basal scores on these subtests were in the four to eight months range. His functional levels were at 18 to 24 months. His ceiling level was at seven to 11 years.

167. Dr. Ansari attempted to assess Student's attention, concentration, and processing speed using an assessment called the Connors' Kiddie Continuous Performance Test. This tool measures the ability to sustain attention to a constantly changing task over a period of time. Student was unable to complete the practice portion of the test so further testing was discontinued.

168. To assess Student's academic achievement, Dr. Ansari administered the Woodcock-Johnson III Tests of Achievement. Student's percentile rank of 4 on the letter-word identification subtest placed him in the significantly below average range. His percentile score on the understanding directions was under the first percentile, placing him in the very significantly below average range. Student's percentile score of two on the picture vocabulary subtest placed him in the very significantly below average as well.

169. Dr. Ansari administered the fine motor ability and gross motor ability subtests of the SCOSD to Student to assess his visual-perceptual, visual-spatial, and motor strengths and weaknesses. Student's basal level and functional levels on the gross motor subtests were in the sensorimotor stage, at 18 to 24 months, although he demonstrated emerging skills at the seven to 11 year range. On the fine motor subtests, Student's basal level was at the 12 to 18 months range. His functional level was at two to four years, and he had emerging skills in the four to seven year old range.

170. The Sensory Profile is a standardized test used to determine how young children process sensory information in everyday situations. It is scored based on questionnaires or scales completed by caregivers and teachers. The child is rated either as typical performance, probable difference, or definite difference for each area assessed. The areas assessed are divided into sensory processing, which is the child's responses to basic sensory systems in daily life, modulation of sensory input for use in daily life, and behavior and emotional responses to sensory input that might be indicative of sensory processing abilities. Mother completed the caregiver questionnaire. She rated Student as having a probable difference in responses to things heard (auditory), responses to activities that contain a combined sensory experience (multi-sensory), the ability to use body senses to generate emotional responses (modulation of sensory input), ability to meet performance demands (behavioral outcomes of sensory

processing), and being sedentary. Mother rated Student as having a definite difference in inattention or distractibility and fine motor and perceptual abilities. In all the other 16 areas assessed, Mother rated Student as typically performing.

171. The Sensory Profile – School Companion ratings provide a teacher’s perspective of a child’s interaction in an academic setting. This portion of the test assesses a child’s sensory processing skills and how they affect the child’s classroom behavior and performance. The ratings are the same as those for the parent questionnaire. Probable differences and definite differences indicate that the child’s responses are more than those of a typical child. Ms. Gradillas completed the teacher questionnaire. She rated Student as having a definite difference in auditory responses, movement, touch, registration, avoiding, seeking and registration, sensitivity avoidance, and registration and avoidance. Ms. Gradillas rated Student as probable difference in the areas of responses to visual things, behavior, seeking pleasure in with all types of sensations, and sensitivity to sensation. Ms. Gradillas only rated Student as typical in one area, that of awareness and attention in the learning environment.

172. Dr. Ansari concluded that Ms. Gradillas’s ratings indicated Student had a significant difficulty in his ability to process noise, in movement, and in touch sensations. She further concluded that Student tended to react to stimuli in behaviorally different ways. He generally demonstrated a tendency to disengage because he did not notice stimuli or he tried to avoid or reduce sensory input.

173. Dr. Ansari also assessed Student’s adaptive skills, his social-emotional development, and social-emotional functioning using various assessment tools. Student’s scores on a couple of these assessments are notable for the picture they painted of Student’s difficulties adapting to the school environment as opposed to the home environment. Parents and Student’s teacher had markedly different perceptions of Student’s social and emotional functioning. For example, one of the assessments Dr.

Ansari utilized was the Behavior Assessment System for Children (BASC-2). These are rating scales which Parents and Ms. Gradillas filled out. The rater has to indicate whether an answer best fits the subject of the assessment, in this case Student, either never, sometimes, often, or almost always. The child is then scored as being either "average," "at-risk," or "clinically significant" in each area reviewed. Parents found Student to be average in 19 of the 24 areas assessed. They only found Student to be at-risk in the areas of attention problems, adaptive skills, and social skills. Parents rated Student clinically significant only in functional communication and developmental social disorders.

174. Ms. Gradillas, however, rated Student as average in only eight areas (aggression, conduct problems, anxiety, depression, bullying, emotional self-control, negative emotionality, and resiliency). She rated Student as at-risk in seven areas (externalizing problems, hyperactivity, internalizing problems, adaptability, social skills, anger control, and executive functioning). She rated Student as clinically significant in eight areas (somatization, behavioral symptoms, atypicality, withdrawal, attention problems, adaptive skills, functional communication, and developmental social disorders).

175. Another assessment Dr. Ansari administered in the area of social-emotional functioning was the Walker-McConnell Scale of Social Competence and School Adjustment. This test samples adaptive behaviors necessary to function independently in the classroom and interpersonal social competencies, which are skills needed to maintain adequate social interactions and relationships. This test is also based on rating scales. The first area measures peer related social behaviors that are preferred by teachers. The second area measures social behavior sought by peers. The third measures competencies valued by teachers within the instructional context. Ms. Gradillas completed the scales. Her responses indicated significant concerns in all three

areas. Dr. Ansari concluded that the ratings were consistent with Student's pattern of difficulties in meeting behavioral and academic expectations in a variety of contexts.

176. Dr. Ansari and her associates observed Student during the seven assessment sessions they had with him. During the first session, Student worked for only 10 minutes before yelling for his sister and then running out the door to her. The assessors gave him a short break and returned to the assessment process. Student then yelled for his parents. He calmed down worked through the sessions after his sister sat in the testing room. Student was distractible throughout the session but responded well to encouragement. During the second session, Student had a limited attention span, was easily distractible particularly when doing a non-preferred task, and gave impulsive responses. At one point, Student screamed inappropriately during an assessment and then spat into a bowl. However, as do all people who interact with Student, Dr. Ansari found him to be sweet and loving.

177. During the third assessment session, Student was unwilling to respond to tasks. He was inattentive and distractible. At one point Student hit his sister, but then apologized. After returning from a short break, he appeared irritated and continued to refuse to respond to or interact with the assessors. Student then fell asleep.

178. Student was a bit ill during the Dr. Ansari's fourth assessment session. He demonstrated little effort to do the assessments. Throughout the entire session Student attempted to leave the room. He became defiant, resistant, and appeared anxious, so testing was discontinued for the day.

179. Initially during the fifth assessment session, Student was highly receptive to earning stickers for completing tasks. However, he eventually began kicking the table and was off task and inattentive. Halfway through the session, Student left the testing room to search for Mother. He eventually returned with his sister and was able to remain attentive for 10 minutes. Student then exhibited frustration and task avoidance,

so the assessors gave him a 30 minute break. When Student returned, he was resistant to going back to the assessments. At one point, he ran out of the room. He returned with his sister, who again remained in the room. Student worked at the tasks, but did not get much done. He responded better to tasks that had visual stimuli. Student was fidgety and distractible. He had trouble sitting still and his speech was often unintelligible. On one occasion even Mother could not understand what Student was trying to say.

180. Student's sixth session with Dr. Ansari took place a full month after the fifth one. Student was again fidgety and restless during the session and it was difficult for the assessors to administer the tests to him. Having Mother stay in the room decreased Student's eloping behavior, but even with her there Student was not able to complete most of the tasks presented to him. At times, he would just echo back directions. At other times he became fascinated with looking at his hands. Even with Mother present, Student had significant difficulty sitting still throughout the assessment session. The team had to often use two assessors working one-on-one with Student to get him to engage more consistently.

181. Although Student was most cooperative during the seventh and final assessment session, he needed to be consistently prompted to provide responses. At times, he became silly. He hid underneath the desk. He took off his shoes. He climbed on the chair and the desk. Student again was consistently inattentive, distracted, and fidgety throughout the session.

182. Dr. Ansari and her team observed Student in his classroom on January 31, 2012. As stated above, the District had assigned an aide to assist the teachers in the classroom. By the time of Dr. Ansari's observation, the aide had, essentially, become a one-on-one aide for Student. Dr. Ansari noted that the aide worked solely with Student during most of the observation.

183. Dr. Ansari began her observation during a group instruction lesson given using an overhead projector. The children were at their desks following along the lesson. Student's aide was at his side. He was very distractible and his aide had to constantly re-direct his attention.

184. The children then transitioned to the rug area. Student tapped a child on the head and then moved to try to engage with another child. That child did not welcome Student's attention because Student was invading the child's personal space. The other children started working in groups while Student worked individually with his aide, who often provided hand-over-hand instruction to Student rather than having him attempt to do the work independently. Student had to be redirected several times during the next lesson. He continued to invade the personal space of other children. However, when redirected, he was able to attend to many of the tasks given him.

185. Dr. Ansari did not believe that Student's aide was appropriately trained because the aide used more physical prompts than necessary and the physical prompts were too strident. She did not believe the aide was very effective. Dr. Ansari noted in her report that it did not appear that any explicit behavior plan was being utilized. Dr. Ansari was correct. However, Parents had not provided her with the November 4, 2011 IEP offer that included a proposed BSP. Dr. Ansari was therefore unaware that a behavior plan had been proposed by the District but rejected by Parents.

186. In her assessment report, Dr. Ansari concluded that the overall impression she had was that Student needed constant support from his aide to stay on task and often exhibited distracting behaviors when the aide was not present. With regard to her cognitive testing of Student, based on his inability to complete tasks even on non-verbal assessments, Dr. Ansari concluded that Student's cognitive impairments prevent him from being able to meet the minimum level of functioning assumed by the non-verbal norm-referenced standardized assessment.

187. Dr. Ansari concluded that Student exhibited high levels of intellectual, linguistic, adaptive, and academic impairment. She stated that he required high levels of support and supervision. Dr. Ansari recommended that Student be placed in a classroom that was designed for his developmental level, and that Student also needed appropriate related services. Her specific recommendation for Student's classroom setting was that he needed a low teacher/teacher assistant to student ratio that would provide small group and individualized instruction. Dr. Ansari also concluded that Student needed a classroom where at least 75 percent of the children could speak fluently as opposed to speaking only isolated words or fragmented speech so that Student could model appropriate language and behaviors. She did not feel it appropriate to place Student in a class where many of the other children were non-verbal.

188. Dr. Ansari also recommended that visual cues and visual directions be used as primary strategies because Student responded best to visual cues.

189. Dr. Ansari recommended that Student's curriculum contain both functional and academic elements.

190. Dr. Ansari concluded that the dual immersion classroom was inappropriate for Student because of his language delays and impairments.

191. Finally, Dr. Ansari specifically found that a general education classroom, even if taught solely in English, was not appropriate for Student. She concluded that "even if [Student] receives a 1:1 aide and extensive pull-out support, it seems unlikely that he can maintain the pace and meet the demands of a regular education classroom. Moreover, to the degree that academic expectations are not aligned with his developmental readiness, [Student's] frustration will likely result in inappropriate behaviors that further limit his ability to benefit from instruction."

192. Dr. Ansari recommended that the occupational therapist design and carry out OT interventions. She recommended a sensory diet as an intervention to address Student's sensory processing needs and fine motor interventions to address his fine motor needs. Since Dr. Ansari did not see Student's November 4, 2011 IEP, she was unaware at the time of her assessment that the District was already providing Student with OT sessions to address his fine motor deficits.

193. Dr. Ansari also recommended that a functional behavior analysis be done to identify and target the behaviors that were interfering with Student's ability to access his learning. As stated above, Dr. Ansari was unaware at the time of her assessment that the District had completed several observations of Student and had developed a BSP for him.

194. Dr. Ansari did not ask to observe the SDC class that the District had proposed for Student at his August 29 and November 4, 2011 IEP's as part of her assessment process. Nor did Parents ask her to observe the classroom.

February 27, 2012 IEP Meeting

195. Student's IEP team had originally scheduled an IEP meeting for January 20, 2012, to discuss the IEE's completed by Dr. Ansari and Dr. Fosnot and to discuss Student's placement and services. The meeting had to be rescheduled to February 27, 2012, in order to accommodate Dr. Ansari's schedule.

196. Parents attended this IEP meeting. Their independent assessors participated by telephone. All required District IEP team members were also present.

197. Student's teachers reported that Student had made some progress on learning to trace his name and to trace numbers. Ms. McDonald reported that Student had made progress on his OT goal.

198. The IEP team discussed Dr. Fosnot's speech and language IEE and her recommendations. Dr. Fosnot explained that Student would benefit from an English only

classroom. She also reviewed her proposed intervention strategies and goals for Student. Dr. Fosnot recommended increasing the frequency and duration of Student's speech and language therapy.

199. Student's present SLP, Kelly Barker, reviewed Student's progress on his speech and language goals. She indicated that Student had made progress on his articulation goal. He was also able to generate short sentences using visual prompts and was following one-step instructions with visual cues. Ms. Barker indicated she was revising Student's articulation goal to also include consonants. She also recommended adding a vocabulary goal. Based upon Dr. Fosnot's recommendations and Ms. Barker's recommendations, the District added a vocabulary goal for Student, bringing to four his number of speech goals, for a total of 12 goals in all. The District also offered Student 30 minutes per week of speech and language therapy in an individual setting in addition to the two, 30-minute per week small group SL therapy he was already receiving pursuant to his last IEP.

200. The IEP team reviewed Dr. Ansari's assessment. Dr. Ansari and her colleagues informed the team that Student was highly distractible, needed constant aide support in the classroom, and required a small group educational setting that contained both functional and academic elements. They informed the team that the dual immersion program was not appropriate for Student and that Student needed a higher level of support and lower staffing ratios (that is, more teachers per student) than what was found in a general education classroom.

201. The IEP team discussed various placement options for Student including remaining in his dual immersion general education class, transferring to an English only general education classroom, a special day class for children aged five to seven with mild to moderate disabilities, and a county operated SDC classroom with a more

functional skills emphasis. Ms. Lau explained again to Parents that there was no mild to moderate SDC at Student's present school for children his age.

202. Dr. Ansari expressed concern about the SDC at Lincoln when she learned from Ms. McFadden that more than half of the children in the class were on the autism spectrum. Dr. Ansari told the team, as she explained at hearing, that she did not think Student would benefit from a class with so many children who were autistic. She believed that autistic children were not verbal enough and that Student would inappropriately mimic their autistic-like behaviors, such as perseverating on things and engaging in self-stimulatory activities.

203. Ms. McFadden explained to the IEP team and during her testimony at hearing that Dr. Ansari had a misconception of her classroom. None of the autistic children in her classroom for the 2011-2012 school year were non-verbal. None had significant behavior challenges that could cause harm to themselves or to others. Her class had a total of 16 to 17 students during the course of the year. Of those, nine or 10 were on the autism spectrum. Four or five of the children, like Student, had intellectual disabilities. One child had a specific learning disability. Ms. McFadden's SDC was not then and has never been an autism-specific classroom. Because her classroom is a mild to moderate SDC, any child placed there who is on the autism spectrum is high-functioning. Many children are assigned to her classroom so that they may learn rules and routines associated with the classroom setting. Once they learn the rules, many of the children transition to general education classrooms.

204. Ms. McFadden indicated that her class additionally met the criteria recommended by Dr. Ansari because it is taught in the manner Dr. Ansari recommended. In addition to Ms. McFadden, two trained aides were assigned full-time to the class. Most instruction is presented to the children in small groups, according to their abilities. Ms. McFadden breaks down her lessons into small chunks in a process

called scaffolding. Visuals support everything verbally taught in the class. Everything in the class is labeled. Ms. McFadden uses hands-on materials as much as possible so the children can see what is being discussed in their lessons. Visual schedules are posted throughout the classroom. Visual prompts and cues are used to instruct the children. Her classroom additionally presents a language rich environment because Ms. McFadden provides many opportunities for the children to practice language skills. Importantly, she teams with the SLP assigned to the school. They both work on the same core vocabulary skills embedded in the English language arts curriculum for each child. All the adults use the same language, and are very consistent with how they speak to the children. If the child does not understand at first, the adults will try another approach to help the child to understand.

205. Ms. McFadden indicated additional benefits to her classroom: a class size much smaller than a general education class, which can be a maximum of some 30 children. Additionally, her class day was almost six hours long as compared to the half-day dual immersion Kindergarten class Student attended. Additionally, recess is used as instructional time. Ms. McFadden and her aides assist on the playground. They teach the children how to play and how to interact with peers and adults. They are constantly modeling behavior and play. By the second semester of a school year, the children are generally interacting without prompting.

206. Ms. McFadden also spoke to the mainstreaming opportunities embedded in her SDC program. Students have opportunities to go back and forth between Ms. McFadden's SDC class and the general education classroom located next to hers. They also have mainstreaming during lunch and recess.

207. Ms. McFadden also voiced her disagreement with the fact that Dr. Ansari was stereotyping the autistic children in her classroom based solely on their disability. As she properly pointed out, each child is an individual who has individual strengths and

weaknesses. Not all children on the autism spectrum have difficulties speaking or have disruptive behaviors. Additionally, there are children who are not on the autism spectrum, such as those with selective mutism, who do not speak or who have problems with spoken language. Therefore, Ms. McFadden felt it inappropriate for Dr. Ansari to criticize the student composition of her classroom without viewing it.

208. As stated above, Dr. Ansari did not ask to observe Ms. McFadden's SDC during her assessment process. Even after the discussion at the February 27, 2012 IEP meeting, concerning the pros and cons of an SDC that included children on the autism spectrum, Dr. Ansari did not request an opportunity to view the classroom. Dr. Ansari's opinions as to the detriments of placing Student in the SDC were therefore purely subjective and based entirely on conjecture, without any concrete information to form the basis of her opinion. When asked at hearing why she did not observe the SDC, Dr. Ansari stated that she wanted to wait to see what type of placement the IEP team was going to recommend. Her testimony was not persuasive because the District had been offering the SDC to Student since the August 29, 2011 IEP. Additionally, even after the discussion at the February 27 IEP meeting, Dr. Ansari did not arrange to view the classroom. If Dr. Ansari had qualms about a classroom, she should have observed it first before making a decision that it would not be appropriate for Student. Dr. Ansari became quite defensive at hearing when questioned by District counsel about the basis of her opinions. At times, she refused to answer questions until directed to do so by the ALJ. Given all these factor's, Dr. Ansari's opinion that Ms. McFadden's classroom was inappropriate for Student was not persuasive.

209. The District IEP team members continued to believe that Student required placement in an SDC in order to access his learning. The District therefore again offered Student placement in Ms. McFadden's SDC. The offer of FAPE additionally included consultation between the SLP and the classroom teacher regarding specific techniques

to use in the classroom to address Student's language and communication needs. The offer continued to include the BSP previously proposed in the prior IEP. Additionally, the offer included a modified classroom discipline plan to increase opportunities for compliance and on task behavior by Student. Based upon Dr. Ansari's recommendations, the IEP offer also included a sensory diet for Student of proprioceptive (dealing with the awareness of his body position) and vestibular (dealing with balance) activities, including but not limited to hand fidgets for Student to manipulate, oral motor toys, having Student use a wheelbarrow walk for sensory input, allowing him to swing, and providing him with a weighted vest. As indicated above, the offer also included speech and language services for two, 30-minute group sessions a week and one, 30-minute individual session, and 45 minutes a week of individual occupational therapy.

210. In spite of Ms. McFadden's description of the positive aspects of her classroom, Parents were not convinced. They did not consent to the February 27, 2012 IEP offer other than the additional 30 minutes per week of speech and language services and the new language goals. They also agreed to observe Ms. McFadden's class.

Dr. Smith Roley's Occupational Therapy IEE

211. Student selected Dr. Suzanne Smith Roley to conduct the OT IEE that the District agreed to fund. Dr. Smith Roley has impressive credentials. She has a bachelor's of science degree in occupational therapy and a master's degree in allied health services. She has just recently received her doctorate in occupational therapy. Dr. Smith Roley is licensed in California and nationally as an occupational therapist. Additionally, she has her SIPT certification. Dr. Smith Roley has been practicing as an occupational therapist for over 30 years. She has maintained a private practice since 1991. Her professional emphasis for many years has been on sensory integration. Dr. Smith Roley has been the project director and an instructor for the University of Southern California's sensory integration program since 1998. She has received numerous honors, most from

the American Occupational Therapy Association. Dr. Smith Roley has conducted significant research in her field, primarily in the area of sensory integration and sensory processing issues. She has published or co-published some 50 articles concerning occupational therapy, most concerning sensory integration issues. Dr. Smith Roley has also given approximately 100 lectures, again primarily focusing on sensory integration.

212. Dr. Smith Roley's assessment was directed at determining Student's OT needs for educational purposes in a school setting. It consisted of observing Student during the testing process and for an hour at school, administering several assessment instruments, reviewing Parents' and teacher responses to rating scales, interviews with Parents, and a review of Student's records.

213. Dr. Smith Roley administered the Adaptive Behavior Assessment System II (ABAS-II) to assess Student's adaptive behaviors. This assessment is based on responses provided by Parents and Student's. The scores for Student on this instrument mirrored adaptive behavior assessment results obtained by the District and Dr. Ansari. Student scored significantly low on adaptive skills across all domains according to both Parents and Student's teacher.

214. Dr. Smith Roley administered the Sensory Integration Praxis Test to Student although it is not intended for children with significant cognitive deficits, such as Student. Student was only able to complete 14 of the 17 subtests of the SIPT. He was unable to complete the figure ground, manual form perception, or kinesthesia tests due to his inability to cope with the test demands. Student scored well below the typical range on 13 of the 14 subtests he was able to complete.

215. The Sensory Processing Measure (SPM) is also an assessment based on rating scales. It rates a child's social participation, vision, hearing, touching, body awareness, balance and motion, and planning ideas. Parents completed a home-based form and Ms. Gradillas completed a school-based form. Responses from Parents

indicated that Student had few sensory responsiveness issues at home. However, the responses from Ms. Gradillas indicated Student had significantly more difficulty in the classroom. Ms. Gradillas rated Student as having definite dysfunction in all areas assessed. She reported that Student had difficulty working as a team, resolving peer conflicts, and understanding the way in which other children liked to play. Student was distracted by visual stimuli and showed stress at loud noises. He made sounds, spoke too loudly, and yelled and screamed at times. He showed distress when his hands were dirty and disliked odors. Student often spilled contents when opening containers. He chewed or mouthed his clothing, stomped his feet when walking, and often ran or hopped instead of walking. Student often ran his hand along the wall when walking and rocked and fidgeted in his seat.

216. Dr. Smith Roley also administered the Behavior Rating Inventory of Executive Function (BRIEF). This assessment is also based on rating scales completed by Parents and Student's teacher. Ms. Gradillas's responses indicated significant concerns with Student's behavioral regulation and what is termed "metacognition." The latter includes working memory, the ability to organize and plan, monitor things. In her report, Dr. Smith Roley indicated that children with difficulties in executive functions often require greater supervision than those with good executive functions.

217. Dr. Smith Roley observed Student in his class for an hour. On that day, there were 20 children in the class, supervised by two teachers with assistance from three other adults. Student was accompanied by an aide during the entire observation. At one point, Student put his hands to his mouth while clicking his teeth together. The aide assisted Student during an activity cutting paper. Student had difficulty sustaining his visual attention to tasks. When using a marker, Student sniffed it and got ink on his face. Later, Student pushed the aide away, picked up some pegs, and went to sit on a little girl's lap. Student often walked away from activities even after being redirected by

his aide. After this occurring several times, the aide took Student for a time out to the buddy room for a minute, then brought him back to rejoin the lesson. Student would not follow directions although prompted three times. Student at one point leaned over the table and started to play with the ears of the child next to him. He continued to do so even after being prompted not to touch others. Student ran away when again directed not to touch the other child.

218. Ms. McFadden then arrived in the classroom. Due to Student's difficulties in the general education classrooms, the District had requested Ms. McFadden for help in educating Student. During the course of the 2011-2012 and 2012-2013 school years, she provided consultation to Student's general education teachers to guide them in attempting to address Student's behaviors and how to modify his curriculum so that he could access his learning. Ms. McFadden generally went at least one day a week to consult with the teachers. On the day Dr. Smith Roley came to observe Student, Ms. McFadden had come to mentor the new aide assigned to Student. The District had responded to criticisms of Student's previous aide by Student's family and assessors by assigning a different aide to Student. The District was attempting to provide as much support as possible in Ms. Gradillas's class by providing direct aide support to Student and by having Ms. McFadden provide guidance to Ms. Gradillas and, the following school year, to Ms. Molina, both of whom were general education teachers without training in special education interventions.

219. Ms. McFadden took Student aside and began to give him one-on-one instruction. Student responded well to this directed engagement. Student then rejoined the other children for a small group exercise. When showed a picture icon for recess, Student moved to a door and proceeded to slam it. Ms. McFadden stopped him when he attempted to slam the door again. Student then kicked the door and yelled. With direction from adults, Student returned to finish his work. He then used a picture icon to

show that he wanted to use swings during recess. On the playground, Student was happy and played on the swings.

220. Student had difficulty maintaining attention to tasks during Dr. Smith Roley's two-hour assessment of him. He could only maintain attention for five minutes without a break. Fine motor activities proved difficult for Student as did balancing tasks. Student had extreme difficulty following unfamiliar verbal instructions. He would respond to Dr. Smith Roley but did not understand what she wanted him to do. Student was sensitive to the light touch required during tactile tests. He also difficulty with some of the gross motor tasks he was asked to do.

221. Based on all aspects of her assessment, Dr. Smith Roley concluded that Student had difficulty regulating his activity level and attention. She concluded that he has poor discrimination of vestibular-proprioceptive sensations affecting postural control, balance and sequencing. Student also had poor body awareness through touch and movement affecting his fine and gross motor skill development. Student also had difficulty with motor planning. Dr. Smith Roley stated that these fundamental abilities are essential for Student to gain necessary skills and increase his independence to access his curriculum and benefit from his education.

222. At hearing, Dr. Smith Roley explained that sensory deficits such as those presented by Student can affect behavior in the classroom. She indicated that research has shown that there are benefits from providing OT that addresses sensory perception. There are gains in social areas, compliance, attention, and in fine and gross motor skills. Dr. Smith Roley indicated that Student needs OT intervention that addresses his sensory needs in whatever type of placement he attends. She recommended that Student receive two hours a week of individual occupational therapy.

223. However, while Dr. Smith indicated that the 45 minutes of OT already being provided Student during the 2011-2012 school year was insufficient because it

was not addressing his sensory deficits, she failed to adequately address why the District's 2012-2013 offer of OT was insufficient. As discussed below, at Student's August 27, 2012 IEP meeting, the District developed two goals addressing Student's sensory needs, incorporating several of Dr. Smith Roley's proposed goals into the goals it developed. The District also developed a sensory diet of vestibular and proprioceptive activities for Student that included the use of hand fidgets, oral motor toys, swinging, and the use of a weighted vest.⁷ The District also increased Student's OT sessions from 45 minutes to two, 30-minute sessions per week to address all his OT needs. Dr. Smith Roley did not sufficiently address why the District's increase in services and goals for Student's was not enough to address his needs. While Dr. Smith Roley's recommendations may have addressed more issues, as discussed in the Legal Conclusions, the District is only required to provide Student with a meaningful benefit; it does not have to maximize either his instruction or his related services. Therefore, Dr. Smith Roley's assertion that Student required two hours of OT services is not persuasive in light of the increase in services, goals, and accommodations the District developed to address Student's sensory needs.

Ms. Bhakta's Behavioral IEE

224. Student selected Asha Bhakta to do an IEE for him in the area of behavior. Ms. Bhakta has a master's degree in behavior analysis that she earned in 2004. She is presently working on her doctoral degree in applied behavioral analysis. As can be surmised from the doctoral degree program she is in, the emphasis of Ms. Bhakta's

⁷ Student alleged at hearing and in his closing brief that the District did not implement Student's sensory diet. However, Student did not allege a failure to implement his IEP's in his due process complaint. Therefore, his allegations of implementation failures are not addressed in this Decision.

education and professional experience is in ABA. She is a Board Certified Behavioral Analyst. She first provided ABA therapy to one autistic child for a period of six years. Ms. Bhakta then became a supervisor for a non-public agency that provides ABA therapy to children who are on the autism spectrum. In 2006, she helped found her own non-public agency called Creative Solutions for Autism, Inc. The agency specializes in providing language-based ABA services to children with autism spectrum disorder or who are identified as having a pervasive developmental disorder, not otherwise specified. The agency's approach is to address a child's inappropriate behaviors through positive reinforcements and thereby increase the child's learning success.

225. Ms. Bhakta has no training as a teacher or as an occupational therapist or speech and language pathologist.

226. Ms. Bhakta and her colleague conducted their assessment by observing Student at school, at home, and in the clinical setting. They also interviewed Mother and Ms. Molina and reviewed Student's records. Finally, they assessed Student using a test called the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R) and through a clinical assessment that consisted of a functional analysis and a descriptive analysis of Student's behaviors.

227. During her assessment of Student in her clinic, Ms. Bhakta observed that Student engaged in non-compliant and grabbing behaviors when the demands of the assessment increased. Student also attempted to run out of the building at the end of the assessment. However, he also responded favorably to praise.

228. Ms. Bhakta also observed Student in his classroom. She noted that Student was off-task consistently. He also engaged in behavior such as licking his teacher and licking his whiteboard. At one point, he licked another child's hair. Ms. Bhakta noted that at times Student's aide appropriately redirected Student and appropriately modeled behavior and tasks for him. The aide and teacher offered appropriate praise to Student

and he responded properly to the praise. Ms. Bhakta also noted that there were many instances when Student would initially comply with redirection but would not be able to maintain a rule or regulate his behavior. She noted that there was no clear systematic approach to behavior interventions for Student. At the time, although the District had developed a BSP with specific behavior interventions, Parents have never consented to its implementation. Therefore, the interventions developed by the District through the BSP that offered a consistent approach to Student's behaviors, were not being implemented in his classroom.

229. Ms. Bhakta's ABLLS-R assessment analyzed the following: Student's cooperation in class and in a clinical setting; receptive language skills; motor imitation; vocal imitation; ability to make requests; ability to label items; intraverbal abilities; spontaneous vocalizations; syntax and grammar; play and leisure skills; social interactions; group instruction; ability to follow classroom routines; generalized responding; reading skills; math skills; writing skills; spelling skills; dressing skills; eating skills; grooming skills; toileting skills; gross motor skills; and fine motor skills.

230. Ms. Bhakta also completed a functional analysis of Student's behaviors based upon what she observed in three different settings. The behaviors she observed were: eloping; being off task; (inappropriate) physical contact with peers; non-compliance; oral self-stimulating behaviors; and grabbing. For each behavior, the assessment detailed an antecedent to the behavior, an operational definition of the behavior, a hypothesized function of the behavior, and a proposed intervention.

231. Ms. Bhakta recommended that Student be placed in a monolingual general education English class with support from a one-on-one aide trained in ABA. She also recommended that Student receive 10 hours a week of ABA supported by approximately 150 goals she determined appropriate through Student's results on the

administration of the ABLLS-R. At hearing, it was unclear exactly how the District was to implement that number of goals for a five-year-old boy at school.

232. It was apparent from her approach to Student's behavioral issues and her recommendations for goals that Ms. Bhakta is accustomed to developing in-home ABA programs for children that may last several hours a day and during which numerous goals can be implemented. Ms. Bhakta's recommendations were unrealistic for an academic setting.

233. Ms. Bhakta testified that she has used ABA methods in addressing behavior challenges faced by children with Down's syndrome and that there are numerous studies supporting its use in that context. However, Ms. Bhakta did not cite to any specific study or research during her testimony and Student did not provide citation to any study or research in his closing brief. The evidence does not support her position that Student's program should include 10 hours a week of ABA therapy and supervision from a Board Certified Behavior Analyst. Ms. Bhakta's emphasis on ABA for a child with Down's syndrome undermined the credibility of her recommendations.

234. Ms. Bhakta's opinions were also undermined by the fact that her ABLLS-R assessment was flawed. Beyond the fact that it assessed Student in academic areas that are beyond Ms. Bhakta's expertise, she did not consistently follow the testing protocols.

235. Additionally, although Ms. Bhakta criticized the District assessors and staff for using "negative" consequences for behavior, such as withholding access to a preferred snack, Ms. Bhakta later admitted during testimony that delaying access to a preferred food or object can be an acceptable intervention depending on the child's overall response to those type of interventions.

236. Ms. Bhakta criticized the District's BSP's because she stated they were based on hypotheses about Student's behavior. However, she later acknowledged that the function of any behavior is based on hypotheses and that one of the purposes of a

behavior plan is to determine if the hypotheses are correct or whether the plan needs to be modified. Most perplexing about her opinion on this issue was the fact that her functional analysis contains a section to describe the hypothesized functions of the analyzed behavior.

237. For these reasons, Ms. Bhakta's criticisms of the District's behavior interventions and her recommendations for services using an alternative approach were not persuasive.

May 15, 2012 IEP Meeting

238. Student's IEP team met on May 15, 2012, to discuss the results of Dr. Smith Roley's OT IEE and Ms. Bhakta's behavioral IEE. All required IEP team members attended the meeting.

239. Dr. Smith Roley reviewed her assessment findings. She emphasized Student's sensory deficits. At this meeting, the District did not offer to increase the duration or frequency of Student's occupational therapy sessions.

240. Ms. Bhakta and one of her colleagues reviewed Ms. Bhakta's behavioral assessment report. The District did not agree with their recommendation for ABA services and an ABA trained aide to support Student in his classroom.

241. Both the District team members and Parents agreed that Student required placement in an English only classroom. Parents requested that Student repeat Kindergarten in an English only setting. Ms. Gradillas and Ms. Molina both agreed that it was appropriate for Student to repeat Kindergarten. Although the District continued to believe that Student's placement should be in an SDC, it agreed to transfer Student to an English only general education classroom for the following school year. Since the new school year had not yet started, there would be room for Student in Ms. Molina's Kindergarten class at Harding, which was Parents' preferred placement. The District enrolled Student in Ms. Molina's class for the 2012-2013 school year.

2012-2013 SCHOOL YEAR

August 27, 2012 IEP

242. The District convened Student's annual IEP team meeting on August 27, 2012. All required IEP team members attended the meeting.

243. The team reviewed Student's progress on his present goals in order to establish his present levels of performance. Since many new goals had been developed for Student throughout the previous school year, the new goals had annual objective dates that would occur after this IEP meeting was held.

244. Student had not met his behavior goal of decreasing his time outs to two and a half times a day. Student had been working on a fine motor goal. As of the date of this IEP, Student had only partially met the goal. Student had an initial goal for him to follow one-step classroom instructions. Student met the goal. Student also had a goal developed after the first to follow two-step instructions. Student had learned to follow one-step instructions without additional visual cues but had not fully met the goal of following two-step instructions. Another goal was for Student to learn to print his name with 100 percent accuracy. At the time of this meeting, Student was only able to do so with 60 percent accuracy.

245. Student had two math goals: one for identifying numbers one to 10, and one for matching quantities to the numbers. Student was only able to consistently identify and match to quantities the numbers zero and one. Student had therefore made de minimus progress on his math goals.

246. Student had speech and language goals to address his deficits. One goal was for Student to be able to use three word utterances when answering questions about pictures and objects. Student had only met the first two of four objectives on the goal. He had a goal to correctly produce 11 age-appropriate consonant sounds at the beginning of words when naming pictures or objects. At the time of the IEP Student was

only able to produce three of the 11 sounds and so had not met the goal. Student had an additional goal for correctly producing consonant sounds paired with vowel sounds in a structured speech setting. Student was making progress on the goal, but had only met the first objective.

247. The IEP team then revised Student's prior goals and developed new goals for him. The team revised Student's ELA goals and added to them. The team added a goal for Student to identify functional words. It added a goal for him to learn to identify more colors and another goal to learn to read words identifying the colors. The team added a self-help goal for Student to get him independently to request to use the bathroom and to use it correctly without assistance. The goal was written to address the fact in spite of being on a schedule to use the bathroom; Student still had about two toileting accidents a month. The team revised Student's behavior goal and added an additional one.

248. The team added a sensory motor goal to address Student's continuing inability to copy letters from the alphabet and to address his inability to stay seated upright for more than a few minutes during class instruction. This goal was commensurate with Dr. Smith Roley's recommendation for a goal addressing Student's deficits in sustaining proper posture and in handwriting. The team also developed a new goal for Student in the area of social skills that was directed at teaching Student to learn to play with other children instead of play alone. This goal was based on Dr. Smith Roley's recommended social and playground skills goal.

249. In the area of speech and language, the IEP team revised Student's present goals to reflect the progress he had made. The team also added a phonology component to Student's articulation goal.

250. The team developed a total of 17 goals for Student.

251. The team then discussed placement options for Student. The IEP meeting took place a day after the start of the 2012-2013 school year. Student was enrolled in Ms. Molina's general education Kindergarten class. This class met for a full school day. The District members of the team, in particular Ms. McDonald, Ms. McFadden, and Mr. Preciado, believed that attending a full day general education class continued to be inappropriate for Student based upon his cognitive level and his behavioral challenges such as inattention and distractibility. They believed that Student would not make adequate progress unless he received instruction in a small group setting.

252. At the time of this IEP meeting, Student had attended a full year of Kindergarten and was now repeating it. He had learned some of the basic school readiness skills that he had not had the prior year. Although the District IEP team members felt that Student required the small group instruction that was not available in the general education classroom, the team also believed that Student's newly acquired readiness skills made part-time placement in the general education classroom appropriate for him. The District's placement offer to Student was therefore 165 minutes in the SDC and approximately 135 minutes in a general education Kindergarten class, with a one-on-one aide for instruction and behavior support.

253. The District continued offering Student 90 minutes a week of speech and language therapy. However, the new offer was for 60 minutes a week of individual services rather than for 30 minutes, and 30 minutes a week of group services rather than for 60 minutes, as had been offered in the February 27, 2012 IEP.

254. The District also offered to increase Student's OT sessions from 45 minutes to two, 30-minute sessions per week in order to address all his OT needs, including the sensory needs discussed by Dr. Smith Roley in her assessment.

255. The August 27 IEP also offered Student several supplementary aids and services to support him in the classroom. It offered to continue consultation between

Student's speech and language pathologist and the classroom teacher regarding techniques to improve communication in the classroom setting.

256. The IEP offered a modified classroom discipline plan to increase opportunities for compliance and on task behaviors.

257. The District added specific concrete accommodations in the IEP offer, some of which Student's previous teacher had tried implementing in the classroom. The IEP included accommodations through the use of pictorial schedules, a token economy, and closure activities to increase Student's ability to attend to lessons.

258. The IEP offer also continued the implementation of a sensory diet of vestibular and proprioceptive activities for Student that included the use of hand fidgets, oral motor toys, swinging, having Student do wheelbarrow walks as a sensory intervention, and the use of a weighted vest.⁸

259. Parents did not consent to the District's IEP offer. They continued to have doubts about the suitability of Ms. McFadden's SDC classroom. Although the District had offered to provide Parents with an observation of the class, Parents had not done so by the time of this IEP meeting.

260. During her testimony at hearing, Ms. McFadden informed that for the 2012-2013 school year there are 15 children in her class. Four of the children have intellectual disabilities, four have specific learning disabilities, one is other health impaired, and six are on the autism spectrum. None are non-verbal. Parents' qualms were unfounded. Ms. McFadden's classroom continued to meet the criteria found

⁸ Student alleged at hearing and in his closing brief that the District did not implement Student's sensory diet. However, Student did not allege a failure to implement his IEP's in his due process complaint. Therefore, his allegations of implementation failures are not addressed in this Decision.

necessary by Dr. Ansari for Student to be able to access his education and make progress.

DECEMBER 12, 2012 IEP MEETING

261. Although Student had transitioned to Ms. Molina's English only Kindergarten class and had a dedicated aide, he was still having trouble in the classroom both academically and behaviorally. The District believed that it was important to develop an updated behavior support plan to address Student's needs in the classroom. It attempted to schedule an IEP meeting for October 2012, but Parents were not available to meet until December 12, 2012.

262. All required IEP team members attended the December 12, 2012 IEP meeting. Dr. Ansari and Ms. Bhakta attended the meeting by phone on behalf of Student.

263. Although this was not an annual IEP meeting for Student, his IEP team nevertheless reviewed Student's progress on his goals. Student had made minimal progress on his 17 goals. He had not made progress on his four speech and language goals. In math, Student still could only count consistently to five, even after a year in Kindergarten and could still not identify numbers or match quantities above the number one. His IEP team therefore rewrote his two math goals to *decrease* the goal's expectations for the next year because the original goal proved too difficult for Student.

264. Student's had made minimal progress on his fine motor, sensory motor, and self-help goals.

265. Student had made good progress on his social skills goal. The IEP team therefore re-wrote the goal at a higher level.

266. Due to his placement in an English only classroom, Student made some progress on his ability to identify letters of the alphabet, on his ability to identify colors, and on his ability to read the words for colors. His IEP team therefore re-wrote his goals

in those areas to reflect his progress. However, other than being able to read some words for a few colors, Student had not made any progress on his reading goal. He was still not able to identify any other word but his name.

267. Student had not made progress either on his behavior goals. For example, he could still only attend to whole group instruction for no more than two minutes without becoming distracted and engaging in behaviors that interfered with his learning and that of the other children. Student's IEP team therefore developed an additional behavior goal for him.

268. The District's primary purpose in convening this IEP meeting was to address Student's continued distractibility and continued engagement in behaviors that impeded learning in the class. Elizabeth Molina, Student's teacher for the 2012-2013 school year, testified at hearing. Ms. Molina has a master's degree in educational administration. She has had her professional clear multiple subject teaching credentials since 1991. She has taught at the District since 1990. In addition to being Student's Kindergarten teacher for the present school year, Ms. Molina often co-taught Student's Kindergarten class the prior year. She is very familiar with Student and what his needs are.

269. Ms. Molina was a very credible witness. She came across as a dedicated teacher who sincerely cares about Student and is trying to meet his needs. However, his academic needs are much greater than her ability to teach Student. It was apparent at hearing that Ms. Molina was concerned about Student's lack of progress. By the time of the hearing, she had taught Student for over a year and a half, but she still was not seeing more than minimal progress. Her class this year has 25 students. Even with the presence of the aide who dedicated the majority of time to Student, Student had not advanced on many of his goals. Ms. Molina believed that he would only be able to do so in a smaller class that allowed more one-on-one instruction by a teacher trained to

teach children with special learning needs. The instructional aide in her class was just that: an aide, not a teacher trained to how to address the learning differences of special needs children.

270. Ms. Molina was particularly concerned about Student's continued behavioral issues as were the other District IEP team members. Ms. Brenes, Ms. McFadden, Mr. Preciado, Student's speech and language therapy assistant for the 2012-2013 school year, his school principal, and other District special education staff, developed a new BSP for Student to address his behavior. They based the BSP on their observations of Student in his classroom and at lunch and recess during the 2012-2013 school year.

271. The behavior support team identified two general behaviors that were impeding Student's learning. The behaviors disrupted the learning of the other children in the class. Student continued touching and tapping his peers. He made sucking, humming, clicking, and kissing noises. He would take or grab items that he wanted inappropriately or without asking. Student sometimes kicked his peers or adults (without hurting them). He would spit sometimes. He continued to follow directions. He would tell others to shut up. Student would try to run away from class or from his teachers. He would attempt to rest on top of peers and adults. Student climbed on top of chairs and tables, and would put his feet up on tables. He sometimes attempted to remove items of his clothing. Student would throw instructional materials, such as books, behavior cards and pencils. He would throw personal items such as sweaters and backpacks. Student often became uninterested in his assignments and would push away his instructional materials and worksheets, often pushing them the materials into his peers' work space.

272. The District behavior support team members saw Student's need for a BSP as moderate because Student was not injuring himself or others. The proposed BSP

noted that in the three months from August 27, 2012, to November 30, 2012, data collected by members of behavior support team indicated Student had engaged in 173 incidents of inappropriate physical contact with others; 199 incidents of non-compliant behavior; 155 incidents when Student made inappropriate noises; engaged in off-task behaviors 82 times; and engaged in mouthing behaviors 37 times.

273. The BSP hypothesized that Student's behaviors were the result of Student's inability to understand the level of instruction in the classroom and inability to attend to instruction for more than short intervals. The purpose of the BSP was to remove Student's need to use the problematic behaviors and to suggest changes to Student's environment and additional supports and structure that would assist in decreasing the behaviors. The BSP indicated that Student's tasks be modified, that he be given more time to complete them, that small group instruction be used with him, and that he be provided with breaks after short instructional intervals.

274. The BSP also stated that Student should be taught a closure strategy so that he understood that he is finished with one task and can go into another activity. The BSP indicated that Student be taught the concept of personal space. To further address Student's behaviors, the BSP indicated that there should be changes in Student's instructional materials by the use of visual schedules and picture prompts for rules and routines. The BSP indicated that Student should be provided with a curriculum that matched his developmental level, that he should be taught discreet skills, and that video modeling be used with him. The BSP also indicated that Student needed to be taught proper interaction strategies such as sitting quietly instead of touching others.

275. The BSP indicated that Student often engaged in his behaviors to escape tasks that were too hard, not meaningful, or lasted too long for him.

276. To replace Student's inappropriate behaviors, the BSP indicates that Student would be given breaks with the choice of developmentally appropriate work.

The BSP developed teaching strategies for Student, specific positive reinforcements for appropriate behavior, such as strong praise, "high fives," notes home praising his behavior, and stickers as rewards. The BSP indicated specific strategies for his teachers, aide and other providers to employ if the behaviors reoccurred.

277. The BSP also laid out a functionally equivalent replacement behavior goal for Student directed at increasing the use of replacement behaviors, reducing the frequency of the problem behaviors, and developing new general skills that remove Student's need to use the problem behavior. The BSP also included provisions for daily monitoring of Student's behaviors. The BSP was detailed and appropriate to address the behaviors that were interfering with the ability of Student and his peers to access their education.

278. Ms. Bhakta, who was present by phone at this IEP meeting, again criticized the District's BSP. However, during her testimony at hearing, she acknowledged that she did not really know what a BSP was, that she was not familiar with how it was developed, or what it should contain. Ms. Bhakta was unfamiliar with any of the hornbooks or guides for developing BSP's. This BSP, which was very similar in structure and scope to the District's previously offered BSP, more than adequately addressed Student's behavioral issues and how to decrease them.

279. Parents did not consent to the BSP at Student's IEP meeting. As of the hearing in this matter, that had declined to consent to the implementation of any of the BSP's proposed by the District.

280. After reviewing Student's present levels, revising his goals and developing new ones, the IEP team discussed placement options. Parents still wanted to maintain Student in Ms. Molina's general education class full time, but with added support from an ABA trained aide. The District believed that Student still required to spend time in an SDC placement to address the many academic and behavioral needs that he continued

to have even after almost a year and a half in Kindergarten. However, because of Student's progress on his social skills goal and the fact that he had acquired a few more school readiness skills, the District IEP team believed that Student's participation in a general education classroom could be increased to 50 percent of his school day. The District's offer of FAPE was therefore for Student to spend 120 minutes of his school day in addition to lunch and recess, mainstreamed in general education.

281. The District made no changes in its prior offer of OT, SL, and modifications and accommodations for Student in his classroom environment.

282. As of the hearing, Parents had not consented to the District's offer. Student has remained in Ms. Molina's class.

283. In addition to Ms. Molina, Mr. Preciado, Ms. McFadden, and Ms. Lau have all observed Student in class subsequent to his December 12, 2012 IEP. As of the hearing, Student is still engaging in the behaviors described in the District's proposed BSP.

FACTUAL FINDINGS REGARDING REMEDIES

284. ALJ's have broad latitude in fashioning equitable remedies for the denial of a FAPE, including but not limited to ordering compensatory education and additional services for a student. An award to compensate for past violations must be based on a fact-specific assessment of the consequences of the district's violation, and must be such that the aggrieved student receives the educational benefit he or she would have received had the school district complied with the law. An award of compensatory education may, but is not required to, provide day-for-day compensation. ALJ's equitable relief also extends to ordering reimbursement to a student's parents for out-of-pocket expenses they may have incurred by self-funding services that a district should have provided.

285. At the last prehearing conference in the instant case, convened on February 20, 2013, the undersigned ALJ reminded Student that it was his burden to prove at hearing any remedies he wished the ALJ to order should he prevail on any or all of his issues. In her Order Following Prehearing Conference of February 20, 2013, the ALJ included the following paragraph, which is standard language contained in the majority of Orders Following Prehearing Conference issued by OAH:

11. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration and need for any requested compensatory education.

286. In his amended complaint, Student requests as remedies compensatory education in the areas of occupational therapy, speech and language therapy, social skills training, and behavior. Student's amended complaint does not specify the amount, duration, or need for compensatory education in any of these areas.

287. Student's amended complaint also requests that Parents be reimbursed for their out-of-pocket costs for placement and services they have paid for Student. The amended complaint does not describe any type of placement or services that Parents may have self-funded.

288. In a cursory statement, Student's closing brief prays that the ALJ grant the requests for remedies in his due process complaint. Student's closing brief does not address the type, amount, duration, or need for reimbursement to Parents for out-of-pocket costs or for compensatory education for Student.

289. During the course of this eight day hearing, Student offered no oral testimony or written evidence in support of any remedy he had requested in his complaint or in his prehearing conference statement, or requested in his written closing argument. Student did not ask any witness, including the expert witnesses who had assessed him, any questions regarding appropriate remedies in this case. Student has offered no evidence of the type, amount, duration, or need for compensatory services. Although Student now requests that Parents be reimbursed for out-of-pocket expenses they incurred providing Student with a placement or services that the District improperly failed to provide, Student has not offered an iota of evidence that his Parents have self-funded any such services or placement for him. Student offers no explanation in his closing brief for his failure to present any evidence in support of the remedies he has requested or offered any guidance to the ALJ in crafting a remedy.

290. With regard to the District's issues, the District's case was intertwined with Student's case regarding whether the District's IEP offers for school year 2012-2013 constituted a FAPE for Student. Pursuant to this Decision, the District has prevailed on its contentions that the IEP's dated August 27, 2012, and December 12, 2012, afford Student with a FAPE. The District is therefore entitled to implement the IEP's.

LEGAL CONCLUSIONS

1. In a special education administrative proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, both parties have filed requests for due process. Therefore, Student has the burden of proof in this proceeding with respect to the issues he has raised in his due process request and the District has the burden of proof as to the issues it raised in its due process hearing request.

ELEMENTS OF A FREE APPROPRIATE EDUCATION (FAPE)

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) The Ninth Circuit has referred to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Federal Way School District* (2004) 394 F.3d 634 (*Federal Way*).) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1212-1213 (*Hellgate*);

⁹ All statutory citations to the Education Code are to California law, unless otherwise noted.

Adams v. State of Oregon (9th Cir. 1999) 195 F.ed 1141, 1149 (*Adams*.) The Ninth Circuit reaffirmed the validity of the *Rowley* standard in *J.L. v. Mercer Island School District* (9th Cir. 2010) 592. F.3d 938 (*Mercer Island*). *Rowley* and its progeny have 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. (*Rowley, supra*, 458 U.S. at p. 200.)

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 objectively reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207. See also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006), 455 F.Supp.2d 1286, 1307-1309; *aff’d on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232).

5. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203, fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress

toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119; *E.S. v. Independent School District, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *M.H. v. Monroe-Woodbury Central School District* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School District v. Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School District v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

6. Whether a student was denied a FAPE is determined by looking to what was objectively reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*)). The relevance of a student's subsequent performance to the adequacy of his IEP is limited. In *Adams*, parents who had supplemented their child's education with private tutoring challenged the adequacy of an Individual Family Service Plan (IFSP) (the equivalent of an IEP for infants and toddlers) on the ground that the child's subsequent lack of progress in school demonstrated the inadequacy of the IFSP. The District Court found it impossible to sort out the progress the child made.

7. The Ninth Circuit, however, rejected that approach. It stated that instead of asking whether the IFSP was adequate in light of the student's progress, the district court should have asked the more pertinent question of whether the IFSP was appropriately designed and implemented so as to convey a meaningful benefit to the student. The court rejected the process of measuring an IFSP (and, by analogy, an IEP) retroactively by its results. Instead of judging the IFSP in hindsight, the proper analysis

was to look at the IFSP's goals, placement and services at the time the plan was developed and ask whether the methods were reasonably calculated to confer the student with a meaningful benefit. The court stated that the IFSP was a snapshot, not a retrospective, and had to take into account what was and what was not objectively reasonable when the snapshot was taken. (*Ibid.*) However, later evidence, such as assessments, may be used to supplement the record if the evidence is relevant, non-cumulative, and otherwise admissible. (*E.M. v. Pajaro Valley Unified School District* (9th Cir. 2011) 652 F. 3d 999, 1005.)

ANALYSIS OF ISSUES: STUDENT'S ISSUES

Did the District Deny Student a FAPE by Failing to Offer an Appropriate Placement and Supports in the LRE for the 2011-2012 and 2012-2013 School Years? (Issues 1(a); 1(b); 2(a); and 2(b))

Enrollment in a Dual Immersion Kindergarten Class

8. Student first contends that that the District should have advised Parents not to enroll him in a dual immersion Kindergarten class. He also contends that that no one from the District ever discussed the detriments of his continued enrollment in a class taught primarily in Spanish at any time during his IEP meetings. The District responds that it would have been illegal for it to have either denied Student enrollment in the class or for it to have counseled Parents against enrolling Student in the class. The District further asserts that the issue was discussed frequently during the 2011-2012 school year. The District further contends that it immediately began offering alternative placements to Student through the IEP process.

9. Student's contentions in this regard are without merit. At the time Parents enrolled Student in the dual immersion class, Student was considered a general education student based on his last IEP, dated December 3, 2010. As the District correctly points out, it would have violated Student's rights under section 504 of the

Rehabilitation Act (29 U.S.C. § 794) and under the Americans with Disabilities Act (42 U.S.C. § 12111, et seq) had it refused to enroll Student in the class or somehow tried to otherwise convince Parents not to do so. The ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity (42 U.S.C. § 12132.) Unless a child is otherwise unqualified for a particular program or class, he or she cannot be denied access based upon his or her disability. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and its implementing regulations (34 C.F.R. § 104), taken together, provide, in relevant part, that no program or activity receiving Federal financial assistance from the Department of Education may discriminate on the basis of disability. (See, e.g. *Cordeiro v. Driscoll, et al.* (D.C. Mass. 2007) 47 IDELR 189, 107 LRP 16705; *Jones v. Lakeview School District* (D.C. Ohio 2007) 48 IDELR 89, 107 LRP 41015.) There is no evidence that Student was not otherwise qualified for enrollment in the dual immersion class. (Factual Findings 35-41.)

10. Nor does the evidence support Student's contention that the District failed to discuss the negative impact of Student's continued enrollment in the class. To the contrary, although the notes to Student's IEP's were not comprehensive and did not indicate the extent of all conversations that took place at the meetings, District IEP team members testified that the issue was discussed consistently during IEP's that took place during the 2011-2012 school year. Kim Cantua, the SELPA program specialist who observed Student in the dual immersion classroom, stated in her observation report that the placement was not beneficial to Student. Her report was discussed at Student's August 29, 2011 IEP meeting. SELPA behavior specialist Louise Brenes observed Student in his classroom during October 2011. Her report was discussed at Student's November 4, 2011 IEP meeting. She specifically indicated in her report that Student responded

more positively to instruction in English than to instruction in Spanish and that his inappropriate behaviors decreased when he was receiving instruction in English. Ms. Brenes therefore recommended against Student's continued attendance in the dual immersion classroom. (Factual Findings 35-41, 43, 71, 87, 97, 124, and 139.)

11. The most significant evidence on this point is the fact that the District was so concerned about the detrimental effects of Student's enrollment in a class taught primarily in Spanish that it offered Student an interim placement in a general education English only Kindergarten classroom even though believed that Student required placement in an SDC to progress in his education. The District offered the interim placement because Parents would not consent to placing Student in the SDC. For the District, the lesser evil was to remove Student from a Spanish only instructional environment to an English only classroom even if he would not progress as they hoped. Inexplicably, Parents refused the offer of the interim placement, choosing to retain Student in the detrimental Spanish only environment that they now blame on the District. (Factual Findings 35-41, 43, 71, 87, 97, 124, and 139.)

12. The law is clear that parents may not use the fact that a school district complied with their wishes as a sword in their due process complaint under the IDEA. (*Cleveland Heights, et al. v. Boss* (6th Cir. 1998) 144 F.3d 391, 398.) Courts have found that as a general matter, it is inappropriate under the IDEA for parents to seek cooperation from a school district and then seek to exact judicial punishment on the school authorities for acceding to their wishes. (*M.M. ex rel. D.M. v. School Dist. of Greenville* (4th Cir. 2002) 303 F. 3d 523, 533, fn 14.) Parents requested to enroll Student in a program for which he was otherwise qualified. The District enrolled him in the program. As soon as the District recognized the deleterious effects on Student's educational progress, it recommended alternative placements for him, including one that it did not believe would meet Student's needs, in order to move Student into a

classroom where he would at least have exposure to English. Student has failed to persuasively demonstrate that the District denied him a FAPE by permitting him to enroll in a dual immersion Kindergarten class. (Factual Findings 35-41, 43, 71, 87, 97, 124, and 139; Legal Conclusions 1-12.)

Was the District's Offers of Placement in an SDC the LRE for Student?

13. Student contends that the District failed to offer him a FAPE because the IEP's it developed for Student during the entire 2011-2012 school year did not include placement in a general education classroom. Student contends that placement in a special day class is too restrictive an environment. He contends that an English only general education classroom with adequate one-on-one aide support is the LRE for him. The District contends that Student could not make progress in a general education class because his behaviors impeded his access to his education and interfered with the ability of his peers to access theirs.

14. As an initial observation, Student's contentions have no merit in light of the fact that the District did, in fact, offer Student placement in an English only general education classroom with aide support in his November 4, 2011 IEP as an interim placement. As stated above, the District was concerned about Student's lack of progress in the Spanish immersion class and offered the interim placement as a means of at least placing Student in a an educational setting that would offer him English instruction. Parents declined the interim offer. Mother stated that she declined it for several reasons. First, Parents had requested IEE's in neuropsychology and speech and language, to which the District had agreed. Parents wanted to wait for the IEE reports to be discussed at an IEP meeting before moving Student to another classroom. Additionally, the English only class that was offered was located at a different school than the one Student was attending. Mother objected to moving Student to another school mid-year. Mother also believed that because the general education class was located next to the special day

class the District had offered as placement, Student would be sent to the SDC anytime he misbehaved. (Factual Findings 121-142.)

15. Parents' reasons for declining the interim offer are unjustified. Parents previously had placed Student in a preschool class mid-year when he began attending the Prop 10 class in April 2011. There is no evidence that Student suffered any adverse reaction to starting a new school mid-year. There is also no evidence that the general education teacher to whose classroom Student would have been assigned ever used Ms. McFadden's SDC as a time out room for her students or that she had any intention of doing so with Student.

16. Most significant is the fact that Student asserts that the District failed to offer him a FAPE because it did not offer him an English only general education placement when the mere fact that the District made the interim offer on its face contradicts Student's position. It is perplexing that Student contends that the District failed to make a certain offer when the District, in fact, made the very offer that Student asserts it should have made him. It is pure speculation at this juncture whether the District would have made the placement offer permanent once it had an opportunity to assess whether Student was able to progress, as Parents maintain he would have, in a general education instructional environment. The District made the offer of a general education English only classroom with one-on-one aide support, which is the very offer Student contends the District should have made. Student then rejected the offer. The District cannot be faulted for offering exactly what Student contends it failed to do, when it made the offer only to have it rejected. Student's contention that the District failed to offer him a placement in a general education classroom with support is therefore not supported by the weight of the evidence. (Factual Findings 35-41, 43, 71, 87, 97, and 121-142; Legal Conclusions 1-15.)

17. In the alternative, Student failed to prove by a preponderance of the evidence that the District's offer of placement in a mild to moderate SDC denied him a FAPE because it was not the LRE for him.

18. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect [the student] had 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].) 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.)

19. Neither party presented any evidence regarding the relative costs of placing Student in a general education classroom with supports as opposed to an SDC

class with a high adult to student ratio, which is the fourth factor of the *Rachel H.* analysis. That factor is therefore not at issue in this case.

20. The parties agree that Student would obtain substantial benefit from interacting with typical peers. The non-academic benefits of mainstreaming are not disputed in Student's case.

21. The parties' disagreement centers on two factors: the educational benefits of placement full-time in a general education class and the effect Student has on the teacher and children in the general education class. Student contends that the District should have given him an opportunity to succeed in a general education class with supports. The District's position is first that Student's behaviors impeded his education and that of his peers to the extent that a general education class, even with aide support, was not appropriate for him. Alternatively, the District points out that Student was, in fact, in a general education class, but was not making progress because his behaviors impeded his learning.

22. There are several flaws in Student's position. First, the evidence demonstrates that Student was not able to function in the general education environment. The District first offered Student placement in an SDC because Ms. McFadden's observations of Student at his Prop 10 preschool class, along with input from the teacher of that class, indicated that Student did not have any school readiness skills to support his placement in general education. Nonetheless, the District offered to place Student in a general education Kindergarten readiness class during the summer of 2011 to determine if a general education placement was, in fact, appropriate for him. The class was taught by Ms. Gradillas, the same teacher who would be teaching the dual immersion Kindergarten class in which Parents had enrolled Student. School psychologist Jesus Preciado observed Student two times while Student attended the summer class. Student was not successful in the placement. The first day, he would not

leave the restroom until escorted out by the Principal. He clung to adults in the class and would not attempt to do things independently that other children readily did, such as eating. Student consistently wandered around the classroom. He did not socialize with his peers. He spit water at children. In class, even after being redirected, Student would get up and wander around. The teacher had to stop her lesson to constantly re-direct Student. Ms. Gradillas called Mother to pick Student up early. Mother dis-enrolled Student from the class just a few days after he started. There is no evidence that the District expelled Student from the class or otherwise caused his removal. (Factual Findings 43, 44, and 47.)

23. The District assessed Student in August 2011. It held an IEP meeting for him just after school began. Based on the assessments and the observations of Student in the summer program, the District again offered Student placement in Ms. McFadden's SDC class. Parents rejected the offer and Student remained in Ms. Gradillas's Spanish immersion class. Based upon Student's continuing behaviors which interfered with his ability to participate in the learning environment, and which interfered with the learning of his peers, the District assigned an instructional aide to Ms. Gradillas's class. Although assigned as a classroom aide, the aide spent most of her time prompting and redirecting Student.

24. Student was not successful in the class even with the assistance of the aide. Several District staff members observed Student in the class during the first 10 weeks he was in Ms. Gradillas's class. Kim Cantua and Louise Brenes, behavior specialists from the SELPA observed Student, as did Ms. Lau, Mr. Preciado, and his classroom teacher. From the beginning of the school year, he was easily distractible and not able to concentrate on lessons. Student disrupted the other children by touching them, tapping them, rubbing their ears, taking their lesson materials, making noises, laying down on the carpet, invading the personal space of the other children, and throwing materials

around the room. This behavior, in turn, made Student unavailable for learning. It further disrupted the learning of the other children because class often had to be stopped so Student's behaviors could be addressed and because Student was interfering with the other children when they attempted to do their lessons. The presence of the aide did not noticeably decrease Student's behaviors. (Factual Findings 54-60, 70, 71, 84-87, 90, and 97.)

25. At Student's November 4, 2011 IEP meeting, the District developed a behavior support plan for Student. The plan described his behaviors, gave hypotheses for the reasons Student was engaging in the behaviors, suggested modifications to Student's curriculum and learning environment, and suggested supports to help Student decrease the behaviors. The BSP described replacement behaviors for Student and described what his instructors would do if Student continued the behaviors. The plan also delineated teaching strategies for Student and positive reinforcement to be used to guide Student to better behavior. Parents have never consented to the implementation of the BSP first developed at the November 4, 2011 IEP meeting and did not consent to a revised BSP developed the following year at Student's December 12, 2012 IEP meeting. (Factual Findings 113-124 and 129-133.)

26. Student's disruptive and interfering behaviors continued unabated throughout the 2011-2012 school year. (Factual Findings 182-186, 209, 217-220, and 228.)

27. The impact of Student's behavior on his learning is apparent from his lack of progress on his goals during the entire 2011-2012 school year. During the course of the school year, the District convened some six IEP meetings for Student to discuss assessments, discuss IEE's, and discuss his progress. The District reviewed Student's present levels and progress at each meeting. It reviewed his behavioral issues at each meeting. Each time it met, it gathered more information regarding Student's strengths,

deficits, and needs. Student's August 29, 2011 IEP contained seven goals; his August 27, 2012 IEP contained 17 goals. However, during the year, Student did not meet any of them. (Factual Findings 90-101, 125-138, 195-209, 238-241, and 243-250.)

28. At Student's annual IEP meeting on August 27, 2012, the District revised its offer of FAPE. Unlike the previous year, Student now had acquired some school readiness skills. Parents also requested that he repeat Kindergarten. However, Student's behaviors had not decreased. He had made little progress on his academic goals. Because of all these factors, the District believed that it was appropriate to offer Student a placement in the SDC combined with a defined amount of time in the general education Kindergarten class. (Factual Findings 242-260.)

29. Parents rejected the District's offer of placement. Because room was now available in Ms. Molina's English only Kindergarten class at Harding, Parents finally agreed to remove Student from the dual immersion class. The District revised Student's goals and developed new behavior goals that the District hoped would address Student's continuing disruptive behavior since Parents had never agreed to the District's proposed behavior support plan. The District also assigned an aide to Ms. Molina's class, primarily to work with Student. (Factual Findings 242-260.)

30. Although the transfer to an English only classroom had some beneficial effect on Student's educational progress, the benefit was minimal. Significantly, even with the additional behavioral goals and new classroom aide, Student's behaviors continued much as before. Ms. Brenes, Ms. Lau, Mr. Preciado, and other District members of Student's IEP team observed Student between his August 27, 2012 IEP meeting and the end of November 2012. They took data on the inappropriate behaviors they observed. The District developed a revised BSP to address the behaviors. At an IEP meeting the District convened for Student on December 12, 2012, the District again revised Student's goals and developed additional ones. It reviewed Student's continuing

behavioral challenges and proposed implementing the revised BSP. Based on Student's progress on some of his academic goals and progress he had made in social skills, the District proposed a new placement, this time comprised of Student spending half of his time in the SDC and half of his time in general education. Parents again declined the offer of placement. They again declined to consent to the implementation of the proposed BSP. (Factual Findings 261-279.)

31. Student contends that *Rachel H.* mandated that the District first place Student in the general education classroom and should only have offered the SDC had he failed to progress. They assert Student was never given that opportunity. Leaving aside the fact that Student was, in fact, in a general education classroom and was unable to progress in it, Student misconstrues *Rachel H.* and the cases that followed it. The Ninth Circuit itself, in a decision issued a year after *Rachel H.*, stated that "[t]he IDEA's preference for mainstreaming is not an absolute commandment." (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 836.) "In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment." (*Id.* at p. 834.)

32. In *Federal Way, supra*, 341 F.3d at p. 1068, the Ninth Circuit also emphasized that it is important to focus on whether a child can obtain academic benefit from mainstreaming. The court cited to *Beth B. v. Van Clay* (7th Cir. 2002) 282 F.3d 493, 499, for the proposition that the fact that a student's academic progress was virtually non-existent weighed against mainstreaming the child. Such is the case here: Student gained little progress academically during the 2011-2012 school year, demonstrating that mainstreaming was not appropriate for him. The SDC offered by the District would have met Student's behavioral needs as well as permitted him to access his education.

He would have been given mainstream opportunities as well. Ms. McFadden credibly described the mainstreaming opportunities embedded in her SDC program. Students have opportunities to go back and forth between her SDC class and the general education classroom located next to hers. They also have mainstreaming during lunch and recess. Student would not have been deprived of mainstream opportunities had he attended the SDC. (Factual Findings 43, 44, 47, 54-60, 70, 71, 84-87, 90, 97, 113-124, 129-133, 182-186, 217-220, and 242-279.)

33. Student's case has little in common with the little girl in *Rachel H.* They share similar intellectual disabilities. The similarity ends there. Unlike *Rachel H.*, Student engages in constant disruptive behaviors in the classroom that interfere with his ability to access his education, interfere with the ability of fellow students to access their education, and interfere with the ability of his teachers to provide instruction in class. An aide has not alleviated the problem. Student has not progressed much on his goals in spite of repeating Kindergarten and in spite of the constant attempts by the District to help him succeed. Student's behavioral issues were such that even his own expert believed that he would derive no benefit from a general education classroom. The weight of the evidence therefore supports a finding that for the 2011-2012 school year, Student's LRE was in the SDC proposed by the District due to the lack of educational benefit Student was receiving as well as his effect on the ability of the other students to access their education while he remained in the general education classroom. The evidence also supports the District's contention that a placement half time in the SDC and half time in the general education classroom was the LRE for Student in the 2012-2013 school year. Student has failed to meet his burden of proof that the District's offers of placement for the two school years at issue denied him a FAPE. (Factual Findings 43, 44, 47, 54-60, 70, 71, 84-87, 90, 97, 113-124, 129-133, 182-186, 217-220, and 242-279; Legal Conclusions 1-33.)

The Recommendation of Dr. Ansari for Student's Placement in an SDC Contradicts Student's Contention that a General Education Classroom was the LRE for Him.

34. Additionally, Student has also failed to demonstrate by a preponderance of the evidence that he was denied a FAPE by the District's offer to place him in an SDC rather than to mainstream him, because his own experts recommended against his placement in a general education classroom.

35. In her assessment report, Student's neuropsychological assessor, Dr. Shirin Ansari, noted that Student's behavior even in the one-on-one environment during her assessment of him, was highly distractible and that he had many behavioral difficulties. Student screamed inappropriately, attempted to flee constantly from the testing room, and spit into a bowl. He was often unwilling to respond to tasks. Providing frequent breaks did not appear to help. Student would refuse to respond to tasks requested even following breaks. Although initially responsive to the use of earning stickers as positive reinforcement, Student eventually began kicking the table and was off task and inattentive. Even with Student's sister or Mother sitting in on the testing sessions, Student was still not able to complete most of the tasks presented to him. At times he would just echo directions. The only way Dr. Ansari's team was able to get him to respond at all to the tasks most of the time was to use two assessors. Student needed to be engaged consistently and needed constant prompting to address tasks. At times, Student totally disengaged from tasks and took off his shoes, hid under the desk, or climbed on top of the chair and desk. (Factual Findings 176-181.)

36. During her observation of Student at his school, Dr. Ansari noted that Student had an aide working at his side for most of the time. Even with the aide, Student was consistently distracted and his aide had to consistently redirect him. Student needed his aide at his side for most activities and displayed behavioral challenges when the aide was not present. (Factual Findings 182-187.)

37. Student was friendly with classmates, but they often rebuffed him because he was unable to identify appropriate boundaries with them. At times during a lesson, Student would not sit down. (Factual Findings 182-187.)

38. Dr. Ansari was unable to administer several subtests of her assessment instruments because of Student's inability to focus and due to his distractibility and failure to stay on task. This was in spite of the fact that a team of assessors was assisting her with Student's testing. (Factual Findings 160, 163, 164, 167, and 176-181.)

39. Dr. Ansari's overall impression was that Student needed constant support from his aide to stay on task and often exhibited distracting behaviors when the aide was not present. With regard to her cognitive testing of Student, based on his inability to complete tasks even on non-verbal assessments, Dr. Ansari concluded that Student's cognitive impairments prevent him from being able to meet the minimum level of functioning assumed by the non-verbal norm-referenced standardized assessment. She further concluded that Student exhibited high levels of intellectual, linguistic, adaptive, and academic impairment. She stated that he required high levels of support and supervision. Dr. Ansari recommended that Student be placed in a classroom that was designed for his developmental level, and that Student also needed appropriate related services. Her specific recommendation for Student's classroom setting was that he needed a low teacher/teacher assistant to student ratio that would provide small group and individualized instruction. Dr. Ansari also recommended that Student's curriculum contain both functional and academic elements, both elements of an SDC. (Factual Findings 187-191.)

40. Dr. Ansari ultimately concluded that a general education classroom, even if taught solely in English, was not appropriate for Student. She wrote in her report that "even if [Student] receives a 1:1 aide and extensive pull-out support, it seems unlikely that he can maintain the pace and meet the demands of a regular education classroom.

Moreover, to the degree that academic expectations are not aligned with his developmental readiness, [Student's] frustration will likely result in inappropriate behaviors that further limit his ability to benefit from instruction." Student's own expert therefore fails to support his position. Student therefore failed to persuasively demonstrate that the SDC was not the least restrictive environment for him. (Factual Findings 187-191; Legal Conclusions 1-40.)

Students Enrolled in the SDC

41. However, Dr. Ansari also concluded that Student needed a classroom where at least 75 percent of the children could speak fluently as opposed to speaking only isolated words or fragmented speech so that Student could model appropriate language and behaviors. She did not feel it appropriate to place Student in a class where many of the other children were non-verbal. Because the District's proposed SDC included children on the autism spectrum, Dr. Ansari expressed concern about the viability of the class for Student. Dr. Ansari told Student's IEP team and testified at hearing that she did not believe that Student would benefit from a class with so many children who were autistic. She believed that autistic children were not verbal enough and that Student would inappropriately mimic their autistic-like behaviors, such as perseverating on things and engaging in self-stimulatory activities. (Factual Finding 202.)

42. There was no objective basis for Dr. Ansari's opinion regarding the proposed SDC. Neither Dr. Ansari nor any of Student's other independent assessors ever visited Ms. McFadden's SDC during either school year at issue in this case. Although Dr. Ansari and other independent assessors believed that the children in Ms. McFadden's classroom were not sufficiently verbal and displayed too many characteristics of children on the autism spectrum, their opinions were based on speculation rather than fact. (Factual Findings 194, and 202-208.)

43. Ms. McFadden's mild to moderate SDC for the 2011-2012 school year was composed of 16 to 17 children. Of those, nine or 10 were on the autism spectrum. Four or five of the children, like Student, had intellectual disabilities. One child had a specific learning disability. None of the children were non-verbal or had significant behaviors that interfered with the learning of the other children. Ms. McFadden's SDC was not then and has never been an autism-specific classroom. Because her classroom is a mild to moderate SDC, any child placed there who is on the autism spectrum was high-functioning. In addition to Ms. McFadden, two trained aides were assigned full-time to the class. Most instruction was presented to the children in small groups, according to their abilities. Ms. McFadden broke down her lessons into small chunks in a process called scaffolding. Visuals support everything verbally taught in the class. Everything in the class is labeled. Ms. McFadden used hands-on materials as much as possible so the children could see what was being discussed in their lessons. Visual schedules were posted throughout the classroom. Visual prompts and cues were used to instruct the children. Her classroom additionally presented a language rich environment because Ms. McFadden provided many opportunities for the children to practice language skills. Importantly, she teamed with the SLP assigned to the school. They both worked on the same core vocabulary skills embedded in the English language arts curriculum for each child. All the adults used the same language, and are very consistent with how they speak to the children. If the child did not understand at first, the adults would try another approach to help the child to understand. All these factors mirrored those recommended by Dr. Ansari. (Factual Findings 203-207.)

44. For school year 2012-2013, Ms. McFadden's SDC has an even fewer number of children on the autism spectrum. This year, there are 15 children in her class. Four of the children have intellectual disabilities, four have specific learning disabilities, one is other health impaired, and six are on the autism spectrum. None are non-verbal.

Parents' qualms are unfounded. Ms. McFadden's classroom continues to meet the criteria found necessary by Dr. Ansari for Student to be able to access his education and make progress. (Factual Findings 260.)

45. Dr. Ansari did not ask to observe Ms. McFadden's SDC during her assessment process. Even after the discussion at the February 27, 2012 IEP meeting concerning the pros and cons of an SDC that included children on the autism spectrum, Dr. Ansari did not request an opportunity to view the classroom. Dr. Ansari's opinions as to the detriments of placing Student in the SDC were therefore purely subjective and based entirely on conjecture, without any concrete information to form the basis of her opinion. When asked at hearing why she did not observe the SDC, Dr. Ansari stated that she wanted to wait to see what type of placement the IEP team was going to recommend. Her testimony was not persuasive because the District had first offered the SDC to Student at the August 27, 2011 IEP meeting and had continued to offer in in the subsequent IEP's. Additionally, even after the discussion at the February 27 IEP meeting, Dr. Ansari did not arrange to view the classroom. Dr. Ansari's qualms about the SDC therefore are not well-taken. Because her opinion is based on conjecture rather than subjective observation, her criticisms of the proposed SDC were not persuasive. Student presented no persuasive evidence that Ms. McFadden's SDC was inappropriate for him due to the makeup of the students who composed the class. Student has failed to prove by a preponderance of the evidence that the SDC was not the LRE for him. (Factual Findings 209 and 260.)

46. In conclusion, Student has failed to prove by a preponderance of the evidence that the District failed to offer him an appropriate placement in the LRE for school years 2011-2012 and 2012-2013. (Factual Findings 43, 44, 47, 54-60, 70, 71, 84-87, 90, 97, 113-124, 129-133, 182-186, 202-209, 217-220, and 242-279; Legal Conclusions 1-46.)

Alleged Failure to Provide Adequate Behavioral Supports

47. Student makes several allegations regarding this issue. He first contends that the District should have conducted a functional analysis assessment (FAA) of him and then developed a behavioral intervention plan (BIP). Student then contends that the District failed to provide him with appropriate and adequate behavior supports during the 2011-2012 and 2012-2013 school year because the instructional aide the District provided him was not properly trained. He then contends that the District's proposed BSP's were not appropriate. Finally, Student contends that the District should have provided him with an ABA trained aide. The District asserts that it appropriately addressed Student's behavior needs.

48. With regard to the allegation that the District should have provided Student with an FAA and then developed a BIP for him, Student's allegations fail on their face. Student never alleged in his amended complaint that the District failed to assess him in all areas of suspected disability or, specifically, failed to conduct an FAA for him or develop a BIP.

49. Alternatively, even had the issues been properly pleaded, Student has failed to provide persuasive evidence in support of the allegations.

50. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right

to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *Parent v. Patterson Joint Unified School District, et al.* (2010) Cal.Ofc.Admin.Hrngs. Case Nos. 2009110397 and 2009110083 (*Patterson*).)

51. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that an LEA conduct an FAA, resulting in a BIP, when a student develops a "serious behavior problem," and the IEP team finds that the instructional/behavioral approaches specified in the student's IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).) A serious behavior problem means the individual's behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) (*Patterson, supra*.)

52. Here, Student failed to present any evidence that his disruptive behaviors met the criteria for mandating an FAA or the development of a BIP. Although Student's disruptive behaviors impeded his education and interfered with the education of his peers, the behaviors did not cause physical harm to Student to others, or to property. There is no evidence that Student hurt anyone when he kicked at them and no evidence that he maliciously or negligently destroyed property. Student has therefore failed to prove that the District denied him a FAPE by failing to conduct an FAA and develop a BIP. (Factual Findings 43, 44, 54- 58, 84-87, 93, 113-124, 129-133, 135, 247, 256, 267, 268, and 270-279; Legal Conclusions 1 and 47-52.)

53. Student further alleges that the District failed to provide adequate supports for him in the classroom. Student's arguments are meritless for two reasons. First, as stated above, the District did not offer Student placement in a general education classroom. It offered placement in an SDC, a classroom model with inherent behavioral supports due to the small class size and high adult to student ratio. Had Student accepted the District's offer, he would have benefited from the supports in the SDC classroom. Student's attendance in the general education Kindergarten was based on his Parents' enrollment of him in the class. It was based on his stay put IEP, which provided him with a general education placement but did not provide for a one-on-one aide. (Factual Findings 43, 44, 54- 58, 84-87, 93, 113-124, 129-133, 135, 247, 256, 267, 268, and 270-279.)

54. In any case, the District did attempt to address Student's behavioral needs through the development of behavioral goals and through the development of a BSP for him, first for the 2011-2012 school year and later, for the 2012-2013 school year. Parents refused to permit implementation of the BSP's. It is contradictory for Student to allege that the District failed to address his behavioral needs when his Parents would not consent to implement a plan to address those needs. (Factual Findings 93, 113-124, 129-133, 135, 247, 256, 267, 268, and 270-279.)

55. Asha Bhakta, Student's independent behavioral assessor was highly critical of the proposed BSP's. However, Ms. Bhakta's testimony indicated that she does not really know what a BSP is, that she is not familiar with how it is developed, or what it should contain. Ms. Bhakta is unfamiliar with any of the hornbooks or guides for developing BSP's. She has not worked in a school setting to develop BSP's. It was quite apparent from her testimony that she was conflating the functions and components of a BSP with those of a BIP. She also criticized the District's BSP's because she stated they were based on hypotheses about Student's behavior. However, she later acknowledged

that the function of any behavior is based on hypotheses and that one of the purposes of a behavior plan is to determine if the hypotheses are correct or whether the plan needs to be modified. Most perplexing about her opinion on this issue was the fact that her functional analysis contains a section to describe the hypothesized functions of the analyzed behavior just as the District's BSP's did. (Factual Findings 224-225 and 231-237.)

56. The BSP's developed by the District contained every provision necessary to address Student's behaviors. There was only one component missing to assure their success: consent by Parents to implement the BSP's. It is, of course, pure speculation whether the BSP's would have successfully addressed Student's behavior. Certainly, had the behaviors decreased and Student's ability to attend to lessons increased Parents' contentions that Student belonged in a general education classroom full time would have been supported by some evidence. Conversely, had the BSP's been implemented without a significant change in Student's behaviors or progress, Student's argument that the BSP's were inadequate might also have been supported. However, neither scenario occurred here because the BSP's were not implemented. (Factual Findings 93, 117-124, 128-133, 135, 247, 256, 267, 268, and 270-279.)

57. Student also contends that the District failed to provide adequate behavioral supports because his aides were not properly trained. Student's expert, Ms. Bhakta, believes that the aides should have been trained in ABA and that the aides should be supervised on a monthly basis, preferably by a non-public agency. The District asserts that its staff is properly trained and that they addressed Student's needs.

58. Ms. Bhakta based her recommendations on her assessment results. However, her assessments are not persuasive for a number of reasons. First, Ms. Bhakta assessed areas far beyond behavior. For example, she assessed Student's math skills and reading skills. Ms. Bhakta is not a teacher and has never received teacher training, either

as a general education teacher or as a special education teacher. Her assessment of Student's academic skills is therefore perplexing. She also assessed Student's fine and gross motor skills, yet has no training as a physical or occupational therapist. Her assessment of these and many other areas was beyond the scope of a behavior assessment and did not comport with her education or training. Ms. Bhakta has never taught in a classroom or worked in a classroom setting. Her recommendation of some 150 goals for Student, including several academic goals and occupational therapy goals, went far beyond her educational and professional experience and were unrealistic in a classroom setting. These factors detracted from the overall persuasiveness of Ms. Bhakta's criticisms of the District's proposed behavior plan as well as her conclusions and recommendations regarding the appropriate methods of addressing Student's behaviors. (Factual Findings 224-237.)

59. Student's issue with regard to the training of his aides, supported by Ms. Bhakta's recommendations, is that the District's aides were not properly trained. Ms. Bhakta believes that only ABA trained aides can support Student in the classroom. She urges that ABA principles be utilized to address Student's behavior needs. The underlying weakness in Ms. Bhakta's argument is that she is trained only in ABA, and is specifically trained to address behavioral needs of autistic children. There was no persuasive evidence, however, that Student shares characteristics of autistic children or that his behavior challenges can only be addressed by traditional ABA therapy. (Factual Findings 224-237.)

60. In any event, the decision to use behavior intervention techniques recommended by its own behavior specialists rather than the ABA techniques recommended by Ms. Bhakta amounts to a decision on what methodology to use to address Student's behavior. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's

discretion. (*Rowley, supra*, 458 U.S. at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) “Beyond the broad questions of a student’s general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs.” (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

61. The reauthorized IDEA does not mandate that a district use a particular methodology. For example, courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. Lexis 27570, pp. 51-57; 46 IDELR 45, 106 LRP 29290, (which provides a comprehensive summary of decisions discussing the matter).) Rather, courts have determined that the most important issue is whether the proposed instructional method meets the student’s needs and whether the student may make adequate educational progress. (*Id.* at pp. 65-68.) Title 34 Code of Federal Regulations part 300.320(a)(4) (2006), states that IEP’s shall include a statement of the special education and related services and supplementary aids and services, *based on peer-reviewed research to the extent practicable*. The language “to the extent practicable” regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program.

62. Unless and until a particular methodology is shown to be ineffective, the choice of methodology lies with a school district and cannot be dictated by a child's parents. Ms. Bhakta's does not have any training or experience in behavior interventions other than ABA. She was unfamiliar with how to interpret or implement a BSP; her criticisms of the District's proposed behavior intervention therefore are not persuasive. In this case, the District developed a behavior support plan for Student. Parents have never consented to the implementation of the plan. It is therefore unknown whether the plan would have been effective in addressing Student's inattention, distraction, and non-compliance. It is thus immaterial whether Ms. Bhakta's recommended behavior interventions may have been superior to the interventions proposed by the District. Student has failed to prove by a preponderance of the evidence that the District denied him a FAPE during the two school years at issue in this case because it did not offer him appropriate behavioral supports or interventions. (Factual Findings 93, 113-124, 128-133, 135, 224-237, 247, 256, and 270-279; Legal Conclusions 1 and 48-62.)

Did the District Deny Student a FAPE by Failing to Offer Appropriate Frequency, Duration, and Type of Designated Instructional Services for the 2011-2012 and 2012-2013 School Years? (Issues 1(c) and 2(c))

Did the District Deny Student a FAPE by Failing to Devise an Appropriate Goals and Objectives in all areas of Disability? (Issues 1(d) and 2(d))

63. Student contends that the District failed to provide him appropriate related services and supporting goals and objectives in the areas of behavior, speech and language, occupational therapy, and social skills. The District responds that it appropriately addressed Student's needs as soon as it was on notice that a need existed.

64. In terms of special education law, a "related service" is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) Related services typically consist of individualized services tailored to address a disabled pupil's particular

needs. (*C.G. v. Five Town Community School* (1st Cir. 2008) 513 F.3d 279, 285 (*Five Town*)). An educational agency in formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child's potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*)). The adequacy of such related services is measured by whether the disabled pupil will gain educational benefit through the assistance provided by such services. (*Mercer Island, supra*, 575 F.3d at p. 1038, fn. 10.) In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School District v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) Behavioral services, OT, SL, and social skills training therefore can be related services if necessary for a child to access his or her education.

65. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § (d)(1)(A)(ii); Ed. Code § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.320(a)(1)(i); Ed. Code, § 56345.)

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

Failure to Provide Appropriate Behavioral Supports and Goals

67. This Decision has already determined that the District appropriately addressed Student's behavioral needs. (Factual Findings 93, 113-124, 128-133, 135, 224-237, 247, 256, and 270-279; Legal Conclusions 1 and 48-62.) The remaining issue is whether the District devised appropriate behavior goals to address those needs.

68. The District here made every effort to address Student's behavioral needs once it became aware of the extent of them. Certainly, its primary response to the fact that Student's behavior was interfering with his education was the District's offer of placement in an SDC. In that educational environment, Student's behavior needs would have been addressed through the small class size, the high adult to student ratio, the physical layout of the class, and the training of the special education teacher and aides. (Factual Findings 44, 97, 98, 137, 209, 241, 251, 252, and 280.)

69. However, the District also addressed Student's behavioral needs in the general education classroom in which his Parents retained him. At the August 29, 2011 IEP meeting, even before the District had an opportunity to formally assess Student's behavior, it developed a behavior goal for him based on the informal observations done

by Ms. McFadden, Ms. Cantua, and Mr. Preciado. The goal specifically addressed Student's inability to follow directions and his distractibility. (Factual Finding 93.)

70. By the time the District convened Student's November 4, 2011 IEP meeting, Ms. Brenes had completed her formal observation of Student as part of a behavior assessment. Mr. Preciado had done further observations of Student, as had his teacher and Special Education Director Janice Lau. Based upon both the formal behavior assessment and informal observations, the District created an in-depth behavior support plan to address all of the behaviors Student's IEP team had observed. The BSP included a comprehensive goal for addressing Student's behaviors. Since Parents never consented to implement the BSP, it is speculation as to whether it would have been effective. However, as written, the BSP, along with the behavior goal, appropriately addressed Student's behavioral issues. (Factual Findings 113-124, 128 and 131-134; Legal Conclusions 1 and 50.)

71. The District consistently addressed Student's continuing behavior needs by updating his behavior goal, by adding additional behavior goals, by adding modifications and accommodations to his educational program, and by updating his BSP's. Student has therefore failed to meet his burden of proof that the District's behavioral supports or goals were not adequate to meet Student's needs during the 2011-2012 and 2012-2013 school years. (Factual Findings 93, 113-124, 128, 131-134, 247, 256, and 270-279; Legal Conclusions 1, 50, and 60-71.)

Speech and Language Goals and Services

72. Student contends, based upon the speech and language IEE conducted by Dr. Fosnot, that the speech and language goals developed for Student were inadequate. He first contends that the District violated his right to a FAPE because it did not develop a receptive language goal for him in the August 29, 2011 IEP. Student also contends that the District's goals were inadequate because the District failed to adopt the 20 plus

goals recommended by Dr. Fosnot in her assessment report. Finally, Student contends that the amount of SL therapy offered by the District was insufficient. He asserts that the District should have increased his services to five hours a week commensurate with Dr. Fosnot's recommendations. The District asserts that the SL goals it developed for Student as well as the therapy sessions it offered met the *Rowley* standard of providing Student with a meaningful benefit in the area of speech and language.

73. The first weakness in Student's argument is that the District's speech and language goals and its decision as to what was an adequate amount of SL therapy for Student was made in the context of the District's offer of placement in an SDC. The instructional model of that class included significant consultation between the SLP assigned to the school and the class teacher, Ms. McFadden. She described the class environment as "language rich" because work on the children's SL goals was imbedded in class instruction during the school day and during breaks such as recess. Since none of Student's experts opted to observe Ms. McFadden's classroom, her description that addressing language needs is imbedded in everyday instruction was not challenged at hearing. (Factual Findings 203-207, and 260.)

74. Student argues that the District denied him a FAPE by failing to develop a receptive language goal in his August 29, 2011 IEP. As discussed above, Ms. Holbrook persuasively explained that she addressed Student's receptive language needs, which were much less severe than his expressive language needs, through Student's other SL goals. (Factual Finding 95.)

75. The failure to develop a specific goal for a Student is a procedural violation. As stated above, a procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. In this instance,

although the District had not included a receptive language goal in the August 29 IEP, it did add one when it convened an IEP for Student on November 4, 2011. Student therefore was without a receptive language goal for only about 10 weeks. Parents were present at the August 29, 2011 IEP but did not object to the goals the District developed or propose their own goals. Their right to participate in the IEP process therefore was not impeded by the District's failure to include a receptive language goal. Additionally, Student failed to produce any evidence of how the 10-week failure to include a receptive language goal impeded his right to a FAPE or deprived him of educational benefit. Student has therefore failed to meet his burden of proof that the short exclusion of a receptive language goal denied him a FAPE. (Factual Findings 95 and 96; Legal Conclusions 1 and 64-66.)

76. Student also contends that the District denied him a FAPE because it did not develop a sufficient amount of goals for him during the two school years in question and did not provide him with an adequate amount of SL therapy.

77. The District developed an expressive language goal and an articulation goal for Student at his August 29, 2011 IEP. It initially offered Student group SL therapy for approximately an hour a week. It added a receptive language goal in Student's November 4, 2011 IEP. After Dr. Fosnot presented her IEE at Student's February 27, 2012 IEP meeting, the District increased Student's SL therapy to one and a half hours a week by adding a half hour session of individual therapy. It also added an additional speech and language vocabulary goal. At Student's annual IEP meeting on August 27, 2012, the District added a phonology component to his articulation goal. It also reversed the amount of group and individual SL therapy it was offering in order to give Student more individual therapy sessions to address his continued speech deficits. (Factual Findings 94, 95, 127, 136, 198, 199, 209, 246, 249, 253, and 255.)

78. Ms. Holbrook and Dr. Fosnot are both qualified speech pathologists. Both administered appropriate assessments to Student, which produced very consistent results. Where they diverge is in their respective recommendations for goals and services. Dr. Fosnot recommended more than 20 goals for Student. She believes that Student requires five hours a week of speech and language services in order to address those goals. Ms. Holbrook, on behalf of the District, believes that the District met at least Student's minimal SL needs by developing goals and offering services that addressed his needs as those needs were evolving. She also believes, as do all the District IEP team members, Student's unique language needs, which include his need to develop his articulation, vocabulary, and expressive and receptive speech, would be addressed better in an SDC where he could generalize the skills in the classroom through its language rich environment, rather than pulling Student from the classroom five hours a week. (Factual Findings 81, 82, and 155.)

79. Although she is highly qualified as an SLP with a doctorate, Dr. Fosnot's recommendations are not ultimately persuasive. She did not review any of Student's cognitive testing or IEP's and did not observe Student in his classroom. She also failed to observe the proposed SDC classroom and therefore her comments regarding its propriety for Student are based on pure conjecture. Her recommendations therefore were made in a total vacuum without an understanding of Student's cognitive abilities, classroom behavior, or classroom performance. Nor do her recommendations appear to be educationally based. Rather, they are based on what an SLP might hope to accomplish in a clinical setting or based on Student's medical needs, which are not the responsibility of the District. The position of Ms. Holbrook that Student's level of understanding was such that Dr. Fosnot's goals were above Student's abilities is therefore more persuasive. Given that Student was communicating primarily through gestures in the classroom, was responding primarily to visual cues, was unable to follow

more than one step instructions, and was basically making one-word utterances, demonstrates that many of Dr. Fosnot's goals were too complex for Student at the time she developed them in November 2011.

80. Additionally, as discussed above, the District made its offer of speech and language services in the context of its offer of placement for Student in a special day class that Ms. McFadden credibly described during her testimony as a "language rich" environment. There is constant consultation between the SLP and Ms. McFadden on how to imbed language goals into the curriculum of the children in the class. Had Student attended the class, many of the goals proposed by Dr. Fosnot would have been imbedded in Student's curriculum and there would not be a necessity for five hours of SL therapy a week. Since Dr. Fosnot did not observe the SDC, she could not address whether the language rich environment described by Ms. McFadden would address Student's language needs in more depth. In any case, many of Dr. Fosnot's goals were already addressed by the District in Student's math goals, his English language arts goals, his behavior goals, his speech and language goals, his fine motor skills goal, and later by the inclusion of a sensory diet for him. Factual Findings 143-156.)

81. The evidence therefore indicated that Dr. Fosnot's recommendations were made in spite of her lack of familiarity with Student's proposed classroom. Conversely, Ms. Holbrook based her findings and recommendations on the totality of testing results, observations, and consultation with the educators who had direct knowledge of how Student was advancing in class and how his needs would be met in the SDC. Ms. Holbrook's opinion and recommendations are therefore more persuasive than those of Dr. Fosnot. (*R.B. v. Napa Valley Unified School District* (9th Cir. 2007) 496 F.3d 932, 942.) Although it is always possible to write more goals for a child, the District demonstrated that its SL goals were reasonably calculated to provide Student with educational benefit. While the goals might not have optimized Student's access to his education, the law

does not require that they do so. The amount and type of SL goals and services offered by the District were reasonably calculated to provide educational benefit to Student and thus offered him a FAPE for the 2011-2012 and 2012-2013 school years. Student has failed to prove by a preponderance of the evidence to the contrary. (Factual Findings 94, 95, 127, 136, 198, 199, 209, 246, 249, 253, and 25; Legal Conclusions 1, 64-66, and 73-81.)

Occupational Therapy Goals and Services

82. Student contends primarily that the District failed to provide him with a FAPE in the area of OT because it did not initially address his sensory needs and then later failed to provide him with an adequate amount of occupational therapy sessions to meet his needs. Student contends that the District should have assessed him for sensory deficits at the time it first conducted its OT assessment in the fall of 2011. Student also contends that the District should have followed Dr. Smith Roley's recommendations for goals and levels of services. Dr. Smith Roley recommended that Student receive two hours a week at minimum of OT services. Student contends that he required these services because his sensory issues impact his ability to benefit from his education. Student has met his burden of proof in this regard.

83. No OT assessment had been administered to Student before he started school at the District in late August 2011. Other than the few days Student attended summer school prior to starting Kindergarten, Student had not attended a District school. There is no evidence that Student's preschool teacher informed the District that Student had anything other than fine motor OT needs. The District was therefore not aware of Student's OT needs at the beginning of fall 2011. However, by the time Ms. McDonald conducted her OT assessment several District and SELPA employees had observed Student in the classroom. They were aware of and reported on several sensory seeking behaviors Student was displaying, such as licking things, touching people and

himself, and putting his fingers in his mouth. All of the District staff who observed these behaviors found that they were part of the reason that Student was unfocused, distractible, and therefore not accessing his education while engaging in the behaviors. These observations should have been indications to Ms. McDonald that Student might have sensory deficits and/or needs that needed to be addressed if Student was going to be able to benefit from instruction. Ms. McDonald therefore should have assessed Student's possible sensory needs and not just his fine motor deficits. Had she done so, based upon the clear indications of Student's sensory needs in Dr. Smith Roley's assessment, it is highly likely that Ms. McDonald would have determined that Student had sensory deficits. (Factual Findings 54-56, 58, 59, 106, 112, 117-124, 129, and 130.)

84. The District asserts that Dr. Smith Roley's recommendations should be discounted. The District argues that Dr. Smith Roley's assessment was based on a clinical rather than educational model. The sole basis for this contention is that Dr. Smith Roley stated that OT should be provided to Student in a therapy room. However, both in her assessment report and her testimony at hearing, Dr. Smith Roley explained how Student's sensory seeking behavior was impacting his ability to access his education. Whether OT is provided to Student in a "therapy room" or the OT room available at his school is not dispositive of the OT deficits that are preventing Student from accessing his curriculum and whether the District's offers of 45 minutes and later 60 minutes of OT minimally met Student's needs. (Factual Findings 212-223.)

85. The District also focused on the fact that Dr. Smith Roley used the SIPT to assess Student even when acknowledging that it was not considered an appropriate instrument for assessing children with cognitive deficits. However, the District fails to address the fact that Dr. Smith Roley also used several other assessments to determine that Student had sensory deficits. The District also fails to address the fact that the rating scales completed by Student's teacher definitely indicated that Student had

sensory needs and that these needs interfered with Student's ability to benefit from instruction. The District also does not address the fact that Dr. Ansari and Ms. Bhakta also determined in their assessments that Student's sensory needs interfered with his ability to access instruction and benefit from it. Finally, the District does not discuss the fact that all observations of Student conducted by District staff indicated that Student had sensory needs that were preventing him from accessing his education. For example, District assessors and staff observed Student licking the table and licking paper, touching himself and touching others, and making many different types of sounds. They also observed Student's inability to remain in his seat without fidgeting. Although Ms. McDonald stated that she did not notice any sensory deficits when she assessed Student, given the extent of information regarding Student's sensory needs from District staff as well as from Student's independent assessors, her position is not persuasive. Rather, Dr. Smith Roley's conclusion is more persuasive that Student had significant sensory needs that required intervention in addition to the OT intervention the District was already providing to address Student's fine motor needs if Student was going to be able to benefit from instruction and make progress on his goals. (Factual Findings 54-56, 58, 59, 106, 112, 117-124, 129, 130, and 212-223; Legal Conclusions 1, 64-66, and 83-85.)

86. However, the District added two sensory motor goals in Student's August 27, 2012 IEP in response to Dr. Smith Roley's assessment, incorporating much of what she had recommended. It also continued to include a sensory diet for Student as an accommodation to address his sensory needs. It added a social skills goal and a self-help goal. Additionally, it added an additional 15 minutes per week of occupational therapy to address Student's needs. While the goals and levels of service did not mirror Dr. Smith Roley's recommendations, there is simply insufficient evidence to support a finding that the District's OT program for Student as of its August 27, 2012 IEP offer

would not give permit Student to make meaningful progress on his OT goals or would not address his OT needs. As stated in Legal Conclusion 3, the District is not required to maximize or optimize Student's programs. It is required only to provide a basic floor of opportunity that offers a child a meaningful benefit. While the District's offers of OT during the 2011-2012 school year did not constitute a FAPE because the offers did not sufficiently address Student's sensory needs, the District remedied this through the additions to OT services, goals, and accommodations in its August 27, 2012 and December 12, 2012 IEP offers. (Factual Findings 247, 248, 254, 258, and 281.)

87. The weight of the evidence therefore contradicts Ms. McDonald's position that Student had few sensory needs and that his sensory needs were not impacting his behavior in the classroom and his ability to access his curriculum. Dr. Smith Roley's position on this issue is therefore more persuasive. Student has met his burden of persuasion that he required additional OT services and goals during the 2011-2012 school year. However, Student has failed to meet his burden of persuasion that the District's goals and offer of OT services and supports for the 2012-2013 school year were insufficient to provide Student with a FAPE. (Factual Findings 54-56, 58, 59, 106, 112, 117-124, 129, 130, 13212-223, 247, 248, 254, 258, and 281; Legal Conclusions 1-5, 64-66, and 83-87.)

DISTRICT'S ISSUES: DID THE DISTRICT OFFER STUDENT A FAPE IN THE LRE IN ITS AUGUST 27, 2012 AND DECEMBER 12, 2012 IEP'S AND, IF SO, MAY IT IMPLEMENT THE DECEMBER 12, 2012 IEP NOTWITHSTANDING PARENTS' OBJECTIONS?

88. As discussed fully in the context of this Decision's discussion of Student's issues, the totality of the evidence presented at hearing supports the conclusion that the District's IEP offers of August 27, 2012, and December 12, 2012, provided Student a FAPE based upon the information known to the District at the time. The District met all procedural requirements when convening these two IEP meetings. Over the course of

the 2011-2012 school year, the District had continuously reviewed Student's needs and had refined and modified Student's IEP's to reflect new information, Student's progress or lack of progress, and his acquisition of some school readiness skills. The evidence thus supports the District's position that its placement offers for Student for the 2012-2013 school year were in the LRE for him. The evidence supports the District's contention that it developed adequate goals for Student. The evidence supports the District's contention that it properly addressed Student's behavioral needs. Finally, the evidence supports the District's contention that it offered an appropriate level of OT and SL services for Student. (Factual Findings 20-283; Legal Conclusions 1-88.)

89. The District has therefore met its burden of proof that its August 27, 2012 and December 12, 2012 IEP offers provided Student with a FAPE. The District may implement the December 12, 2012 IEP over Parents' objections if they wish for Student to continue to receive special education support. (Factual Findings 20-283; Legal Conclusions 1-88.)

REMEDIES

90. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid, supra*, 401 F.3d at p. 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.*)

91. In her Order Following Prehearing Conference of February 20, 2013, the undersigned ALJ reiterated to Student that it was his burden to provide evidence of the type, amount, duration, and need for any requested compensatory education, or the need for any other remedy requested. In his closing brief, Student perfunctorily requests that the ALJ order the District to provide Student with those remedies he requested in his amended due process request. (Factual Findings 285-289.)

92. However, there is no basis for the remedies proposed in Student’s due process request. Student failed at hearing to put on any testimony of what type of remedy he should be awarded if he prevailed at hearing. Student did not ask any witness, let alone any of his experts, what the remedy should be or the basis for any such award. Nor has Student provided any documentary evidence in support of his request for remedy. Student requests remedies but provides no basis for them, although having been specifically directed to do so by the ALJ. (Factual Findings 285-289.)

93. Student’s lack of supporting evidence places the ALJ in a difficult position. Student has proven by the weight of the evidence that he suffers from sensory deficits that the District failed to address for almost an entire school year. The question here is how to devise a remedy given Student’s failure to provide a concrete basis for one. The ALJ has reviewed the testimony of the witnesses and the documentary evidence presented at hearing. Had the District assessed Student’s sensory needs, it is likely that it would have provided him with additional OT therapy, as it did in his August 27, 2012 IEP. It is likely that it would have developed goals to address Student’s sensory, self-help and social skills needs at the November 4, 2012 IEP meeting, as it did at the August 27 meeting after having reviewed Dr. Smith Roley’s assessment. Student was deprived of goals, therapy, and classroom modifications for almost an entire school year that would

address these additional OT needs. Applying the equitable principles discussed in Legal Conclusion 91, the ALJ finds it reasonable and equitable for the District to be ordered to provide Student with 15 hours of individual compensatory occupational therapy sessions to specifically address Student's sensory needs. The sessions will be provided to Student in half hour increments during Student's school day. The District shall have 12 months from the date of this decision to provide Student with the compensatory OT ordered here. All of Student's other requested relief is denied. (Factual Findings 20-289; Legal Conclusions 1, and 90-93.)

94. With regard to the District's issues, since this Decision determines that the District's August 27, 2012, and December 12, 2012 IEP's offered Student a FAPE, the District is entitled to implement those IEP's if Student wishes to continue receiving special education and related services from the District. (Factual Findings 20-289; Legal Conclusions 1-94.)

ORDER

1. The District shall provide Student with 15 hours of individual OT to address his sensory deficits. These hours shall be in addition to any OT services provided by Student's IEP's. The District shall provide the 15 hours of compensatory services in half hour increments during Student's school day. The District shall provide the hours over a time period not exceeding 12 months from the date of this decision.
2. All other relief requested by Student is denied.
3. The District may implement its August 27, 2012 and December 12, 2012 IEP's over the objections of Student's parents.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Student partially prevailed on Issue 1(c) of the complaint only to the extent the issue addresses occupational therapy goals and services for the 2011-2012 school year. The District prevailed on every other issue heard and decided in this case.

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 in accordance with Education Code section 56505, subdivision (k).

Dated: April 23, 2013

/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings