

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the matter of:

STUDENT,

Petitioner,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2005080935

DECISION

Martha J. Rosett, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter on June 26, 27, 28, 29, and 30, 2006, July 5, 6, 7 and 31, 2006 and August 1, 2, and 3, 2006 in Long Beach, California.

Rhonda L. Krietemeyer, Attorney at Law, represented Petitioner (Student) and his parents. Student's mother was present throughout the proceedings. Certified Court Interpreter, Annie M. Lo, was available to translate the proceedings into Cantonese for Student's mother's benefit.

Deborah Ungar, Attorney at Law, represented Respondent Long Beach Unified School District (District). Sara Jocham, District Special Education Program Director, and Douglas W. Siembieda, Senior Psychologist for the District, were present at different times during the hearing.

Student filed a request for a due process hearing on August 26, 2005. On September 27, 2005, Student filed an amended due process request. On November 16, 2005, the parties

notified OAH that they agreed to take the matter off-calendar. The matter was placed back on calendar on April 21, 2006, and set for hearing to begin on June 26, 2006. At the conclusion of presentation of evidence on August 3, 2006, the matter was continued for a telephonic post-hearing conference and submission of written closing briefs. On August 14, 2006, a telephonic post-hearing conference was held to set the briefing schedule. The matter was continued for submission of written closing briefs. Upon receipt of written closing arguments and replies, the record was closed and the matter was submitted for decision on September 11, 2006.¹

ISSUES²

1. Did the District deny Student a free, appropriate public education (FAPE) for the 2002-2003 school year and extended school year by:
 - A. Failing to appropriately identify Student's unique needs and failing to administer Student's initial assessments in Cantonese?
 - B. Failing to develop appropriate goals and objectives in the areas of speech and language, occupational therapy (OT), pre-academics, sensory processing, and behavior?

¹ Petitioner's written closing argument was received on September 1, 2006, and marked for identification as Exhibit 92. Respondent's written closing argument was received on September 1, 2006, and marked for identification as Exhibit 93. Petitioner submitted a Reply brief on September 7, 2006, and an Amended Reply on September 11, 2006. Petitioner's Reply and Amended Reply are collectively marked for identification as Exhibit 94. Respondent did not submit a Reply brief nor oppose Petitioner's Amended Reply Brief.

² For purposes of clarity and organization, this decision reorganizes issues identified in the due process hearing request and clarified at the prehearing conference.

- C. Failing to offer sufficient direct OT and speech and language services?
 - D. Failing to offer placement in the least restrictive environment?
 - E. Failing to have a regular education teacher and Cantonese interpreter present at the September 23, 2002 Individual Educational Program (IEP) meeting and failing to have a general education and speech and language specialist present at the December 2002 IEP meeting?
2. Did the District deny Student a FAPE for the 2003-2004 school year and extended school year by:
- A. Failing to appropriately identify Student's unique needs by failing to assess Student in all areas of suspected disability and failing to administer Student's initial assessments in Cantonese?
 - B. Failing to develop appropriate goals and objectives in the areas of speech and language, OT, pre-academics, sensory processing, and behavior?
 - C. Failing to offer sufficient direct OT and speech and language services?
 - D. Failing to offer placement in the least restrictive environment?
 - E. Failing to have an interpreter present at the September 24, 2003 IEP team meeting?
3. Did the District deny Student a FAPE for the 2004-2005 school year and extended school year by:
- A. Failing to identify Student's unique needs?
 - B. Failing to develop an appropriate behavior plan?
 - C. Failing to develop appropriate goals and objectives in the areas of speech and language, communication and self-help?
 - D. Failing to offer appropriate speech and language and OT services?
 - E. Failing to secure attendance of all required IEP team members at the June 4, 2004 IEP meeting?
 - F. Failing to provide services, accommodations and modifications called for in

Student's IEPs?

4. Did the District deny Student a FAPE for the 2005-2006 school year by:
 - A. Failing to appropriately identify Student's unique needs?
 - B. Failing to offer a placement in the least restrictive environment?
 - C. Failing to offer appropriate Applied Behavior Analysis (ABA) therapy, speech and language and OT services?
5. Should the District reimburse Student for the costs of independent educational assessments performed by Dr. Chris Davidson, Dr. Jerry Lindquist, and Susan Berkowitz?
6. Did the District's failure to produce copies of the 2002 OT assessment, the October 4, 2006 assistive technology consultation report, and the 2005 autism specialist report within proper time frames deny Student educational benefit or seriously infringe on his mother's right to meaningfully participate in the IEP process?
7. If it is established that the District denied Student a FAPE for any or all of the school years in question, is Student entitled to compensatory education? If so, what relief is necessary to ensure that Student is appropriately educated?

FACTUAL FINDINGS

1. Student is an eight-year-old boy who is eligible for special education under the

category of autism.³ He lives with his mother and brothers within the District. Student is non-verbal, and currently uses only three words: "no", "hi" and "bye." Both English and Cantonese are spoken in his home.

2. Student was first diagnosed with autism by his pediatrician in the spring of 2002. Shortly thereafter, Student's mother brought him to the District to register for pre-school. The District arranged for Student to be assessed by a school psychologist, a speech and language therapist, and a nurse in July of 2002, and in September of 2002, Student was found to be eligible for special education.

I. FAPE for the 2002-2003 School Year

3. In order to constitute an offer of FAPE, the educational program offered by the District must be designed to meet the student's unique educational needs, be reasonably calculated to provide the student with some educational benefit, comport with the student's IEP⁴ and provide the student with an education in the least restrictive environment.

4. For the 2002-2003 school year, Student attended a pre-school special day class (SDC) for children with autism at Garfield Elementary School (Garfield). Two IEPs governed

³ Autism is a developmental disorder of neurobiological origin that impacts how children learn to be social beings, to take care of themselves, and to participate in the community. Autism affects the child's ability to communicate ideas and feelings, to use his or her imagination, and to establish relationships with others. Education covers a wide range of skills or knowledge, including not only academic learning, but also socialization, adaptive skills, language and communication, and reduction of behavior problems, to assist a child to develop independence and personal responsibility. (See *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 883.

⁴ For the 2002-2003 school year, providing a program which comported with the IEP is not at issue.

Student's educational program for that year. Student's initial IEP was developed at a meeting held on September 23, 2002, which addressed Student's eligibility for special education, and the District's offer of an educational program, placement and services. Student's mother, a school psychologist, a speech and language therapist, a nurse, a special education teacher and an administrative designee attended this meeting. The District's offer of an educational program for Student included placement in an Early Childhood special day class (SDC) at Garfield to allow for Student to spend 92 percent of his time in special education, and 8 percent of his time in general education. Participation in the general education environment was limited to recesses, lunches, and special assemblies on the general education campus. Services offered in the initial IEP on September 23, 2002, were limited to 30 minutes per month of classroom consultation by a District speech and language specialist, curb-to-curb transportation, and an extended school year.

5. The IEP team met again on December 2, 2002, and added OT goals and services. Student's mother, a special education teacher, school psychologist Tiffany Brown, and occupational therapist Steve Cummings attended this meeting. The District offered 45 minutes per week of direct OT.

A. Unique Needs

6. At the September 23, 2002 IEP meeting, the IEP team reviewed the results of the assessments performed in July of 2002, and agreed that Student was eligible for special education as a Student with exceptional needs, under the classification of autistic-like behavior. They agreed that Student's disability affects verbal and non-verbal communication and social interaction, and as such, adversely impacts educational performance.

7. In identifying Student's unique educational needs, the team relied on the reports of the District's psychoeducational and speech and language assessments performed in July of 2002. School psychologist Lorena Davila's psychoeducational assessment of Student in July of 2002 found that he was not using language to communicate. Her

assessment was therefore largely based on her observations of Student and on information provided by Student's mother. Ms. Davila watched Student playing with toys, and saw that he was able to play on his own without prompting or assistance. She observed tantrums, repetitive hand movements, and screaming when Student's play was interrupted, and saw that he had difficulty transitioning between activities. Ms. Davila assessed Student's abilities in pre-academics,⁵ self-help, social/behavioral, and fine and gross motor skills. She found that his functioning level was "significantly below average," that he exhibited significantly delayed skills in pre-academics and expressive language, and that his gross and fine motor skills were "moderately delayed." Ms. Davila recommended that Student's educational program implement behavioral strategies and structured teaching techniques effective for children with autism spectrum disorders, including a small group setting, visual cues and schedules, hands-on activities, clear and concise directions, and frequent opportunities to engage in outside gross motor activities.

8. District speech and language pathologist Donna Jeffers performed her assessment at the same time as Ms. Davila's. In her report, Ms. Jeffers found significant delays in Student's receptive and expressive language, as well as in pragmatics. Despite efforts to test him in both English and Cantonese, voice fluency and articulation could not be assessed due to Student's severely deficient level of expressive language. Student's mother told Ms. Jeffers that both English and Cantonese were spoken in his home, but that Student did not use words at all to communicate. Student would mainly express himself through screams and/or pulling his mother to get her attention. Student did not respond or make eye contact when Ms. Jeffers initially greeted him, and seemed not to hear or acknowledge the presence of a person near him. Student did not respond when his mother called his

⁵ "Pre-academics" is a term used to refer to skills developed in preparation for academic learning. Examples of "pre-academic" skills include matching and sorting colors and shapes, using a crayon, understanding concepts relating to quantity and size.

name, and the only way she was able to get his attention was by trying to hold him close to her. He did not respond when his mother spoke to him in Cantonese or English. During this assessment, Student demonstrated the speech and language skills of a six month old child. Ms. Jeffers recommended activities and strategies to implement at home and in the school setting to increase Student's language skills, including the use of pictures and word cards. She recommended that the IEP team develop goals to address Student's level of language in an appropriate educational setting. She did not recommend any related services.

9. The findings of the District's 2002 assessments were consistent with the findings of another psychoeducational assessment performed in July of 2002 by Lisa M. Doi, Ph.D., at the request of the Harbor Regional Center. Dr. Doi confirmed the diagnosis of autism. She administered the Vineland Adaptive Behavior Scales (VABS), which assessed Student by examining his functioning in the areas of communication skills, daily living skills, socialization abilities and motor skills, in comparison to chronological age peers. Her assessment showed that Student fell in the mild deficit range in a composite of adaptive behavior. In communication, Student exhibited skills at the seven month age level. In daily living skills, he exhibited skills in the one year, six months level. His socialization skills were at the one year, one month level, and his motor skills were at two years, three months. Student showed delays or abnormal functioning in social interaction, language as used in social communication and symbolic or imaginative play. Dr. Doi specifically recommended a language-based preschool program which focused on communication and vocabulary skills, social skills, appropriate behavior and pre-academics. To promote Student's comprehension, she recommended keeping directions short and simple, breaking multi-part directions down into several smaller steps and pairing verbal directions with visual cues, especially in instructional settings. The Regional Center also recommended that Student's parents participate in a support group for parents of children with autism and that they contact the Autism Society of America to obtain further information.

10. At the December 2, 2002 IEP addendum meeting, the District occupational

therapist discussed the results of the OT assessment he performed in November of 2002. At that time, Student demonstrated delays in the areas of behavior organization, sensory processing and visual-motor skills. Student's ability to attend to activities was inconsistent, and he had difficulty with non-preferred tasks and transitions. He showed signs of tactile defensiveness, and exhibited behaviors indicating that he was seeking sensory input (such as rocking in his chair and attempting to lie down on the floor during circle time). Student was also delayed in visual-motor skills, particularly in the areas of cutting and writing. The occupational therapist found that these delays negatively impacted Student's performance within his academic setting, and recommended to the IEP team that Student receive OT services.

11. At the time of Student's initial assessments by the District in 2002, Student's mother reported that both English and Cantonese were "primary" languages used in the home. She was present at the assessments, and was available to speak to Student in Cantonese when called upon to do so. The District's psychologist and speech and language pathologist found that Student was unresponsive to both Cantonese and English. The assessments were based on observations of Student engaged in various activities and on information provided by Student's mother.⁶

12. With regard to the issue of Student's primary language, Petitioner failed to establish that Cantonese was Student's primary language. Student's mother has consistently

⁶ The initial psychoeducational and speech and language assessments of Student took place more than three years prior to the filing of Petitioner's due process request. Therefore, claims challenging the appropriateness of those assessments are barred by the statute of limitations. However, because those initial assessments were in turn relied upon by the District in formulating subsequent IEPs, the issue of the appropriateness of the assessments is considered, in terms of whether the assessments identified Student's unique needs sufficiently to provide a FAPE.

indicated that both English and Cantonese are spoken in the home. Although she is not a native English speaker, she came to this country when she was in sixth grade and attended schools in the District through graduation from high school. She has studied for and obtained her license as a vocational nurse, and is functionally fluent in English. She reports that her two older sons speak primarily English at home and that she tries to use English when speaking with them. None of Petitioner's experts performed assessments or tests in Cantonese. The District's failure to administer tests to Student in Cantonese did not result in a failure to identify Student's unique needs.

13. The foregoing assessments identified Student's unique needs as a non-verbal child with autism.

B. Goals and Objectives

14. An IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to enable the student to progress in the general curriculum, and to meet each of the student's other unique educational needs that result from the disability. The IEP should also contain a description of the manner in which the student's progress towards meeting each of the goals will be measured.

15. At the September 23, 2002 IEP meeting, the IEP team determined Student's levels of educational performance in the areas of pre-academic, behavioral, social-emotional, communication, language, self-help, health, gross and fine motor skills. They drafted educational goals and objectives designed to meet Student's unique needs in a language-based SDC. An OT goal was added at the December 2, 2002 meeting.

16. Student contends that the speech and language goals in the 2002 IEPs were not specific or comprehensive enough to adequately address Student's needs. In support of this position, Student offered the testimony of speech and language pathologist Susan Berkowitz. Ms. Berkowitz established her extensive experience in special education and in working with children with autism, which spans over 30 years. She is licensed in California

and Massachusetts as a speech pathologist, and holds a credential in California for Speech-Language-Hearing as well as special class authorization in Education Administration. She has worked as a speech pathologist in public schools, private institutions and in private practice. As of the date of hearing, she had not taught in, provided consultation for, or otherwise observed autism SDCs in the District. She performed an independent augmentative-alternative communication assessment for Student in April of 2006, and reviewed his school records going back to the 2002-2003 school year. Based on her review of Student's IEPs for the 2002-2003 school year, Ms. Berkowitz opined that the speech and language goals and objectives were neither specific nor comprehensive enough to address Student's needs. For example, there were not enough goals addressing specific vocabulary development skills, such as specifying what vocabulary words would be targeted, extending Student's ability to point to communicate, and including more receptive vocabulary goals. Ms. Berkowitz also would have recommended implementing ABA principles, which would have been reflected in the goals and objectives. She thought that given Student's significant delays in speech and language, she would have recommended he receive direct services from a speech and language therapist at least three times per week plus consultation for the 2002- 2003 school year.

17. The District contends that the curriculum and classroom organization in the language-based SDC were designed specially for students with autism and related disorders. Goals and techniques to address speech and language, communication, occupational therapy and behavioral needs goals were embedded in the SDC curriculum. District psychologist Tiffany Brown, Ph.D., testified at hearing and established her qualifications and extensive experience in the field of special education, which includes extensive research and practical experience in educational settings working with non-verbal children with autism. Dr. Brown was the school psychologist at Garfield Elementary school when Student was attending pre- school and kindergarten there during the 2002-2003 and 2003-2004 school years, and is now District Senior Psychologist, so she is familiar with Student and with his

educational progress. Although she did not attend Student's September 23, 2002 IEP meeting, Dr. Brown did attend the December 2, 2002 meeting. She described the language-based SDCs he attended at Garfield. The "language based" or "total communication" SDCs for children with autism incorporate activities designed to enhance speech and language as part of the curriculum. In addition to small group activities in class which focus on speech and language skills, teachers and aides spend one-to-one time in class with each child, and consult weekly with the speech and language therapist as a matter of practice. Although the weekly consultations are to discuss all 8 to 12 children in the class, each child's individual progress is also monitored.

18. District assistive technology specialist, Jimene Miniaci, also testified at hearing and established her qualifications and extensive background in speech and language therapy as well as related experience in assistive technology. Ms. Miniaci addressed Student's contentions regarding the 2002-2003 school year's speech and language goals and objectives and level of services. She explained that during the first year of pre-school, it is common for schools to perform an on-going assessment of a child's performance and progress within existing techniques embedded in the language based curriculum. The school would therefore assess the child's responses to interventions over a period of time before recommending more intensive direct services and supports. Both Ms. Miniaci and Dr. Brown supported the District's position that the speech and language goals and objectives, and level of services, provided to Student during the 2002-2003 school year were appropriate. The District's explanations are persuasive. Although Student's speech was severely impacted when he entered the District, he had not had any educational interventions at that time. Student did not establish that the District's approach of seeing how Student responded to the interventions in the language based classroom unreasonable. In fact, although Student remained unable to speak, his overall communication skills did progress during that first year.

19. Student did not establish what, if any, unique pre-academic, sensory

processing and behavioral needs Student had at that time that were not otherwise adequately addressed in the context of the SDC program. Therefore, he did not establish that the IEP's goals and objectives were deficient in those areas.

20. When Student's 2002-2003 goals and objectives were reviewed in preparation of the following year's IEP, he had made measurable progress in the realm of expressive, receptive and pragmatic language skills. Even if Student's speech and language goals and objectives could have been more specific or comprehensive, as Student contends, they were reasonably calculated to provide Student with educational benefit. Student made more than *de minimis* progress in communication skills, even if by the end of the year he was still unable to talk.

21. Student's September 2002 IEP, and the modifications added in the December 2, 2002 addendum, set forth goals and objectives in the areas of pre-academics, sensory processing, behavior, speech and language and OT. These goals and objectives, when viewed in conjunction with the curriculum in the language based pre-school SDC, were all appropriate to measure and promote Student's educational progress and were reasonably calculated to provide Student with some educational benefit. Student made educational progress during the 2002-2003 school year.

C. Services

22. In addition to the provision of classroom instruction, districts may provide designated instruction and services (related services) including transportation, and such developmental, corrective and other supportive services as may be required to assist a student with special needs to benefit from special education. Designated instruction and services may be provided to individuals or to small groups in a specialized area of educational need, and throughout the full continuum of educational settings.

23. The only instructional services designated in the September 23, 2002 IEP were 30 minutes per month of consultation between the speech and language specialist and the

classroom teacher. At the addendum IEP meeting held on December 2, 2002, the IEP team determined that Student was eligible for OT services and developed an OT goal in the content area of language arts to address Student's writing skills. The addendum IEP offered Student OT services at school one time per week for 45 minutes.

24. Other than the 30 minutes per month of classroom consultation, the 2002 IEPs did not specify any direct speech and language therapy services to be provided to Student, either one-to-one or in a group setting. Student contends that 30 minutes per month of speech and language consultation services was not sufficient during that first year to meet Student's unique needs. The goals and objectives also pointed to a need for an increase in the level of services for the 2003-2004 school year, which the 2003-2004 IEP team took into consideration in developing Student's educational program for that school year. As set forth in Factual findings 17 and 18 above, the District responds that the educational program in the language-based SDC at Garfield incorporated intensive speech and language, OT and behavior components into the daily activities of the class, embedded in the curriculum. The daily program in the SDC included provision of direct and group speech and language services and weekly consultation between the classroom teacher and the speech and language specialist. Therefore, the District was in fact providing more speech and language services for Student than suggested by his IEP. Student's 2002-2003 IEP did provide for additional consultation services specific to Student, which in turn could lead to further direct and group services as the year progressed. Student did in fact make progress in his overall communication skills during that first year. Student therefore did not persuasively establish that the level of speech and language services offered in the 2002-2003 school year were not appropriate to meet his speech and language needs.

25. Student also contends that the 45 minutes per week of direct OT services offered in the 2002-2003 school year was not adequate to address Student's unique sensory processing needs. Student's expert witness, Jerry Lindquist, Ph.D., testified at hearing and established his qualifications as a neuro-psychologist and occupational therapist with

extensive experience providing psychotherapy and OT to children with autism and their families. As to the 2002-2003 school year, Dr. Lindquist opined that Student should have received two hours per week of OT services. He emphasized that two hours per week was "optimum," and did not opine as to whether or not the 45 minutes per week would be sufficient to assist Student in obtaining some educational benefit. Dr. Lindquist was not familiar with the SDC curriculum at Garfield, and could not express an opinion as to whether or not techniques and activities in that class, when coupled with the 45 minutes of direct OT services received, would be adequate to meet Student's unique needs.

26. By all accounts, Student, who had never attended school prior to entering the pre-school class at Garfield, adjusted well in the SDC environment and advanced academically and socially. Student made progress towards the OT goals set forth in the 2002-2003 school year.

27. Petitioner failed to establish that the OT services offered to Student during the 2002-2003 school year were not appropriate and adequate to meet Student's unique needs. The District offered Student sufficient OT and speech and language services during the 2002-2003 school year, and the services were appropriate to assist Student to benefit from special education.

D. Placement in Least Restrictive Environment

28. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. Special classes that serve students with similar and more intensive educational needs are available. In providing activities for students, districts must ensure that each special education student participates in those activities with nondisabled students to the maximum extent appropriate to the individual student's special needs, including

nonacademic and extracurricular services and activities.

29. Four factors are analyzed to determine if a placement is in the least restrictive environment: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the benefits of a special education classroom; (2) the non-academic benefits to the disabled child of interaction with non-disabled children; (3) the effect of the presence of the disabled child on the teacher and other children in the regular classroom; and (4) the costs of supplementary aids and services necessary to mainstream the disabled child in a regular classroom setting.

30. As discussed above, Student was placed in the pre-school SDC class for children with autism at Garfield for the 2002-2003 school year. The classroom organizational structure, behavioral strategies, and teaching techniques were designed to address the unique language, behavioral and social needs of pupils with autism. The curriculum focused on communication and vocabulary skills, social skills, appropriate behavior, and pre-academics. Small group setting, visual cues and schedules, hands-on activities, clear and concise directions, and frequent opportunities to engage in outside gross motor activities are all aspects of the SDC designed to enhance the learning environment. The pre-school classroom teacher, Ms. Howard, held a credential in special education and had many years experience working with special needs students. She was trained in and has extensive

experience utilizing the Picture Exchange Communication System (PECS)⁷ and other methodologies designed to be used to teach students with autism. In addition to the classroom teacher, there were also two classroom aides, reducing the student-teacher ratio, and providing additional opportunities for one-to-one interactions between each student and the classroom teacher, as well as between students and the classroom aides.

31. Student's initial placement in the pre-school SDC at Garfield offered the least restrictive environment within which Student could receive an education. When he entered the District, Student had no prior education, could not express himself with words, and did not consistently reflect an ability to understand what was being said to him. He had the verbal abilities of a six month old infant. The language based program of the pre-school autism SDC at Garfield consisted of special curriculum, trained staff, accommodations, supports and services required in order for Student to make progress towards his educational goals and allow Student to "learn how to learn." He was not at the same level of development as other non-disabled children at that time, and would not receive the level of attention needed in a general education class. The cost of providing all of the supports and services Student would need to learn in a general education classroom would far outweigh any educational or social benefit to him. At the same time, the SDC was on a general education campus, with opportunities for Student to interact with non-disabled peers on the

⁷ PECS is an augmentative and alternative communication strategy (AAC), widely used with non-verbal children with autistic disorders. It was developed as a means to teach children with autism and related developmental disabilities a rapidly acquired, self-initiating, functional communication system. In its simplest form, PECS uses flash cards with picture symbols and words, which can be used to communicate. The PECS system develops use of picture symbols through several stages of increasing complexity, including development of sentences. In addition to flash cards, pictures can be contained in a book developed according to a user's vocabulary.

playground during recess, during lunch, and during school wide activities such as assemblies and the like.

32. Student's unique communication and behavioral needs for the 2002-2003 school year were appropriately and adequately addressed by placement in the SDC. Speech and language and OT activities were embedded in the special education curriculum and built into the daily activities and classroom structure. The SDC was an appropriate placement for Student in the least restrictive environment.

Educational Benefit

33. Student made progress toward his 2002-2003 goals and objectives. He progressed in the areas of pre-academics, behavior, self-help and motor skills. Student also progressed in his communication and language development, albeit more slowly. Student was able to sort objects by color and shape, use hand motions while singing songs, complete up to three tasks with moderate prompting, and recognize his name on a picture schedule. He was able to transition to an activity without a tantrum, sit in a group and participate using hand motions, and was able to wait his turn without crying on the playground. Student could eat with a spoon and follow the lunch routine. He was able to pull his pants up and down, remove his diaper, and stand at the urinal. He also knew how to wash and dry his hands. He held a crayon in a palmer grasp, was responsive to correction, and was able to draw a line with minimum physical prompting. He was also able to ride a tricycle and throw a ball.

34. Student's educational progress during the 2002-2003 school year was far more than *di minimis*. He entered school unresponsive to the people around him, with the language and communication skills of a six month old, and by the end of the year was able to be much more responsive, interacting appropriately with his environment. The educational program offered by the District for the 2002-2003 school year was designed to meet Student's unique educational needs, was reasonably calculated to provide Student with some educational benefit, and provided Student with an education in the least restrictive environment.

E. Composition of the IEP team members participating in the September 23, 2002 and December 2, 2002 IEP team meetings

35. Student contends that the District failed to include a general education teacher and a Cantonese interpreter at the September 23, 2002 IEP team meeting, and failed to include a general education teacher and a speech and language specialist at the December 2002 IEP addendum meeting, and that these procedural violations caused a denial of FAPE. However, the absence of these participants at the IEP meetings did not result in any loss of educational benefit to the Student nor was Student's mother's ability to fully and meaningfully participate in the IEP process impeded in any way. It was never anticipated during the 2002-2003 school year that Student would spend more than recesses, lunches and special assemblies in a "general education" environment. Input from a general education teacher was not necessary to develop an appropriate pre-school program for him. In addition, Student's speech and language needs were not discussed at the December 2, 2002 IEP meeting, which was convened to address OT services and related goals and objectives. Therefore, the absence of a speech and language specialist was not significant. As to the absence of an interpreter, Student's mother did not request an interpreter for these meetings, and there was no indication that one was necessary in order for her to be able to meaningfully participate. In fact, Student's mother expressly declined opportunities at both the September 23, 2002 and December 2, 2002 IEP meetings to have the IEP documents translated for her and have a copy of the IEP translated for her into her native language. In addition, although English is not Student's mother's native language, at hearing she demonstrated sufficient proficiency to understand the materials and explanations provided to her, and was able to ask for clarification or interpretation as needed. Therefore, there was no procedural violation that resulted in lost educational benefit to Student or interfered with Student's mother's meaningful participation in the process.

II. FAPE FOR THE 2003-2004 SCHOOL YEAR

36. During the 2003-2004 school year, Student attended kindergarten in an autism SDC at Garfield. Student's educational program for the 2003-2004 school year was set forth in the September 24, 2003 annual review IEP, which was amended to add speech and language goals and services at an addendum IEP meeting on October 1, 2003. In addition, there were some modifications to his 2003-2004 school year program made at the February 2004 IEP meeting.

37. In the September 24, 2003 IEP, the District offered Student continued placement in the kindergarten SDC at Garfield elementary school, with 92 percent of the time in special education and 8 percent in general education (lunch, recess, passing periods and school day activities). Student received direct speech and language services two times per week for 30 minutes, in class. Direct OT services continued to be provided once per week for 45 minutes. In addition, curb-to-curb transportation was added "through September of 2004." Student was also offered an extended school year for five weeks, beginning in June of 2004. At the October 1, 2003 meeting, goals and objectives in speech and language were added, but no further change was made to Student's educational program. At the February 13, 2004 meeting, the District offered continued placement in the SDC with increasing mainstreaming at Garfield for the remainder of the 2003-2004 school year. The transportation was clarified. Student's mother signed indicating her consent to each IEP, with no exceptions.

A. Unique Needs

38. Student's unique needs going into the 2003-2004 school year remained essentially the same as the previous year. Student remained eligible for special education and related services under the category of autistic-like behaviors. The team agreed that Student continued to need extensive small group and one-to-one instruction in a modified or alternate curriculum to make educational progress. At the September 24, 2003 IEP

meeting, the team determined that Student needed additional direct services and related goals and objectives in the area of speech and language. The team further addressed Student's speech and language needs, and drafted additional goals, at the October 1, 2003 addendum IEP meeting.

B. Goals and Objectives

39. At the September 24, 2003 meeting, the IEP team drafted five new goals and objectives in the general content areas of health, language arts, and mathematics. Each of these goals had an expressive, receptive or pragmatic language component (e.g. pointing to body parts, pointing to letters, pointing to numbers, learning to write). Among the language art goals was a goal pertaining to learning to write, which was to be worked on during designated OT service time. A new language arts goal was added, to address the content standard of comprehension. Student's mother agreed to the new goal. All of the goals were measurable and designed to enable Student to be involved and make progress in the general curriculum.

40. On October 1, 2003, the team reconvened, and the speech and language specialist and speech and language intern were also present. As of the October 1, 2003 IEP meeting, Student was still working towards the 2002-2003 goal related to the use of PECS.⁸ He needed physical prompts to use pictures to request items, and would still resort to pointing to wanted items, rather than trying to communicate more completely using the pictures in place of speech. Although Student made sounds, they were unintelligible. The speech and language therapist indicated that there might be the need for an augmentative device if Student's expressive speech did not develop. Student's inability to turn sounds into

⁸ The minutes from the October 1, 2003 IEP team meeting reflect that the team provided Student's mother with some picture symbols to use at home, and encouraged her to ask for more as needed.

intelligible words was not addressed in the October 2003 IEP, and no goal was developed pertaining to Student's unique needs in expressive, verbal language. At the February 13, 2004 IEP meeting, however, a new goal for the development of his verbal expression was added, which focused on vocalizing certain consonants.

41. As with the 2002-2003 school year, in determining the appropriateness and adequacy of Student's goals and objectives, consideration must be given to the fact that Student attended a kindergarten SDC in which the entire educational program and classroom environment were specially designed for autistic children with many of Student's same unique needs. In that context, the goals and objectives were reasonably calculated to provide and measure Student's educational progress.

C. Services

42. At the September and October 2003 IEP meetings, the district modified the individual speech and language services Student was to receive, offering two 30 minute sessions of direct speech and language services in the classroom per week. Student continued to receive OT services for 45 minutes per week.

43. The levels of direct speech and language and OT services provided to Student were designed to augment his educational program in the kindergarten autism SDC, a total communication program which embedded speech and language and OT activities into the daily class. The September 24, 2003 IEP listed such classroom and curriculum accommodations as, "tactile, visual, PECS, gestures, frequent breaks, shorter work sessions, and aide support." Therefore, the speech and language and OT services provided to Student during the 2003-2004 were appropriate to assist him in making educational progress.

D. Placement in the Least Restrictive Environment

44. The kindergarten autism SDC was a total communication program, which included classroom organization and structure, curriculum, and activities designed to promote the communication and other special educational needs of children with autism.

The class was taught by an experienced and trained teacher, two classroom aides, with 8 to 12 children enrolled at any given time.

45. Placement in the kindergarten SDC at Garfield was appropriate to meet Student's unique educational needs in the areas of pre-academics, behavior and social functioning, and, most significantly, language and communication skills. His unique educational needs were met with the appropriate levels of supports and services. He also had daily opportunities to interact with typical (non-disabled) peers on campus during recesses, lunches and school wide activities. This was an aspect of his school time that, from all accounts, both Student and his peers greatly enjoyed and benefited from.⁹

46. At the February 2004 IEP meeting, Student's placement for the remainder of the 2003-2004 school year was modified to include "increasing mainstreaming opportunities." Student did show an increase in behavioral problems when transitioning between the SDC class and the general education class. However, there was no indication that his behaviors were of a severity or duration that they negatively impacted his or other children's ability to learn.

47. The District's placement of Student in a kindergarten autism SDC with mainstreaming opportunities, offered Student the least restrictive environment in which to meet his unique needs during the 2003-2004 school year.

EDUCATIONAL BENEFIT

48. During the 2003-2004 school year, Student continued to make educational progress and receive benefit from his program. In the February 2004 IEP, which was written less than five months after the September 2003 IEP goals were drafted, the team noted that

⁹ In fact, consistently over all four years in question, Student quickly adapted to his peers and was regularly seen on both the Garfield and McKinley campuses, giving and receiving hugs and, for the most part, playing appropriately with the other children.

Student was making progress in all areas of educational performance, though he was still working towards most of his goals for the year. The District's "Change of Placement Summary," prepared in May of 2004 further reflects Student's progress during the 2003-2004 school year. He was able to sort objects by shape and color, and could match like items, letters and numbers. He could imitate actions such as clapping and pointing during singing time, and was able to complete tasks with moderate prompting. He recognized his written name and responded to hearing his name called. Although he was still non-verbal, he could request items using a picture, and would take staff by the hand and lead them to desired objects, pointing. He was able to use the cafeteria, and could wait in line with minimal prompting. He put toys and work tasks away independently and cared for his personal needs independently. He was also able to trace his name and draw a circle and other patterns that were modeled on paper using a palmer grasp.

49. Student made educational progress during the 2003-2004 school year, and received more than *de minimis* educational benefit from his participation in the kindergarten SDC for children with autism at Garfield. The educational program offered by the District for the 2003-2004 school year was designed to meet Student's unique needs, was reasonably calculated to provide Student with some educational benefit, comported with Student's IEP, and provided Student with an education in the least restrictive environment.

E. Failure to Provide Cantonese Interpreter at the September 24, 2003 IEP team meeting

50. Student's mother, his SDC class teacher, a general education teacher, the occupational therapist and a school counselor attended the September 24, 2003 annual review IEP meeting. No speech and language specialist attended this meeting. However, an additional meeting was held on October 1, 2003 which was attended by the speech and language pathologist. Student's mother expressly declined opportunities to have these meetings and related documents translated for her. There was no denial of FAPE resulting from the absence of an interpreter or a speech and language specialist at the September 24,

2003 IEP team meeting.

III. FAPE FOR THE 2004-2005 SCHOOL YEAR

51. For the 2004-2005 school year, Student's placement changed, and he attended Mr. Fawcett's first grade general education class at his local school, McKinley Elementary School (McKinley). Student's educational program for the 2004-2005 school year was developed, modified and offered at several IEP meetings. The first and principal IEP governing Student's 2004-2005 school year was developed at an IEP team meeting held on February 13, 2004, at Garfield. At that meeting, the team agreed to the change of placement to full-inclusion at McKinley for the first part of the 2004-2005 school year. An addendum meeting was held on June 4, 2004, while Student was still at Garfield. Adaptive Physical Education (APE) and a behavior plan were added at this meeting. The first IEP team meeting held at McKinley and attended by Mc Kinley staff was held on October 8, 2004, one month after Student started school there. At this meeting, the McKinley team addressed transportation services, and the general terms of Student's program called for in the February and June 2004 IEPs were discussed. A more comprehensive IEP team meeting was held on November 29, 2004, at which time Student's levels of performance and goals and objectives were reviewed. The issue of placement was revisited. At this meeting, the District agreed to extend the full inclusion placement to allow for a period of further assessment. Some of the goals and objectives from the February 2004 IEP and June 2004 addendum were modified, and a more complete behavior plan was added.

52. At the February 13, 2004 IEP meeting, the Garfield IEP team discussed changing Student's placement to full inclusion in a general education classroom at his local school, McKinley. Many on the team believed that an SDC was the appropriate placement for Student. However, to honor Student's mother's request, the IEP team ultimately offered placement in a general education first grade class at McKinley, with related services, modifications and accommodations. The supports and services offered included: (1) a

paraeducator on school days for six hours per day to work with Student in the general education environment; (2) continued direct speech and language services for two 30 minute sessions per week; (3) continued direct OT once per week for 45 minutes per week; (4) training of the paraeducator and teacher regarding autism; (5) two 30 minute sessions per week of consultation with the teacher regarding inclusion; (6) a one time lesson plan for student in the classroom to increase awareness of autism; (7) an "intake/planning" meeting by May 30, 2004, with the McKinley IEP team and/or representatives to discuss transition; extended school year; and (8) curb-to-curb transportation through the extended school year, to discontinue "after 9/04."

53. The February 2004 IEP document indicated that the placement, supports and services called for would continue through November of 2004, at which time the McKinley IEP team would meet to revisit the least restrictive environment issues. The February 2004 IEP also expressly called for the Garfield IEP team to meet again to update Student's behavior plan and to discuss speech and language, OT, and APE, and for a meeting to occur with staff from McKinley no later than May 30, 2004. After having additional time to consider it, Student's mother signed her consent to the IEP, with no exceptions, on February 20, 2004.

54. The Garfield IEP team met again on June 4, 2004 to discuss Student's behavioral needs and APE. This meeting was attended by Student's mother, Student's advocate, Student's special education teacher at Garfield, the APE specialist; a school psychologist from Garfield; a District inclusion specialist; and a team leader. No staff or specialists from McKinley attended this meeting, nor was there a general education teacher from either school present. During his last few months at Garfield, Student was being partially mainstreamed, spending up to one hour per day in a general education kindergarten class. He began exhibiting tantrums and difficulties with transitions between preferred and non-preferred activities. At the IEP meeting, the team drafted a behavior plan with strategies for addressing Student's needs. To further address Student's communication needs, a referral was made for an assistive technology assessment to take place at McKinley

in the fall, when Student could be observed in his general education program. The June 4, 2004 IEP also made specific reference to Student having a speech book with pictures which he used to help with communicating his wants and needs, and to help reduce frustration. APE was added for two 30-minute sessions per week for Student, and one 30-minute consultation per month with the classroom teacher.

55. No evidence was presented that any further meetings, or coordinated preparation or planning, took place to facilitate Student's transition to McKinley prior to his starting school there in September of 2004.

56. On October 8, 2004, the McKinley IEP team met for the first time. The purpose of this meeting was to consult with Student's teacher as to the services, accommodations, and modifications that were to be provided to Student as part of his educational program. Also discussed were behavioral strategies and techniques to use in presenting curriculum to him. The team reviewed the February 13 and June 4, 2004 IEPs. At this meeting, Student's program was not modified other than to add transportation as a service.

57. On November 29, 2004, the District held an IEP team meeting. The IEP reflected that, "Based on review of previous assessment, student performance levels, and other data, team feels Student can meet his goals in a SDC with small group and individualized instruction." Nonetheless, the IEP called for continued placement in the general education class for an additional 50 day assessment period. A behavior plan was spelled out. Direct OT services were discontinued, and replaced with consultative services once a month for 30 minutes. Student's mother disagreed with the offer of placement in an SDC, and with the discontinuation of the OT direct services, but agreed to the extension of the placement in general education during a 50 day period of assessment. This was the IEP that governed the remainder of Student's 2004-2005 school year.

A. Unique Needs

58. For the 2004-2005 school year, the District properly identified Student's unique

needs as a non-verbal child with autism, which remained the same as identified in prior IEPs. Student continued to need small group and one-to-one instruction in a modified or alternate curriculum. He needed a consistent mode of communication to use in class, on the playground, and at home. While Student's educational needs remained the same as when he was in an SDC, Student also needed additional supports and services in order to succeed in a general education, first grade class that emphasized reading, writing and vocabulary development. He needed to be taught by properly trained staff. The teacher and classroom aide needed to be trained to work with children with autism, and to be familiar with how to communicate with Student, given that he was totally non-verbal. They needed to understand how to present materials and directions in a way that Student would be able to understand, and they needed to be prepared to implement strategies to deal with Student's behavior.

B. Behavior Plan

59. Student's behavior plan for the 2004-2005 school year was initially developed at the June 4, 2004 IEP meeting at Garfield. After Student had been at McKinley for a month, the first IEP team meeting was convened there, and a new behavior plan was drafted. At the November 29, 2004 IEP meeting, the behavior plan was further addressed, and it was agreed that the District would perform a functional behavior analysis, which it did in February of 2005.

60. Student contends that the staff and teachers at McKinley did not develop a behavior plan for Student to be implemented upon his arrival at McKinley in September. As discussed further below in Sections E and F, the McKinley staff did not participate in the June 4, 2004 IEP meeting. Nor did they meet prior to the first day of class. Mr. Fawcett did not receive training prior to Student's arrival in his class on how to communicate with him, and on what behavioral strategies to implement. Mr. Fawcett had never taught an autistic or a non-verbal child before, and was not trained in the use of PECS. Similarly, although the classroom aide, who was a long-term substitute, had some experience assisting disabled

children, she had never worked with an autistic child, and was not familiar with PECS prior to her work with Student. The classroom and Student's work area were not prepared for his arrival, and there were no behavioral supports in place.

61. Student's transition into the general education environment at McKinley was very difficult for Student, for his teacher and aides, and for the other children in his class. Student exhibited disruptive behavior often during the first month, including tantrums, throwing himself on the floor, and banging on his table, and his mother was frequently called in to school. After the IEP team first met at McKinley in October 2004, some communication and behavioral strategies were implemented, such as the use of PECS, visual cues, and other positive reinforcers. Nonetheless, on November 9, 2004, Student was suspended for a day after slapping other children in his class. At the November 29, 2004 IEP meeting, a more elaborate behavioral plan was agreed upon, and the team also agreed to have a full functional behavioral analysis performed in February 2005. Further modifications to Student's behavior plan were implemented, and Student's behavior continued to improve throughout the school year.

62. Beginning in October of 2004, the District worked to catch-up from its failure to implement communication and related behavioral strategies from the time Student first arrived at McKinley. However, the District's failure to implement an appropriate behavior plan at the time Student entered Mr. Fawcett's class resulted in the loss of educational benefit to Student. The relationship between Student and Mr. Fawcett, as well as between Student and his classmates, was negatively impacted.

C. Goals and Objectives

63. The goals and objectives set forth in the February 13, 2004 IEP were adequate to meet Student's needs in the context of a language based SDC, where many of Student's unique educational needs were addressed through the specially designed curriculum and classroom structure. However, the February 2004 IEP goals and objectives were not adequate

to assist Student in making progress in the context of the general education environment at McKinley. At the November 29, 2004 IEP meeting, Student's present levels of performance were evaluated and his progress towards the 2003-2004 goals and objectives was measured. A few new goals were added, and overall, the goals were made clearer, more specific as to content, and as to measurement. In addition, Student's behavior plan was more clearly drafted, and included clearer strategies for staff to implement, as well as goals and objectives for measuring Student's progress.

64. Student contends that his speech and language goals and objectives were not appropriate, and were not reasonably calculated to provide adequate educational benefit. Student's expert, Susan Berkowitz, testified that the speech and language goals set forth in the February and June 2004 IEPs were not specific or comprehensive enough to meet Student's communication needs. She pointed out that the IEP did not set forth objectives for using a picture based communication system, or for increasing receptive vocabulary. In addition, given that Student was beginning to make sounds, Ms. Berkowitz testified that she would expect to see a goal for verbal imitation, which was lacking in these IEPs. There was no goal for receptive language or for Student to produce sounds to express comprehension. As to the November 29, 2004 IEP, while a speech and language goal was added to work on making sounds ("muh, puh, tuh; buh," etc.), Ms. Berkowitz would expect the focus of the speech and language services to be on using pictures to communicate, and that working on articulating bi-labial sounds would be secondary. There was no specific goal for development of vocabulary, through pictures or signs, other than body parts, which was carried over from 2002. There were inadequate goals for Student to develop a primary mode of communication. In sum, Ms. Berkowitz opined that the speech and language goals set forth in the February 13, June 4, and November 29, 2004 IEPs for Student's 2004-2005 school year, were not adequate to meet Student's needs.

65. Student's IEPs for the 2004-2005 school year included a language related OT goal, designed to develop Student's writing skills. Student met this goal, and could copy

words and sentences when samples were placed before him. However, he did not demonstrate progress in comprehension of the words he wrote, and could not initiate writing words or sentences to convey meaning. The lack of specific language goals addressing needed skills was reflected in Student's lack of demonstrated progress in comprehension of certain nuances of language.

66. In addition, Student's speech and language goals and objectives for the 2004-2005 school year failed to adequately address his need to develop a primary mode of communication which he could use consistently, in school, at home and in the community. There was no evidence as to what, if any, computer software and supports were implemented to promote language and academic skills. All who worked with Student noted that Student was very motivated when it came to using computers, and it was apparent that he used computers at school. However, no one who testified, including Student's aide Ms. Barba, could specify what programs Student was using and whether he was making progress using them.

67. The evidence at hearing established that Student's speech and language, and communication goals and objectives for the 2004-2005 failed to adequately address his unique needs, and were not reasonably calculated to provide him with sufficient educational benefit to progress in the curriculum.

68. Student contends that the IEPs for the 2004-2005 school year did not contain self-help goals and objectives. Student did not establish what self-help goals and objectives the District should have included. Student did not meet his burden of proof on this issue.

D. Services

SPEECH AND LANGUAGE

69. The speech and language services offered to Student for the 2004-2005 school year were not adequate to meet his unique needs as a non-verbal autistic first grader in a general education classroom. Whereas in the SDC, techniques to develop speech and

language and communication skills were embedded in the classroom curriculum and incorporated in the classroom structure, in the general education environment, Student had none of these additional supports and services. Mr. Fawcett's first grade class at McKinley was a "reading first" classroom, which emphasized verbal language, and focused intensively on the development of reading, writing and vocabulary skills in order to meet federal requirements under the "No Child Left Behind" program. Two 30 minute sessions per week of speech and language services were not sufficient to support Student in the general education program.

70. The District's speech and language therapist testified that she worked with Student in using PECS, but admitted that she was not fully familiar with the extent to which PECS and picture symbols can be used to develop language skills in more advanced ways, to convey more complex meaning. Student's speech and language specialist at McKinley was also not adequately trained in behavior interventions or in other methods of working with a non-verbal autistic six year old. She was not adequately trained and supported in the proper use of PECS for language development. The evidence also showed that the speech and language specialist did not attend many of the group IEP meetings, and therefore did not fully collaborate with the classroom teacher, and other specialists in developing and implementing Student's program. This prevented meaningful collaboration between teacher, staff and other specialists in developing and implementing Student's educational program. During speech and language therapy, Student spent most of his time being drilled on making basic sounds, with some time spent working on skills in PECS. Student's experts and the District's experts were in agreement that it is difficult at this time to determine whether or not Student will ever be able to speak full words or sentences. However, it is equally, if not more, important to ensure that all of Student's communication needs are addressed. Skills in the areas of expressive, receptive and pragmatic language can be developed in a number of ways, in addition to drilling on vocalization. With the possible exception of some general work on using PECS, the speech and language services Student received were severely

limited in the techniques and approaches utilized to promote speech and refine skills related to communicative intent.

71. The speech and language services provided to Student during the 2004-2005 school year were not sufficient to promote his development of a primary mode of communication which he could consistently use at school, in home and in the community. Student was no longer in a language based SDC or a classroom environment in which his unique needs were all addressed, and he therefore required a greater level of services. The District failed to provide appropriate speech and language services necessary to assist Student in receiving educational benefit from the general curriculum.

OCCUPATIONAL THERAPY

72. Pursuant to the February 2004 IEP, Student received 45 minutes per week of direct OT services. At the November 29, 2004 IEP meeting, the OT services were modified to 30 minutes per month of consultation services, with the occupational therapist consulting with the classroom teacher and aide about techniques for working with Student. At the April 6, 2005 IEP team meeting, a new OT goal was added, and OT was changed to 30 minutes per week of direct services for Student.

73. Student contends that the OT services he received during the 2004-2005 school year were not adequate to meet his unique needs. Student's OT expert, Dr. Jerry Lindquist, opined that the OT provided by the District failed to adequately address all of Student sensory processing issues. Dr. Lindquist performed a thorough OT assessment of Student in his OT clinic over the course of several days. He testified about the benefits of an intensive, physical education type OT program, which he believes improves attention span, balance and focus in children with autism, and in turn provides related educational benefit. He would have recommended that Student receive two hours per week of OT during the 2004-2005 school year, and during each of the prior and subsequent years. Dr. Linquist admitted, however, that he recommended this as the optimum level of services. In addition,

Dr. Lindquist has extensive experience in providing OT and other psychological services to children with autism and their families in a clinical setting. However, he has not worked with or observed Student in an educational setting, at McKinley or any other school. His recommendations for remedial OT would remain two hours per week.

74. Dr. Lindquist credibly testified that Student benefited from the OT he received in a clinical environment during Dr. Lindquist's assessment. However, it was not established that two hours per week of OT recommended by Dr. Lindquist was necessary to assist Student in receiving some educational benefit. In addition, Dr. Lindquist did not address or compare his recommended amount with the 45 minutes per week of OT plus one hour per week of APE Student received during the 2004-2005 school year. Student did not establish that the OT services offered and provided to Student for the 2004-2005 school year were inappropriate.

E. Failure to secure attendance of all required IEP team members at the June 4, 2004 IEP meeting

75. The special education law requires that each meeting to develop, review, or revise an IEP must be conducted by an IEP team made up of at least one of the student's parents or guardians or their representative; at least one regular education teacher of the student, if the student is, or may be, participating in the regular education environment; at least one of the student's special education teachers or special education providers; a representative of the local educational agency who is qualified to provide, or supervise the provision of, special education and services, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources; an individual who can interpret the instructional implications of the assessment results; and, at the discretion of the parent or the local educational agency, other individuals who have knowledge or expertise regarding the pupil. In addition, the regular education teacher of an individual with exceptional needs must, to the extent appropriate, participate in the development, review and revision of the student's IEP, including assisting in the determination of appropriate positive behavioral

interventions and supports, and the determination of supplementary aids and services, program modification, and supports for school personnel that will be provided for the student.

76. The February 2004 IEP called for an additional meeting or meetings to be held to discuss Student's IEP with staff from McKinley, and to make any necessary modifications to the program and services. The agreed upon transition meeting with Mc Kinley staff or representatives, which was to take place by May 30, 2004, did not occur. Nor is there any indication in the record of a meeting that included representatives from the Garfield IEP team, Student's mother and advocate, and the staff of Mc Kinley, occurring prior to the first day of school in September of 2004.

77. The June 4, 2004 IEP team meeting was attended by Student's mother and the advocate, Student's special education teacher, Student's APE provider, a District psychologist who had prepared a "Change of Placement Summary," a District inclusion specialist, and a team leader. No general education teacher from McKinley or from Garfield attended this meeting. The June 2004 IEP team did begin drafting a new behavior plan, but there was no input from Student's Garfield general education teacher nor from any of the general education teachers or staff at McKinley. Absence of the appropriate team members from McKinley prevented meaningful discussion of the goals and objectives as well as possible modifications to the general education classroom structure and curriculum to accommodate Student's unique needs. There was no discussion of training for personnel. Student's speech and OT services were not reviewed and modified at the June 2004 meeting, as had been suggested in the February IEP.

78. In addition, the District did not make up for its failure to secure the attendance of appropriate team members at the June 4, 2004 IEP meeting by convening an additional meeting later in the summer, before school started. Issues such as whether the District would provide transportation services, as well staff coordination, training and supervision, and a system to address behaviors such as tantrums, were not resolved as of the day Student first

arrived at McKinley. Student's communication needs, which required the use of picture symbols, were also not in place.

79. The District's failure to secure the attendance of all required team members at the June 4, 2004 IEP meeting was a procedural violation which resulted in the loss of educational benefit to Student and impaired his mother's ability to fully participate in the educational process.

F. Failure to provide services, accommodations and modifications called for in IEPs

80. The District failed to provide all of the services, accommodations and modifications called for in Student's February 13, 2004 IEP and the June 4, 2004 addendum. None of the McKinley staff attended either of these IEP meetings, and there was no additional meeting held with them to review Student's needs prior to entering school in September. As a result, when Student started school at McKinley on September 9, 2004, communication between his mother and school personnel, including the principal and teacher, was tense and very limited. There was a general lack of coordination and communication between District personnel and school staff, as well as between school staff and Student's mother. Issues of transportation and provision of a one-to-one aide were not clearly addressed by McKinley prior to the first day of school. The original classroom aide quit the first day, without providing necessary support for Student. The school staff should have been better prepared to assist Student from the moment he arrived on campus. The school was fortunate enough to find a substitute aide, Ms. Barba, after a week or so. However, the transportation issue was not resolved prior to a formal IEP meeting held on October 8, 2004.

81. The training of paraeducator and teacher called for in the February 2004 IEP was not in place by the first day of school, although the District did try to catch up after the first month. Principal Stephenson, Mr. Fawcett, and Ms. Barba, had no prior training or experience in teaching or working with non-verbal children, or in a communication system

such as PECS. Mr. Fawcett's first grade class was a "Reading First" classroom, specially designed to meet federal mandates to improve reading scores of all pupils by the time they reach age nine. Mr. Fawcett was under tremendous pressure to establish his merit as a teacher by pushing his students to perform. He testified at hearing that he was extremely concerned about how he was going to be able to teach all 19 of his students with the methodologies he had planned, which called for very intensive use of language, vocabulary development, reading and writing. The environment in Mr. Fawcett's class was very fast paced, with students moving around the room from one activity to another. It was into this environment that Student was placed, unable to speak, unable and unready to read or write, and lacking in ability to comprehend spoken and written language. Modifications and accommodations to the classroom structure and curriculum had not been adequately addressed prior to Student's arrival. Appropriate services were not in place.

82. In this new and stressful environment, Student's behavior problems escalated, and he regularly threw tantrums, banged on his table, and had other inappropriate outbursts. His substitute aide, Ms. Barba, rose to the occasion, and, despite her lack of training in special education, worked very diligently with him. In addition, as the months progressed, the staff at McKinley worked to develop and implement strategies to enable Student to function more successfully in the general education environment.

83. Despite difficulties Student encountered during his first grade year at McKinley, he did make some educational progress, particularly in the social functioning realm. According to his teacher, Mr. Fawcett, and Principal Stephenson, following the November IEP, Student's behavior improved and there were no further disruptions in class until May, when it is typical for all students to get "Spring Fever" and become more active. In the beginning of January 2005, the Autism Team Leader met with Mr. Fawcett to discuss ways to include Student in classroom activities. Some of these strategies were implemented. For example, during circle time, Student had a role in the daily weather report. In addition, Student learned to put away toys and activities and line up with the other children to go to

recess and lunch. But the lack of specific language skills was reflected in his not being able to discern that a particular group of children was asked to line up (e.g. "table number 5"). However, as described above, the District did not design a program which adequately addressed Student's academic needs. By the end of the 2004-2005 school year, Student did not make even *de minimis* educational progress in academic areas. During the extended school year for 2004-2005, Student attended school at McKinley. In his Summer Progress Report, his extended school year teacher noted that Student could not read, and that although he could write, he did not understand what he wrote. She recommended that he be retained in second grade.

84. In sum, overall, the level of services and supports provided to Student during the 2004-2005 school year was not adequate to meet his educational needs and to assist him in accessing the curriculum. As a result, Student was denied a FAPE.

85. The District's failure to develop appropriate speech and language and communication goals and objectives, failure to provide adequately trained staff, and failure to provide appropriate services, supports, accommodations and modifications to curriculum, resulted in Student being denied a FAPE for the 2004-2005 school year.

IV. FAPE FOR THE 2005-2006 SCHOOL YEAR

Student's Educational Program

86. During the 2005-2006 school year, Student attended a general education second grade class at McKinley. Student's educational program for the 2005-2006 was discussed at IEP meetings in April and June of 2005. No agreement was reached at these meetings, and therefore the last signed IEP was the one agreed to on November 29, 2004.

87. At the April 2005 IEP meeting, the team discussed the results of an inclusion assessment performed by District consultant Kristin Stout, and results of an assistive technology/augmentative communication consultation by District specialist, K. Jimene Miniaci. The team also discussed and added to the November IEP an OT goal, and modified

the frequency and duration of OT services to one 30 minute session per week, in class. The District offered SDC placement with services and mainstreaming, but the team decided to defer a final decision regarding placement until pending triennial assessments were completed. Student's mother did not sign her consent to the April 2005 IEP.

88. The team met again on June 13, 2005, to discuss the results of the triennial assessments completed on June 6 and June 8, 2005, and to further address Student's educational program and placement for the 2005-2006 school year. The District made the following offer of FAPE:

- (1) Placement in an SDC at Garfield, to include mainstreaming¹⁰ into general education classes;
- (2) Speech and language services for two 30 minute sessions per week for Student, and a monthly speech and language consultation for the classroom teacher;
- (3) OT in the form of direct services for Student one time per week, for 30 minutes for the first month, and then one time per month OT consultation with the classroom teacher for October through June;
- (4) APE twice per week, for 30 minutes each session.
- (5) Extended school year, with options including placement in a central summer SDC or placement at McKinley with a one-to-one paraeducator, and reimbursement to parent for transportation.

89. The June 13, 2005 IEP meeting was attended by all of the required team members. The team worked together to draft new goals and objectives, and a new behavior plan was drafted and agreed to. Student's mother was concerned about the provision of

¹⁰ The term "mainstreaming" is used to denote time spent in general education when a child's primary placement is in an SDC. The term "full-inclusion" is used to denote when a child's primary placement is in a general education classroom, with related services being provided either in class or in a special resource room.

speech and language therapy services, and wanted the team to consider an outside speech therapist to help Student. In addition, she expressed concerns about teacher choice, qualifications and abilities. At the end of the meeting, Student's mother requested the opportunity to take the offer home, to review with her advocate.

90. Student's mother did not sign the June 13, 2005 IEP. Instead, she wrote to the District and rejected the offer on June 24, 2005. In her letter, Student's mother disagreed with the level of speech and language services offered, and felt that since Student was not making progress, maintaining the same level of services as the previous year was not appropriate. She also disagreed with the level of OT services offered, which she felt was not adequate to meet Student's self-care needs. She wanted to see strategies to assist Student in increasing his attention span addressed, and expressed concern about the level of training for teachers and staff. Finally, Student's mother disagreed with the District's assessments of Student¹¹, and asked for an independent educational assessment of Student in all areas, including autism and assistive technology.

91. On July 1, 2005, the District sent Student's mother an assessment plan, addressed Student's request for independent assessments, and clarified its offer of FAPE. The District specified that placement would be in the Primary Autism SDC at Garfield for 51 percent of his school day, and placement in a general education second grade classroom at Garfield for the remaining 49 percent of his day, from September 7, 2005, through June 13, 2006. He would attend the SDC class each morning, and then go to the general education class with a one-to-one aide for the afternoon. Student would also be mainstreamed with typical peers during lunch, recess and school assemblies. Curb-to-curb transportation would

¹¹ The disagreement was expressed in general terms, and did not specify which assessments were objected to, or which assessments she seeks reimbursement for, other than to refer to "autism" and "assistive technology" assessments. This is addressed further in Section VI below.

be provided, and the speech and language and OT services remained as previously offered in the June 13, 2005 IEP. The District offered to reconvene another IEP meeting as soon as agreed upon, and pointed out that Student's mother could consent to only those portions of the offer with which she agreed.

92. On July 12, 2005, Student's mother returned the signed assessment plan, consenting to the assessments. However, she reiterated her blanket disagreement with all of the District's assessments, which she claimed did not identify Student's needs adequately to develop an appropriate educational program. She asked for more information about who would be performing the new assessments, and requested a complete set of Student's records, indicating that copies previously requested were incomplete. In this July 12, 2005 letter, Student's mother expressly complained that the District had not lived up to its duty to provide Student with an appropriate education.

93. On July 27, 2005, the District responded to Student's mother, indicating that the IEP developed on June 13, 2005 constituted an offer of a FAPE, but agreeing to go forward with the agreed upon assessments, to take place in the fall when Student could be observed in class. In that letter, the District also explained that Student's mother could continue to express disagreement with the June 13, 2005 IEP, while agreeing to certain parts, such as goals and objectives.

94. On August 1, 2005, the Special Education Hearing Office (SEHO) noticed the scheduling of a mediation conference at the District's request. On August 8, 2005, Student's mother responded to the District, indicating that she did not wish to participate in mediation. She asserted that she wanted her son to remain at McKinley in a regular education, second grade classroom, with a one-on-one aide, and reiterated a request for the District to, "pay for an Individual Educational Assessment." She did not indicate which assessment or assessments she wanted the District to paid for.

95. On August 26, 2005, Student filed a due process request, which was amended on September 27, 2005. In it, he set forth claims pertaining to denials of FAPE for each of the

prior school years he was in the District. In addition, he rejected the District's June 2005 IEP offer of placement in an SDC with mainstreaming and services, claiming the District failed to offer a FAPE in the least restrictive environment. He requested stay put placement in a regular education second grade class at McKinley.

96. The 2005-2006 school year began in September 2005 without a new IEP signed and agreed to. Student's placement continued to be full-inclusion in a general education environment. During the past year, the parties have met on an ongoing basis to discuss modifications to Student's program, some of which have been informally implemented. However, no new IEP was agreed upon and signed during the 2005-2006 school year. Student attended a general education second grade class at McKinley for the entire year, and received the services set forth in the proposed June 2005 IEP. Additional assistive technology and autism assessments were generated and discussed at IEP meetings during the 2005-2006 school year. Some modifications and adjustments to the supports and services were implemented.

A. Student's unique needs

97. As in previous years, Student's unique educational needs as a non-verbal child with autism remained much the same. In the spring of 2005, the District performed a number of assessments, including a behavior analysis and an inclusion report developed in February of 2005, an assistive technology assessment performed in March of 2005, and the psychoeducational, OT and speech and language assessments performed as part of Student's Triennial assessment in June of 2005. The educational programs offered by the District at the June 2005 and subsequent IEP meetings were based on Student's unique educational needs as identified in his prior IEPs and in these assessments.

ASSESSMENTS

98. Student's behavioral needs were properly identified in District psychologist Bridgette Myers' behavioral analysis performed in February of 2005 and discussed at an IEP

meeting on February 2, 2005. In her report, she outlined parent's and school personnel's concerns regarding Student's continuing tantrums, which involved crying, banging on tables, screaming, and throwing himself on the floor. Ms. Myers concluded her report with a list of 15 suggestions toward the development of a behavioral intervention plan, to be implemented both at home and in school. At the June 2005, the IEP team was able to draft and agree to a behavior plan based on Student's identified behavioral needs.

99. On June 6, 2005, District psychologist Russell Martin completed a report of the District's comprehensive triennial assessment. Mr. Martin's assessment was based on behavioral observations of Student in his home, in class and during testing, and on standard tests and assessment tools. Mr. Martin found increases in Student's academic achievement, levels of functional independence, receptive and expressive language abilities (albeit by PECS), and fine and gross motor skills since his previous assessments in 2002. However, he concluded that overall, Student was still functioning in the below average range of cognitive and adaptive abilities. Student's communication skills were non-verbal at that time, and Student was still learning to express himself with PECS. Academically, Student's performance fell in the below average range. His functional independence was comparable to that of the average two-year-ten month-old child. His fine and gross motor abilities appeared to have improved since 2002. Student continued to exhibit autistic like behaviors, and to meet the eligibility for special education as a student with autism.

100. Mr. Martin recommended giving Student a curriculum with tasks which were appropriate to his developmental level, and which related to his daily functions. He also recommended making oral directions clear and concise; including Student in whole class activities with an appropriate means of participation; rewarding Student for task completion, attempts, effort, compliance, etc.; delineating work stations from play stations within the classroom; checking for understanding and meaning by generalizing learning to real world situations and not mere rote memorization; and rewarding Student for attending to his work. Mr. Martin felt that Student's needs could best be met in a special day class setting, with

appropriate related supports and services. Mr. Martin's assessment properly identified Student's unique needs as he approached the 2005-2006 school year.

101. District speech and language pathologist Judy Phelps assessed Student on June 8, 2005. Her assessment consisted of observing Student one day in his classroom, and conducting interviews with his mother, classroom teacher, special education RSP teacher, one-to-one aide, and speech and language service provider. From this, Ms. Phelps concluded that Student continued to qualify for speech and language services in the area of articulation, and that his oral language continued to be developmentally delayed. She reported that she could not assess voice and fluency. She recommended continued use of PECS to develop language skills, and placement in a language based SDC in which Student would have more communication opportunities. Ms. Phelps opined that Student's communication, speech and language needs could best be met in this environment.

102. Ms. Phelps' speech and language assessment report did not make recommendations that could be formed into new goals and objectives for Student, other than the continued use of PECS. Her assessment did not make any reference to Ms. Miniaci's assistive technology assessments, or offer any recommendations about how some of the methods and devices recommended by Ms. Miniaci could be used to assist in developing Student's language skills. Beyond looking at his lack of ability to speak, Ms. Phelps did not fully or adequately address Student's strengths and weaknesses in expressive, receptive and pragmatic language. She offered no insights into the extent of his ability to use language to express his needs, and did not objectively measure his ability to comprehend words and language, or measure his vocabulary.

103. In March of 2005, Ms. Miniaci, the District assistive technology specialist, performed an additional assessment, and made recommendations regarding implementation of supports for Student's communication needs. Ms. Miniaci's assessments were based upon observations of Student in the classroom setting, and interviews with his teacher, his aide, and his special education service providers. Her observations were more

focused and took place over a longer period of time than Ms. Phelps' had. In her March 2005 assessment, she echoed some of the recommendations she made in an October 2004 assessment. Ms. Miniaci's recommendations included creating materials that are reusable to modify and supplement classroom curriculum such as Open Court, and include sounds, symbols, math, spelling and writing. She recommended additional training for the resource teacher and speech and language specialist, and a refresher for his paraeducator in using PECS. She also recommended that the speech and language specialist use choice making and sentence development through picture symbols while stimulating sound production during her therapy sessions.

104. On June 8, 2005, District occupational therapist Ilene Fuson completed an OT assessment as part of Student's triennial review. Ms. Fuson provided OT services to Student during the 2004-2005 school year. Her assessment was conducted over the course of Student's ongoing therapy sessions, in several settings at school. Procedures used to assess Student included classroom observations, teacher and staff interviews, clinical observations, and a review of school records. She also administered the Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI) on May 11, 2005, and assessed his neuromotor, visual perception, fine motor, visual motor, sensory modulation, sensory processing, and motor planning skills. Ms. Fuson found that Student demonstrated areas of strength, including "dramatic" improvement in his fine and visual motor skills for grasping a writing utensil and writing legibly on lined paper; cutting with scissors; and locating, seeing and identifying objects. She found that Student has functional sensory modulation, sensory processing and motor planning skills. Areas of concern included Student's ability to understand what was expected of him, to understand academic curriculum material, to tolerate breaks in activities, and to be able to communicate his needs, desires or confusion. She recommended that the school continue to provide visual demonstrations or samples of work for Student to do, assist Student in writing by highlighting the proper area in which to write, and clearly showing Student the steps needed to complete a task.

105. The District appropriately identified Student's unique needs in all areas but speech and language in developing the educational program offered in the June 2005 IEP.

B. Services

106. Student's mother rejected the District's June 2005 offer of placement in an SDC with services designed to address his needs in the context of that placement. Specifically, Student contends that the District failed to offer appropriate ABA therapy, speech and language, and OT services.

ABA THERAPY

107. Reference to Applied Behavior Analysis (ABA) therapy relates largely to the methodology used by the District. ABA principles of teaching children with autism are implemented by educators in a variety of ways, and can be offered in the form of designated services and instruction or may be incorporated into the curriculum and classroom structure (usually in an SDC). The law gives deference to educators in matters of methodology. The District's June 2005 offer of placement in an SDC and related services did not spell out specific methodologies, and time spent one-to-one with Student. Where the February 2006 IEP offer made specific reference to training of aides in ABA principles, the June 2005 IEP made no express reference of ABA. It was not established that the District should have or was required to make specific reference to ABA or any principles of teaching listed in the IEP. Oftentimes, however, ABA principles are embedded in the curriculum and classroom structure of SDCs. Student did not offer any evidence that the District's second and/or third grade SDC classes utilized or failed to utilize methodologies based on ABA principles. Nor did Student offer any specific evidence as to what form of ABA therapy Student needs, how much is needed, and how it should be provided. Student therefore did not meet his burden of proof on the issue of provision of ABA therapy.

108. The District's specialists all agreed that Student's speech and language and communications needs required that he be placed in an SDC, where the entire curriculum and classroom environment is designed to promote communication in children with autism. The training and resources required to adequately address Student's needs as of the June 2005 offer were and remain too great, and Student's impairment so severe, that they could only be addressed in a special education environment. Nonetheless, even if viewed in the context of placement in an SDC, the speech and language and communication services were not adequate to meet Student's unique language needs. Not all autistic children have the same communication limitations, and many are verbal. In the second grade environment, each child's unique needs in terms of assistance accessing the general curriculum, depend on the impact of their unique disability on their ability to learn to read, write and express themselves. Student was almost completely non-verbal, and had not successfully developed a primary mode of communication to use consistently across all settings, in the classroom, on the playground and at home. The speech and language and communication services offered in the June 2005 IEP did not adequately address Student's unique needs.

109. In addition, the June 2005 IEP offer, and the services as actually provided, did not provide for a speech and language therapist who was adequately trained and qualified to work with a non-verbal autistic child, to help him develop a primary mode of communication, and to work with him, other service providers, and parents to incorporate drills connecting classroom curriculum with speech and language therapy. Student's needs in the area of speech and language and communication encompassed not only his ability to make sounds forming intelligible words, but also the ability to comprehend and use words and vocabulary to express and understand thoughts, needs, and desires. The District did not adequately ensure that the recommendations of the assistive technology specialist in her March 2005 report were implemented, nor that the services provided by the speech and language therapist were adequately supervised or coordinated with the rest of the teaching staff.

110. In October of 2005, Ms. Miniaci observed Student again, this time in the second grade general education class at McKinley. She made additional recommendations consistent with Student's continued participation in the full inclusion environment. Ms. Miniaci also identified areas of Student's academic and speech and language skills which could be addressed through use of electronic devices and software, including use of picture symbol software and a sequential vocal output device. However, implementation of Ms. Miniaci's suggestions was limited, and as of the hearing, there was no agreement among staff or between staff and parent as to which devices and software to use. The record was lacking in evidence that the speech and language services Student actually received incorporated use of computer software, picture symbol software, or any electronic devices to promote Student's speech and language development.

111. The level of speech and language services offered in the June 2005 IEP was not adequate to appropriately address Student's unique needs.

OT

112. The June 13, 2005 IEP offered Student 30 minutes per week of OT for the first month, and then one time per month OT consultation with the classroom teacher for October 2005 through June 2006. This offer of services was made based on Student's anticipated placement in an SDC. In addition, Student was to receive APE twice per week for 30 minutes each session. As set forth in Section IV (C) above, Student did not establish that the OT services the District offered were inadequate to meet Student's OT needs.

C. Offer of placement in the least restrictive environment

113. At the time of the June 13, 2005 IEP meeting, the team considered the educational benefits available to student in a regular classroom, supplemented with appropriate aides and services, as compared to benefits of an SDC. They also considered the non-academic benefits and the effect Student's presence would have on other children in

the class and on the teacher. While not the primary or sole concern, the District also considered the cost in terms of providing the level of supports and services Student would require to access the general education curriculum sufficiently to make educational progress.

114. In considering the appropriateness of Student's placement, the IEP considered results of the triennial assessments as well as the behavior analysis and an inclusion consultation performed in February of 2005. They also looked at how Student had performed during the 2004-2005 school year in Mr. Fawcett's class. In her report of her assessment performed in February of 2005, District inclusion consultant Kristin Stout described the ongoing disagreement among members of Student's IEP team regarding the appropriateness of placement. Student's mother and his classroom aide saw significant improvements in his behavior and academic performance over the course of the year, especially after the initial difficulties with transition. The general education teacher and principal felt that the placement was inappropriate, primarily because of the lack of academic growth, lack of obvious benefit to student, concerns for the other students in the classroom, and disruptive behavior. Other team members expressed mixed feelings, but were concerned that Student's needs were not being met, and that the related services were not assisting Student improve his classroom success. Some of the team members had expressed to Ms. Stout that they felt that McKinley was resistant to mainstreaming and inclusion, and that the staff was not adequately trained for the level of intensive student involvement required. In addition, school personnel and parent were all concerned about Student's lack of verbal communication, his behavior outbursts, and difficulties in communication between school and home.

115. There is little dispute that the transition from Garfield to McKinley, and from an SDC environment to a general education one, was difficult for all involved, and that Student initially did not receive much in the way of academic educational benefit. There was some social progress, in terms of Student being able to model or imitate other children's behavior in class. As the staff at McKinley adjusted to and became more familiar with working with

Student, Student's inclusion in Mr. Fawcett's class became more routine. At the outset, Student's tantrums and behavior outbursts did disrupt the class. However, after the November 29, 2004 IEP meeting, new behavioral strategies were implemented, Student's behavioral needs were further assessed, and Student's behavior greatly improved. There were no major disruptions again until late Spring, but staff attributed these to the end of year atmosphere and activity. Student received social benefit by watching what the other children did and following along. By the end of the year, Student had a role in some of the specific daily activities, and was able to put away toys and other materials and line up with the other children, and although he could not take the same tests they were taking, he could sit quietly and write on paper while they were taking tests.

116. Nonetheless, because Student's communication and language skills were limited, the academic benefit he received from being in a general education first grade class was minimal. He was not able to fully participate in classroom activities, which entailed moving from work station to work station, and working on language intensive activities. The emphasis in the curriculum was on reading, writing and vocabulary. Student required intensive one-to-one teaching, and needed materials to be presented in a special way, designed to meet his unique needs. His paraeducator and teacher spent many additional hours creating materials to modify the classroom curriculum to be more accessible to Student. But this still was not enough to meet the severity of his needs.

117. Dr. Brown, District Senior Psychologist, testified that she has known Student since he entered the District in 2002. At that time, she was a school psychologist at Garfield. Dr Brown is extraordinarily qualified, holds a PhD. in psychology, and has researched and published extensively on issues relating to educating children with autism. She testified that she did not think that placing Student in a general education environment was ever appropriate given his unique needs. Dr. Brown is concerned that Student and his aide became an island within the first and second grade general education classes, since the level of services and assistance Student required was so high. She strongly believes that he should

be in a special education class, with mainstreaming opportunities. She also recognizes that Student thrives in an environment in which he has opportunity to interact with non-disabled peers. Dr. Brown, on behalf of the District, opined that an SDC on a general education campus provides an optimum environment in which Student can best meet his educational needs. The specially designed supports and services, which are embedded in the classroom organization and structure, promote the development of communication and language skills. All children are offered instruction in a small group and one-to-one environment, tailored to meet their unique needs and provide individual attention, to make the curriculum accessible.

118. Student did not offer any evidence that, as of June of 2005, continued placement in a general education class at McKinley was appropriate. Nor did he offer any credible evidence that continued placement in a general education class would be appropriate at this time. In fact, his representatives are now arguing for placement in a more restrictive environment, in a non-public school with fewer than a dozen other pupils, all of whom have varying degrees of autism.

119. Student's proposal for continued full inclusion placement for the 2005-2006 school year in a general education environment was not appropriately designed to meet his unique needs, and was not reasonably calculated to provide educational benefit. Student did receive some benefit, but his progress in communication and related reading and writing skills was impeded by not being in a more appropriate SDC environment, in which his severe deficits in these areas could best be addressed.

120. The District's offer in the June 2005 IEP of placement in an SDC at Garfield, with mainstreaming opportunities, was an appropriate offer of placement in the least restrictive environment.

V. REIMBURSEMENT FOR INDEPENDENT EDUCATIONAL ASSESSMENTS

121. Parents and guardians have the right to obtain an independent assessment of their child at any time. However, in order to do so at public expense, parents and guardians

must express disagreement with an assessment obtained by the school district, and must request that the school district pay for an independent educational assessment. Once a parent has done that, the agency must either agree to fund the independent assessment or initiate a due process hearing to show that its assessment is appropriate, or that the assessment obtained by the parent was not appropriate. If at hearing, the final decision is that the agency's assessment is appropriate, the parent still has the right to an independent educational assessment, but not at public expense.

122. Assessments must be conducted by individuals who are knowledgeable of the student's disability and competent to perform the assessment. A psychological assessment must be performed by a credentialed school psychologist. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of FAPE.

123. On June 24, 2005, Student's mother wrote the District a letter indicating that she disagreed with the IEP presented at the June 13, 2004 IEP team meeting. She also expressed disagreement with the triennial assessments performed in June of 2005, which were reviewed at that meeting. She did not specify which of the three triennial assessments she disagreed with, speech and language, OT and/or the comprehensive psychoeducational assessment.

124. In its response of July 1, 2005, the District indicated that it would agree to reassess Student in assistive technology and in autism, and presented her with an assessment plan for her consideration. The District also asserted that the assessments recently completed by the school psychologist, speech pathologist, and occupational therapist were each thorough and appropriate, were conducted by individuals who are

knowledgeable about Student's disability and competent to perform the assessments, and were properly selected and administered. The District therefore asserted that the requested independent assessments in those areas were not necessary. Nonetheless, the District agreed to perform additional assessments in the areas of assistive technology and autism to determine if additional services in those areas were required in order for Student to access his educational program. These assessments would take place once Student was back in school in the fall, and could be observed in his classroom setting.

125. In subsequent correspondence, Student's mother returned the signed assessment plan, but requesting more information about the specific tests to be administered. On August 1, 2005, the District requested voluntary mediation. Student's mother declined, and instead filed a due process request on August 26, 2005. There has been additional correspondence and communication between the parties since the due process request was filed regarding Student's request for a psychoeducational assessment to be performed. No agreement was reached, however. No evidence was presented at hearing that there were any further written requests prior to hearing for reimbursement for an occupational therapy assessment by occupational therapist Dr. Jerry Lindquist, or for a communications assessment by speech and language therapist Dr. Chris Davidson.

A. Dr. Chris Davidson's Psychoeducational Report

126. As set forth above, Student's mother expressed general disagreement with the assessments performed in June of 2005 as part of the District's triennial review, one of which was a psychoeducational assessment by school psychologist Russell Martin¹². In the fall of 2005, Student's mother retained Dr. Chris Davidson, a psychologist, to perform a psychoeducational assessment of Student¹³. Dr. Davidson observed Student in his classroom

¹² Mr. Martin's assessment is discussed further in Section IV above.

¹³ Dr. Davidson did not testify at hearing. Her report had been reviewed and

and administered a battery of assessments, reviewed Student's school records, and prepared a comprehensive 100 page psychoeducational report. Student seeks reimbursement for Dr. Davidson's psychoeducational assessment.

127. Student did not establish at hearing that the psychoeducational assessment performed in June 2005 by District psychologist Russell Martin was not appropriate. Student did not establish that Mr. Martin was not a credentialed school psychologist, and otherwise knowledgeable and competent to perform the assessment. Dr. Lindquist, Student's OT expert, is also a licensed psychologist, and has practiced in both OT, psychology and neuropsychology. He established that he is qualified to express opinions outside the field of OT. Dr. Lindquist disagreed with the picture Mr. Martin drew of Student and Student's abilities. Beyond that, however, Dr. Lindquist did not challenge Mr. Martin's qualifications to perform psychoeducational assessments, nor did he successfully challenge the validity of the tests performed. In addition, Dr. Lindquist met Student almost a full year after Mr. Martin performed his assessment. By that time, Student had spent almost a full school year in second grade, with goals and objectives, supports and services added as a result of the District's assessments. It is difficult, if even possible, to determine whether or not the different impression Student made was due to any lack of skill or appropriateness in Mr. Martin's assessment or to other factors.

128. Petitioner did not establish that Dr. Davidson's independent assessment was appropriate. Dr. Davidson did not testify at hearing to address her qualifications or findings. Student's other expert witnesses, including Dr. Lindquist, Ms. Berkowitz and Dr. Mary Lang, Director of Beacon Day School, had reviewed Dr. Davidson's report, but her assessments

considered by other expert witnesses. Dr. Davidson's report was admitted as administrative hearsay, pursuant to California Code of Regulations, title 5, section 3082. It is therefore not considered as direct evidence, but only to the extent it supplements or explains other direct evidence admitted into the record.

were not addressed in detail at hearing.

129. The District is not required to reimburse Petitioner for the costs of Dr. Davidson's independent assessment.

130. The District must consider Dr. Davidson's assessment in developing an appropriate educational program for Student.

B. Dr. Jerry Lindquist's OT Assessment

131. In April of 2006, Student was assessed by occupational therapist Dr. Jerry Lindquist, who, as stated above, is licensed as an occupational therapist and as a psychologist. Student seeks reimbursement for this independent OT assessment.

132. There is no indication in the records presented at hearing that Student expressly, and in writing, requested an independent OT assessment by Dr. Lindquist or by any other independent assessor, at District expense. Student did, however, express general disagreement with the triennial assessments performed in June of 2005, one of which was an OT assessment by Ms. Fuson. Student had also expressed disagreement in November of 2004 with the decision to discontinue direct OT services for Student.

133. As set forth above in Section III C, the District's occupational therapist, Ms. Fuson testified at hearing and established her qualifications in the field of occupational therapy. She has training and experience in providing occupational therapy to children with autism, and is qualified to perform OT assessments. At hearing, she described her methods and findings in her June 2005 OT assessment in detail. She also described her work with Student during the 2004-2005 school year, and explained her recommendations in November of 2004 to reduce the amount of direct OT services provided to Student, and in April 2005 to increase it.

134. Valerie Adams, another District OT specialist and provider, testified about the appropriateness of the District's OT assessments. Ms. Adams established her qualifications and extensive experience in the area of OT in general, and specifically in the provision of OT

in educational settings to children with autism. She and Ms. Fuson consulted with each other during the 2004-2005 school year about the provision of OT to Student. She credibly opined that Ms. Fuson's OT assessments of Student were appropriate in identifying the OT services Student needed in order to assist him in accessing his educational program.

135. Ms. Adams' testimony explained the line specialists attempt to draw between what is an optimum level of services to provide a child with autism in a therapeutic sense, as contrasted with the level of services a school district must provide in order to assist a Student in receiving educational benefit from the academic curriculum. Ms. Adams testimony was both helpful in clarifying the issues, and persuasive in supporting the District's decisions with regard to the appropriate level of OT services for Student. While the testimony and findings of Dr. Lindquist was very compelling in terms of optimum services that might be beneficial in a therapeutic sense, the District persuasively established that Ms. Fuson's assessments properly identified Student's OT needs in an educational setting.

136. The evidence presented by the District established that its OT assessments during the 2004-2005 school year, including the triennial assessment in June of 2005, were appropriate.

137. Because Student did not establish that the District's OT assessments were not appropriate, Student is not entitled to reimbursement for Dr. Lindquist's OT assessment of Student performed in the spring of 2006. However, the District must consider the assessment and testimony of Dr. Lindquist in developing an appropriate educational program for Student.

C. Susan Berkowitz's Communication Assessment

138. On April 24, 2006, Susan Berkowitz performed an independent communication assessment of Student. Student seeks reimbursement for this assessment. As set forth above, Ms. Berkowitz testified at hearing and established her extensive experience in special education and in working with children with autism. She is licensed in California and

Massachusetts as a speech pathologist, and holds credentials in California for Speech-Language-Hearing and special class authorization as well as in Education Administration. She has worked as a speech pathologist in public schools, private institutions and in private practice. She also provides augmentative-alternative communication assessments for all ages by contract to school districts and through the San Diego Assistive Technology Center. As of the date of hearing, she had not taught in, provided consultation for, or otherwise observed autism SDCs in the District, and did not have a contract with them to provide services.

139. The triennial review with which Student's mother expressed written disagreement included the June 2005 speech and language assessment by District speech and language pathologist Judy Phelps. Student expressed disagreement with this assessment as part of her general disagreement with the triennial review. The District asserted that its speech and language assessment was appropriate, and that it was conducted by a person knowledgeable about Student's disability, who was competent and qualified to perform speech and language assessments. Nonetheless, the District agreed to perform an additional assistive technology/augmentative communication assessment of Student in the fall of 2005. Student did not present evidence that he expressed written disagreement with Ms. Miniaci's October 2005 assessment.

140. As part of her assessment in April of 2006, Ms. Berkowitz reviewed Student's school records and the reports from an augmentative assistive communication assessment performed by Ms. Miniaci in October of 2005 and an assessment performed by a private company called ATEC in early 2006. As part of her communications evaluation in April, Ms. Berkowitz met with Student and his mother, and presented Student with several electronic devices and computer software tools. She was able to quickly establish rapport with Student and, in essence, communicate with him. Ms. Berkowitz utilized alternative assessment tools, and was able to evaluate Student's speech and language and communication needs.

141. Ms. Berkowitz did not agree with the devices Ms. Miniaci recommended in her assessment. However, Ms. Berkowitz's testimony did not establish that Ms. Miniaci's

assessment was not properly administered. Student did not establish that Ms. Miniaci was not qualified to perform the assessments. Rather, the evidence established that Ms. Miniaci's assistive technology assessments were each appropriate and properly identified Student's needs for augmentative communication and/or assistive technology devices.

142. In addition to assessing Student's need for an augmentative communication device or other assistive technology, however, Ms. Berkowitz also performed an alternative, informal assessment of Student's basic communication skills, and, using some of her proposed devices, was able to get a more complete picture of the extent of Student's comprehension of vocabulary and language, as well as his ability to express himself in alternative modes. But she did not perform a traditional "speech and language assessment," and did not establish that the tests she administered, however effective, were properly validated or met the District's criteria for an appropriate tests.

143. Student did not establish that the District's assistive technology/augmentative communication assessment was inappropriate.

144. Student did not establish that Ms. Berkowitz' "communication evaluation" administered tests and used materials which were validated for the purpose of performing a speech and language assessment.

145. Student is not entitled to reimbursement for Ms. Berkowitz' independent communication evaluation. However, the District must consider this evaluation in determining an appropriate educational program for Student.

VI. PROCEDURAL VIOLATIONS REGARDING DELAYED PRODUCTION OF REQUESTED RECORDS

146. Parents and students are entitled to receive copies of their records within five days of written or oral requests.

147. On October 4, 2004, District Assistive Technology Specialist Jimene Miniaci prepared a report based upon the first of three of her Assistive Technology assessments of Student. Although there was no express reference to Ms. Miniaci's report at the October 8,

2005 IEP meeting at McKinley, nor that Ms. Miniaci attended this meeting, many of her recommendations made in the October 4, 2005 assessment are evident in the IEP.

148. Evidence at hearing established that during the period of time between the filing of the due process request and the first day of hearing, Student's mother and her attorney made several written requests for the production of all of Student's records, and also personally reviewed Student's cumulative file as provided to them by the District. Nonetheless, it was not until five days prior to hearing that the District provided Student's mother with a copy of Ms. Miniaci's October 4, 2004 report, despite prior requests. The District had an obligation to provide copies of these reports within five days of Student's requests for records.

149. In addition, evidence at hearing established that a copy of the original OT report prepared by District occupational therapist Steve Cummings in 2002 was not provided to Student until five days before the hearing, despite numerous requests over the past year for production of all records. It was not established at hearing whether or not the District had provided Student's mother with a copy of the 2002 OT report at or around the time of the December 2, 2002 IEP meeting at which it was discussed. However, Mr. Cummings, the occupational therapist at that time, was present at the December 2002 meeting and discussed his findings. Mother was also present at that time. Nonetheless, Student, through her attorney, did make several subsequent written requests for all of Student's records. OT was a relevant issue, as it was a concern raised in the due process hearing request. The District had an obligation to provide copies of these reports within five days of Student's requests.

150. District autism specialist Dennis Sweningsen performed an assessment in the fall of 2005. Evidence at hearing established that a copy of this report was faxed to Student in February of 2006, four months later. No evidence was presented at hearing that Student received a copy of Mr. Sweningsen's report prior to that time. However, no evidence was presented that Student's mother requested copies of that report prior to February of 2006.

151. The District's failure to provide Student with these records was a procedural violation of special education law. However, the evidence did not establish that these failures to provide Student with copies of his records within five days of his requests actually deprived Student of any educational benefit, nor that they impaired Student's mother's participation in the IEP process or in these proceedings to a significant extent.

VI. COMPENSATORY EDUCATION

152. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. These are equitable remedies that courts may employ to craft relief designed to ensure that the student is appropriately educated. The purpose of compensatory education is to replace lost educational services. There is no obligation to compensate the child by providing a day of education for each educational day lost. If a District failed to provide FAPE, the subsequent analysis is not what precise services were missed, but, rather, what compensatory services are necessary to provide an appropriate education under the law. Compensatory awards aim to place disabled children in the same position they would have occupied, but for the school district's violations.

153. In this case, as set forth above, the District denied Student a FAPE for the 2004-2005 school year by failing to develop appropriate speech and language and communication goals and objectives, failing to provide adequately trained staff, and failing to provide appropriate supports, services, accommodations and modification to curriculum. In addition, the speech and language and communications goals and objectives and related services offered in the June 2005 IEP were not adequate to appropriately address Student's unique needs.

154. The placement offered by the District's in June of 2005 was appropriate, and in the least restrictive environment. The June 2005 offer, and subsequently modified but similar offers of placement in an SDC, was based upon proper and thorough consideration of

Student's unique educational needs, and how to meet them in the least restrictive environment.

155. The evidence in this case establishes that Student's educational needs can best be met in a special education class, designed for Students with autism, with related speech and language, communication and occupational therapy services as required to supplement the classroom program. Student benefits from being in an educational environment where he has some regular contact with non-disabled peers, but does not require being educated alongside non-disabled peers in the same classroom or school in order to make academic progress, receive social benefits or otherwise enjoy and thrive at this time. Student's educational needs can be met in an appropriately administered public or non-public setting, and can be met either in an SDC on a public school campus or on a non-public school campus.

156. Over the course of the 2005-2006 school year, the parties have met numerous times, and had Student evaluated by numerous specialists in several different settings. Beacon Day School (Beacon) is a certified non public school (NPS) designed specifically for children with autism and related disorders. Student's mother has taken Student for assessment at Beacon, and District staff has had an opportunity to observe him there, and to meet the staff. Dr. Mary Lang is the Director of Beacon. She testified at hearing and established her extensive experience and qualifications in providing therapy to and teaching children with autism. She also has extensive experience training teachers, aides and parents. The staff at Beacon includes a special education teacher who used to teach in the District, and a paraeducator who has expertise in working with autistic children in educational and community settings using PECS, and is experienced in utilizing various communication and behavior interventions for children with autism.¹⁴ Over this past summer, Student spent one

¹⁴ This staff member trained with the individual who first researched and developed PECS.

week at Beacon and was also observed there by District staff. Within that time, Student was able to quickly adapt to the environment. He worked one-to-one with specialists, day in and day out, and was observed by Dr. Lang. The Beacon school site is a converted house, and there is a very low student to teacher ratio. Dr. Lang also has extensive experience providing psychoeducational services to school districts as a non-public provider, and works with schools and families to develop appropriate educational programs for children with autism.

157. During his time at Beacon, Student demonstrated that he was able to catch up quickly in the ability to use of PECS and a picture book to communicate. In addition, because of the small school size, and high amount of time spent one-to-one with the classroom teacher, the teacher, aides and supervisors were all able to quickly learn what activities would motivate Student to communicate and provide opportunities for Student to develop related cognitive and academic skills.

158. District representatives argue that placement in a small non-public school such as Beacon would not be appropriate, and that Student's needs can best be addressed in an SDC on a public school campus. They believe that a small non-public school with only autistic children that the environment is too restrictive, and does not allow Student the opportunities to interact on a daily basis with typical peers. In addition, District representatives believe that its SDC programs for Students with autism offer all of the positive supports Student needs, and also offer a larger staff, with greater opportunities for academic development through mainstreaming. The District stands by its offers of a program for Student that includes placement in one of the District's autism SDCs, with mainstreaming and related services and supports. District representatives also point out that Beacon does not have a speech and language therapist on staff.

159. The District's arguments are persuasive in the context of determining an appropriate placement for Student in the long run. Their offer of placement in one of the District's autism SDCs is appropriate. Student's proposal for full-time placement in Beacon Day School is not appropriately designed to meet his unique needs and is not reasonably

calculated to provide educational benefit in the least restrictive environment. The cost of Student's full-time participation, for an entire school year, in an NPS, particularly one without an in-house speech and language therapist or OT provider, such as Beacon outweighs the benefit of such a program. However, there is no disagreement that the 2004- 2005 placement was inappropriate, and that Student's related educational program was not adequate. For the 2005-2006 school year, District representatives made modifications to their offer, and to Student's second grade program while he was still in general education. They made several offers and met numerous times with Student's mother and the IEP team, and were unable to persuade her to accept their offers of placement in an SDC. However, at this point, Student has remained in a full inclusion environment for two years. His identified needs have remained inadequately addressed. A period of remedial placement and intensive related services in the form of compensatory education is warranted.

LEGAL CONCLUSIONS

DISCUSSION OF APPLICABLE LAW

1. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), children with disabilities have the right to a free appropriate public education that emphasizes special education and related services that are available to the child at no charge to the parent or guardian, that meet the State educational standards, and that are designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.)¹⁵ FAPE consists of special

¹⁵ The most recent IEP in place pursuant to "stay put" was drafted in June of 2005, prior to the authorization of the IEDA, which became effective July 1, 2005. However, the Due Process complaint, as well as several assessments and proposed IEPs were drafted after July 1, 2005. To the extent that provisions of the former version of the IDEA differ from the reauthorized version, and such differences are relevant to the determination of any issue in

education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as special instruction, at no cost to parent, designed to meet the unique needs of the student. (20 U.S.C. § 1402(29).) Related services must be sufficient to enable the student to benefit fully from instruction. (Ed. Code § 56301.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services are also referred to as designated instruction and services (DIS). (Ed. Code § 56363, subd. (a).)

2. The congressional mandate to provide a FAPE to children includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 205 (hereafter *Rowley*), the United States Supreme Court utilizes a two-prong test to determine if a school district has complied with the IDEA. First, the district is required to comply with statutory procedures. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al., v. Board of Trustees of Target Range School Dist.*, (9th Cir. 1002) 960 F.2d 1479, 1483 (hereafter *Target Range*)). Second, the IEP is examined to determine if it is reasonably calculated to enable the student to receive some educational benefit.

3. To determine whether a school district substantively offered a FAPE to a student, the adequacy of the school district's proposed program must be determined. (*Gregory K. v. Longview School Dis.* (9th Cir. 1987) 811 F.2d 1307, 1314 (hereafter *Gregory K.*)). Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four

this Decision, they will be specifically noted.

factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. If the school district's program meets these criteria, then the school district provided a FAPE, even if the student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. Whether the program set forth in the IEP constitutes a FAPE is to be determined from the perspective of what was objectively reasonable to the IEP team at the time of the IEP, and not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999), 195 F.3d 1141.)

4. A student's IEP must be designed to meet the student's unique needs and be reasonably calculated to provide the student with some educational benefit, but the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. 176 at p. 200.) In addition to providing specially designed instruction, the District must provide related supportive services as may be required, to assist the student to benefit from special education. A school district must provide "a basic floor of opportunity...[consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Rowley*, 458 U.S. 176 at p. 201.) The intent of the IDEA is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." (*Id.* at p.192.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at pp. 197, 200; *Gregory K., supra*, 811 F.2d 1307, 1314.)

5. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student's educational needs shall be

conducted. (Ed. Code § 56320.) Thereafter, special education students must be reassessed every three years or more frequently, if conditions warrant, or if the student's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code § 56381.) The student must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (Ed. Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (Ed. Code § 56320, subd.(a)(b).) The personnel who assess the student must prepare a written report, or reports, as appropriate, of the results of each assessment. (Ed. Code § 56327.)

6. Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code §§ 56320, subd.(g); 56322.) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (Ed. Code § 56320, subd.(a),(b).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 444 F.3d 1149, 1154-1155.)

7. IEPs must contain annual goals and objectives. (20 U.S.C. § 1414(d)(1)(A)(ii) and 20 U.S.C. § 1414(d)(1)(A)(viii)(1).) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. The annual goals must contain a statement of measurable annual goals and a description of the manner in which progress will be measured. (Ed. Code § 56345, subd. (a).)

8. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114¹⁶; Ed. Code §§56031, 56364.2.) To the maximum extent appropriate, special education students should have opportunities to interact with general education peers. The law demonstrates a strong preference for mainstreaming which rises to the level of a rebuttable presumption. (*Daniel R.R. v. State Board of Education* (5th Cir.1989) 874 F.2d1036, 1044-45.) Four factors are analyzed to determine if a placement is in the least restrictive environment: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the benefits of a special education classroom; the non-academic benefits to the disabled child of interaction with non-disabled children; the effect of the presence of the disabled child on the teacher and other children in the regular classroom; and (4) the costs of supplementary aids and services necessary to mainstream the disabled child in a regular classroom setting. (*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400.)

9. In determining the placement of a child with a disability, each public agency must ensure that the placement decision is made in conformity with least restrictive environment provisions and that the placement is as close as possible to the child's home. (34 C.F.R. § 300.116(b)¹⁷.) The public agency must also ensure that, unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he

¹⁶ This reference is to the 2006 edition of the Code of Federal Regulations. In the 1999 edition, the citation is 34 C.F.R. § 300.550(b).

¹⁷ In the 1999 edition of the Code of Federal Regulations, the citation is 34 C.F.R. § 300.552(b).

or she would attend if non-disabled. (34 C.F.R. § 300.116(c)¹⁸.) In selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. (34 C.F.R. § 300.116(d)¹⁹.)

10. In addition to the provision of classroom instruction, districts may provide related services (or designated instruction and services), including transportation, and such developmental, corrective and other supportive services as may be required to assist a student with special needs to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code § 56363, subd. (a).) Designated instruction and services may be provided to individuals or to small groups in a specialized area of educational need, and throughout the full continuum of educational settings. (Cal. Code Regs., tit. 5, § 3051(a)(1).) Special education law requires that all entities and individuals providing designated instruction and services be qualified, be employees of the district or county office, or be employed under contract and certified by the Department of Education to provide such services. (Cal. Code Regs., tit. 5, § 3051(A)(3),(4).)

11. School districts must take steps to ensure that at least one of the student's parents or guardians are present at an IEP meeting, or are given the opportunity to participate. (Ed. Code § 56341, subd. (b); Ed. Code § 56341.5) In developing a child's educational program, the district must also ensure that the IEP team includes at least one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment, and at least one special education teacher or provider. (Ed. Code § 56341 subd.(b)(2)(3).) At the discretion of the parent, guardian or local educational agency, individuals who have knowledge or special expertise regarding the pupil, including related

¹⁸ In the 1999 edition of the Code of Federal Regulations, the citation is 34 C.F.R. § 300.552(c).

¹⁹ In the 1999 edition of the Code of Federal Regulations, the citation is 34 C.F.R. § 300.552(d).

services needed by the student, should also be included. (Ed. Code § 56341, subd. (b)(6).

12. Parents and guardians play a significant role in the IEP process. They must be informed about and consent to assessments of their child, must be included as members of the IEP teams, and have the right to examine any records relating to their child within five days after a request is made. (20 U.S.C.1415(b)(1)(A); Ed.Code § 56504.) In addition, parents have the right to obtain an independent assessment of their child. (20 U.S.C. §1415(b) (1); Ed. Code §56329, subd. (b).) Under federal regulations, parents and guardians have the right to an independent assessment at public expense if the parent disagrees with an assessment obtained by the public agency. (34 C.F.R. §300.502(b)(1).) If a parent requests an independent educational assessment at public expense, the public agency must either initiate a hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense, unless the agency can show that the independent assessment did not meet agency criteria. (20 U.S.C § 1451(b)(2).) If the public agency initiates a hearing and the final decision is that the agency's assessment is appropriate, the parent still has the right to an independent educational assessment, but not at public expense. (20 U.S.C. § 1415(b)(3).) In addition, under California law, if a parent obtains an independent educational assessment of their child, the results of the assessment "shall" be considered with respect to the provision of FAPE. (Ed. Code § 56329, subd. (c).)

13. The IDEA and state law require that a due process decision be based upon substantive grounds when determining whether the child received a FAPE, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the IEP. (20 U.S.C. § 1415(f)(3)(E); Ed. Code § 56505, subd.(j); *Rowley, supra*, 458 U.S. at 206-207; see also *Amanda J. v. Clark County School Dist.*, (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding

that a pupil has been denied a free appropriate public education. (*Target Range, supra*, 960 F. 2d at 1484.)

14. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (hereafter *Puyallup*)). These are equitable remedies that courts may employ to craft appropriate relief for a party, designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Puyallup*, 31 F.3d at 1497.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. The purpose of compensatory education is to replace lost educational services. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 44 F.3d 1149, 1156; *Burlington v. Department of Education* (1985) 471 U.S. 359, 369. There is no obligation to compensate the child by providing a day of education for each educational day lost. If a District failed to provide FAPE, the subsequent analysis is not what precise services were missed, but, rather, what compensatory services are necessary to provide an appropriate education under the law.

15. Petitioner, in this case Student, has the burden of proving at an administrative hearing the essential elements of his claims. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d.387].)

DETERMINATION OF ISSUES

ISSUE ONE: DID THE DISTRICT DENY STUDENT A FREE, APPROPRIATE PUBLIC EDUCATION (FAPE) FOR THE 2002-2003 AND EXTENDED SCHOOL YEAR?

1. The educational program offered by the District for the 2002-2003 school year was designed to meet Student's educational needs, was reasonably calculated to provide Student with some educational benefit, comported with Student's IEP and provided Student with an education in the least restrictive environment.

A. The District appropriately assessed Student in all areas of suspected disability and

properly identified Student's unique educational needs as a four year old, non-verbal child with autism. The psychoeducational, speech and language and OT assessments performed by the District were administered by trained personnel, who were knowledgeable of Student's disability and were competent to perform the assessments. The assessments were selected so as not to be racially, culturally or sexually discriminatory, and were provided and administered in the student's primary language or other mode of communication, to the extent feasible. The District was provided an adequate picture of Student's strengths and areas of need from which they were able to develop an appropriate educational program.

(Findings of Fact 6-13; Applicable Law 6)

- B. Student's September 2002 IEP, as amended and modified in December of 2002 set forth goals and objectives in the areas of pre-academics, sensory processing, behavior, speech and language and OT. These goals and objectives were all appropriate to measure and promote student's educational progress, and were reasonably calculated to provide Student with some educational benefit. Student made educational progress during the 2002-2003 school year. (Findings of Fact 14-21; Applicable Law 3 and 4, 7)
- C. The District offered Student sufficient OT and speech and language services. The related services provided to Student in the areas of OT and speech and language were appropriate to assist Student to benefit from special education. The District offered Student an adequate level of speech and language and OT services, which together with activities and supports embedded in the curriculum of the SDC, adequately provided the support he needed to access and make progress in his educational program. (Findings of Fact 22-27; Applicable Law 3 and 4)
- D. The language based SDC at Garfield was a placement in the least restrictive environment, allowing Student to receive the educational benefits of special program supports and services designed to meet his unique needs, while allowing

him to receive the non-academic benefits of being on general education campus, where he had daily contact with typical peers on the playground, at lunch and during special assemblies. (Findings of Fact 28-32; Applicable Law 8 and 9)

- E. Student was not procedurally denied a FAPE for the 2002-2003 school year by failing to include a general education teacher and a Cantonese interpreter present at the September 23, 2002 IEP meeting, nor by failing to have a general education teacher and speech and language specialist present at the December 2, 2002 addendum IEP meeting. The absence of these participants at these two IEP meetings did not result in the loss of an educational opportunity to Student, nor interfere with the opportunity of Student's mother to participate in the formulation process of the IEP. Therefore, there was no denial of FAPE. (Findings of Fact 33-35; Applicable Law 11 and 13)

ISSUE TWO: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2003-2004 SCHOOL YEAR AND EXTENDED SCHOOL YEAR?

2. The educational program offered by the District for the 2003-2004 school year was designed to meet Student's educational needs, was reasonably calculated to provide Student with some educational benefit, comported with Student's IEP and provided Student with an education in the least restrictive environment.

- A. The District appropriately assessed Student in all areas of suspected disability and properly identified Student's unique educational needs as a five year old, non-verbal child with autism. The District was able to develop an educational program designed to meet Student's educational needs. (Finding of Fact 38; Applicable Law 6)
- B. Student's September 2003 IEP, as amended and modified in October 2003, set forth goals and objectives in the areas of OT, pre-academics, sensory processing and behavior. These goals and objectives, when viewed in conjunction with the curriculum in the language based pre-school SDC, were all appropriate to measure

and promote student's educational progress and were reasonably calculated to provide Student with some educational benefit. Student made progress. (Findings of Fact Nos. 39 and 41; Applicable Law 7)

- C. The speech and language and OT services provided to Student during the 2003-2004 school year were appropriate to assist him in making educational progress and to benefit from special education. (Findings of Fact 42 and 43; Applicable Law 3, 4, and 10)
- D. The language based SDC at Garfield was a placement in the least restrictive environment, allowing Student to receive the special program supports and services to meet his unique needs, while allowing him to do so on a general education campus where he had daily contact with typical peers on the playground, at lunch and during special assemblies. In addition, during the 2003-2004 school year, the District increased mainstreaming for Student, providing him with increasing opportunities to spend time in general education classrooms with typical peers for up to an hour per day. (Findings of Fact 44-47; Applicable Law 8 and 9)
- E. Student was not procedurally denied a FAPE for the 2003-2004 school year by failing to include a Cantonese interpreter at the September 24, 2004 IEP meeting. The absence of an interpreter did not result in the loss of an educational opportunity to Student, nor interfere with the opportunity of Student's mother to participate in the formulation process of the IEP. Therefore, there was no denial of FAPE. (Finding of Fact 48-50; Applicable Law 11 and 13)

ISSUE THREE: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2004-2005 SCHOOL YEAR AND EXTENDED SCHOOL YEAR?

- 3. The District denied Student a FAPE for the 2004-2005 school year by failing to include a general education teacher or any teaching staff from McKinley at the June 4, 2004 IEP team meeting and failing to meet with appropriate staff from McKinley prior to the

beginning of the 2004-2005 school year. In addition, the District failed to offer appropriate speech and language goals and objectives and failed to provide adequate speech and language and OT services. Finally, the District failed to provide services, accommodations and modification called for in Student's IEPs. These violations resulted in lost education benefit to Student.

- A. For the 2004-2005 school year, the District properly identified Student's unique needs as a non-verbal child with autism, which remained the same as identified in prior IEPs. (Finding of Fact No. 58; Applicable Law 6)
- B. The District's failure to implement an appropriate behavior plan from the time that Student entered Mr. Fawcett's class in September of 2004 resulted in the loss of educational benefit to Student. (Findings of Fact 59-62; Applicable Law 4)
- C. Student's speech and language, and communication goals and objectives for the 2004-2005 failed to adequately address his unique needs, and were not reasonably calculated to provide him with sufficient educational benefit to progress in the curriculum. The lack of specific language goals addressing needed skills was reflected in Student's lack of demonstrated progress in comprehension of certain nuances of language. In addition, Student's speech and language goals and objectives for the 2004-2005 school year failed to adequately address his need to develop a primary mode of communication which he could use consistently, in school, at home and in the community. However, Student did not establish what self-help goals and objectives the District should have included. Therefore, Student did not meet his burden of proof on this issue. (Factual Findings 63-68; Applicable Law 7)
- D. The speech and language services offered to Student for the 2004-2005 school year were not adequate to meet his unique needs as a non-verbal autistic first grader in a general education classroom. The speech and language services provided to Student during the 2004-2005 school year were not sufficient to

promote his development of a primary mode of communication which he could consistently use at school, in home and in the community. (Factual Findings 69-71; Applicable Law 10)

- E. The District's failure to secure the attendance of all required team members at the June 4, 2004 IEP meeting was a procedural violation which resulted in the loss of educational benefit to Student and impaired his mother's ability to fully participate in the educational process. No general education teacher from McKinley or from Garfield attended this meeting. Absence of the appropriate team members from McKinley prevented meaningful discussion of the goals and objectives, behavior plan, and modifications to the general education classroom structure and curriculum to accommodate Student's unique needs. Student's speech and OT services were not reviewed and modified at the June 2004 meeting, as had been suggested in the February IEP. In addition, the District did not make up for its failure to secure the attendance of appropriate team members at the June 4, 2004 IEP meeting by convening an additional meeting later in the summer, before school started. (Findings of Fact 75-79; Applicable Law 11 and 13)
- F. The District's failure to provide adequately trained staff, and failure to provide appropriate services, supports, accommodations and modifications to curriculum, resulted in Student being denied a FAPE for the 2004-2005 school year. The level of services and supports provided to Student during the 2004-2005 school year was not adequate to meet his educational needs and to assist him in accessing the curriculum. As a result, Student was denied a FAPE. (Findings of Fact Nos. 80-85 Applicable Law 3 and 4)

ISSUE FOUR: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2005-2006 SCHOOL YEAR?

- 4. The educational program offered by the District for the 2005-2006 school year failed to provide for adequate speech and language goals and objectives and services, given

Student's level of need. Otherwise , the offer of placement in an SDC with mainstreaming opportunities was reasonably calculated to provide Student with some educational benefit, in the least restrictive environment.

- A. The District did not appropriately identify Student's unique needs in speech and language. Student's other unique needs were appropriately identified and addressed in the June 2005 IEP. (Findings of Fact 97-105; Applicable Law 3 and 4)
- B. Student did not establish that in the context of one of the District SDCs offered, Student would need additional ABA services, nor what the level or extent of those services should be. Student therefore did not meet his burden of proof on the issue of provision of ABA therapy. In addition, Student did not establish that the level of OT services offered by the District in the June 2005 IEP did not appropriately address his needs. However, the speech and language and communication services offered in the June 2005 IEP did not adequately address Student's unique needs, even when viewed in the context of placement in an SDC. (Findings of Fact Nos. 106-112; Applicable Law 3, 4 and 10)
- C. The District offers of placement in one of the District's autism SDC with related supports and services and opportunities for mainstreaming into general education classes for parts of the day offered Student an educational program designed to meet his unique needs in the least restrictive environment. Student failed to establish that continued full inclusion in a general education class was appropriate or adequate to meet his needs. (Findings of Fact 113-120; Applicable Law 8 and 9)

ISSUE FIVE: SHOULD THE DISTRICT REIMBURSE STUDENT FOR THE COSTS OF INDEPENDENT EDUCATIONAL ASSESSMENTS PERFORMED BY DR. CHRIS DAVIDSON, DR. LINDQUIST, AND SUSAN BERKOWITZ?

- A. Student is not entitled to reimbursement for the independent psychoeducational assessment performed by Dr. Chris Davidson in November of 2005. Student failed to establish that the psychoeducational assessment performed by the District's

psychologist, Russell Martin, was not appropriate. In addition, Student failed to establish that the psychoeducational assessment performed by Dr. Davidson was appropriate. (Findings of Fact 121-125; 126-130; Applicable Law 12)

B. Student is not entitled to reimbursement for the OT assessment performed by Dr. Lindquist as an independent educational assessment pursuant to Ed. Code Section 56329(b). Although Student expressed disagreement with the OT assessment performed by District occupational therapist Ilene Fuson, Student failed to establish that the District's OT assessment was not appropriate. The District may consider Dr. Lindquist's assessment in developing an appropriate educational program for Student. (Findings of Fact 116-120; 131-137; Applicable Law 12)

C. Student is not entitled to reimbursement for the communications assessment performed by Susan Berkowitz as an independent educational assessment. Student disagreed with the all of the assessments performed by the District as part of its Triennial review, including the speech and language assessment. The District responded to Student's written disagreement by offering two re-assessments, including an additional assistive technology/augmentative communications assessment by Ms. Miniaci. Student made no further request for an independent speech and language assessment. The District may consider Ms. Berkowitz' communications assessment in developing an appropriate educational program for Student. (Findings of Fact 116-120; 138-1452; Applicable Law 12)

ISSUE SIX: DID THE DISTRICT'S FAILURE TO TIMELY PRODUCE RECORDS OF STUDENT'S ASSISTIVE TECHNOLOGY CONSULTATION OF OCTOBER 4, 2004, THE OT ASSESSMENT FROM NOVEMBER 2002 AND THE DISTRICT'S AUTISM SPECIALIST, WITHIN FIVE DAYS OF STUDENT'S MOTHER'S WRITTEN AND ORAL REQUESTS RESULT IN A DENIAL OF AND EDUCATIONAL BENEFIT TO STUDENT OR INFRINGE ON HIS MOTHER'S ABILITY TO MEANINGFULLY PARTICIPATE IN THE IEP PROCESS?

6. The District's failure to provide Student with these records was a procedural

violation of special education law, which impacted Student's mother's ability to participate in the IEP and hearing process. However, the impact was lessened because Student and his representatives and witnesses were provided with an opportunity to review these reports prior to hearing and prior to the testimony of related witnesses. Student was also provided the opportunity to ask for additional time at hearing to offer rebuttal evidence pertaining to these reports. Student did not establish that he was denied any educational benefit or that his mother's ability to meaningfully participate in developing his educational program or in these due process proceedings was significantly impaired. (Findings of Fact 146-152; Applicable Law 12 and 13)

ISSUE SEVEN. IF IT IS ESTABLISHED THAT THE DISTRICT DENIED STUDENT A FAPE FOR ANY OR ALL OF THE SCHOOL YEARS IN QUESTION, IS STUDENT ENTITLED TO THE REMEDY OF COMPENSATORY EDUCATION?

7. Student is entitled to compensatory education to remedy lost educational services as a result of the District's failure to provide a FAPE for the 2004-2005 school year. Student's educational progress, primarily in the areas of speech and language and communication, has been impacted due to the denial of FAPE described above. Student still has not developed a primary mode of communication to use consistently across all settings, in school, at home and in the community. He cannot read and has limited comprehension of words. On the other hand, Student demonstrates skills in such things as putting together complex puzzles and using computers. It is difficult to obtain accurate readings of his cognitive abilities to determine appropriate academic material due to his communication impairment. (Findings of Fact 153-159; Applicable Law 15)

8. The compensatory services necessary to provide Student with an appropriate education would include intensive services designed to remedy Student's deficits in speech and language and to develop a primary mode of communication which he can use across all settings. Therefore, compensatory education in the form of a three month intensive educational program at Beacon Day School, is warranted. After three months, Student must

return to a District SDC. At the end of the three month period, an IEP team meeting should be held to develop Student’s educational program in a District SDC. (Findings of Fact 153-158; Applicable Law 15)

ORDER

1. District shall provide Student with compensatory education in the form of three months of intensive educational services at Beacon Day School in order for Student to develop a primary mode of communication.
2. District shall convene an IEP team meeting within fifteen days of this decision, to develop an IEP consistent with this decision.

PREVAILING PARTY

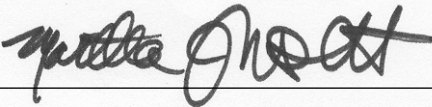
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

- Issue One: The District prevailed on issues 1A through 1E.
- Issue Two: The District prevailed on issues 2A through 2E.
- Issue Three: Student prevailed on issues 3B, C, D, E and F. The District prevailed on issue 3 A.
- Issue Four: The District prevailed on issue 4B and C. Student prevailed on issue 4A.
- Issue Five: The District prevailed on issues 5A through C.
- Issue Six: The District prevailed on issue 6.
- Issue Seven: Student prevailed on issue 7.

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 ninety days of receipt of this decision. California Education Code § 56505, subdivision (k).

November 3, 2006



A handwritten signature in black ink, appearing to read "Martha J. Rosett", is written over a horizontal line. The signature is contained within a light gray rectangular box.

Martha J. Rosett

Administrative Law Judge

Office of Administrative Hearings

Special Education Division