

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

In the Consolidated Matter of:

STUDENT, *et al.*,

Petitioner,

v.

REDLANDS UNIFIED SCHOOL
DISTRICT,

Respondent,

OAH CASE NO. N 2006100159

STUDENT, *et al.*,

Petitioner,

v.

REDLANDS UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2007031009

DECISION

Darrell Lepkowsky, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 28 – 30, 2007, and December 5, 6, 7, 10, 11, 12, 13, 14, 17, and 18, 2007, at offices of the Redlands Unified School District in Redlands, California.

Attorney Steven Wyner, Esq., of Wyner & Tiffany, represented Student and his

parents. Paralegal Jennifer Ralph accompanied Mr. Wyner each day of the hearing. Either Student's mother or father, or both parents, were present for each day of the hearing. Student did not attend.

Gail Lindberg, Program Manager for the East Valley Special Education Local Plan Area (SELPA) represented the Redlands Unified School District (District). Cheryl Sjostrom, the District's Director of Pupil Services, was present throughout the hearing.

PROCEDURAL BACKGROUND

On October 5, 2006, Student filed his request for a due process hearing (complaint) in Case No. N2006100159. The hearing in that case was continued. On February 5, 2007,

OAH granted Student's request to amend his complaint. Student filed a new complaint on March 29, 2007, in OAH case number N2007031009. On May 16, 2007, OAH granted Student's motion for continuance and motion to consolidate the two cases. On July 30, 2007, the District requested that OAH continue the case until its assessments of Student were completed. OAH granted the motion and scheduled the case to begin on November 28, 2007.

The ALJ opened the record for the due process hearing on November 28, 2007. The ALJ received sworn testimony and documentary evidence during thirteen non-consecutive hearing days through December 18, 2007. With the agreement of the parties, the record remained open for the service and filing of simultaneous written closing argument by February 5, 2008. The parties waived time for a decision, agreeing that a decision would be issued no later than March 3, 2008. On January 30, 2008, the ALJ granted Student's motion to extend the time for filing closing briefs to no later than 5:00 p.m. on Tuesday, February 19, 2008. The District stipulated to the extension on time, and both parties agreed to waive time for a decision to be issued to March 17, 2008.

Student timely filed his closing brief on February 19, 2008. However, the District did not file its brief until the morning of February 22, 2008, almost three full days late. The

District did not request an extension for filing its brief or offer any explanation as to why it filed its brief late. On February 25, 2008, Student filed a motion to strike the District's brief based upon its untimely filing and the resulting prejudice to Student. The District has not filed a response or opposition to Student's motion.

Student's motion to strike the District's closing brief, received by OAH almost three days after the time it was to be filed, is granted. The ALJ did not consider the District's closing brief for this Decision. After receipt of Student's written closing briefs, the ALJ closed the record and deemed the matter submitted as of February 19, 2008.

ISSUES¹

1. Did the District fail to provide Student with a free appropriate public education (FAPE) during the 2003 – 2004 and 2004 – 2005 school years (SY), in violation of the Individuals with Disabilities Education Act (IDEA) by timely failing to conduct and/or provide an occupational therapy (OT) assessment and OT services?

2. Did the District deny Student a FAPE by failing to constitute a complete individualized education program (IEP) team at the IEP meeting held on June 23, 2003, and at IEP meetings held during the 2006 – 2007 SY?

3. Did the District deny Student a FAPE during the 2004 – 2005 SY by failing to hold an IEP team meeting prior to changing Student's placement?

4. Did the District deny Student a FAPE during the 2004 – 2005, 2005 – 2006, and 2006 – 2007 school years by failing to develop an appropriate Behavior Support Plan

¹ During a status conference prior to the start of the hearing, Student withdrew several issues that were identified in the prehearing conference order. Those issues are therefore not included here. Additionally, the issues in the due process complaint have been restated and in some cases, combined, for purposes of organizing this decision.

(BSP) and/or a Behavior Intervention Plan (BIP)?

5. Did the District deny Student a FAPE during the 2003 – 2004, 2004 – 2005, and 2005 – 2006 school years by failing to offer and/or provide him with an appropriate educational placement and related services?

6. Did the District deny Student a FAPE during the 2004 – 2005 and 2005 – 2006 school years by failing to develop goals and objectives that addressed Student's unique needs and that would allow Student to access the general education curriculum as circumscribed by the California Content Standards?

7. Did the District fail to provide Student with a FAPE during the 2006 – 2007 SY by:

- a. failing to provide Student with an appropriate educational placement in the least restrictive environment?
- b. failing to develop a legally sufficient IEP due to the failure to review Student's progress on prior goals and objectives?
- c. failing to have a legally sufficient IEP in place at the beginning of the school year due to a failure to develop any goals and objectives for the coming year?
- d. failing to implement appropriate goals and objectives?
- e. failing to provide Student access to California's third grade general education curriculum?
- f. failing to provide appropriate related services in the areas of speech and OT?
- g. failing to develop an appropriate transition plan?
- h. failing to consider the recommendations of the non-public school due to pending litigation?
- i. failing to implement all of the services identified in Student's June 30, 2006 IEP?

REQUESTED REMEDIES

Student requests a ruling that the District denied him a FAPE for SYs 2003 – 2004,

2004 – 2005, 2005 – 2006, and 2006 – 2007. He alleges that he is entitled to a substantial amount of compensatory education because of these violations, funded by the District. Student asserts he is entitled to compensatory education in the areas of reading, to be provided by the Lindamood – Bell agency. He asserts that he is entitled to compensatory education through intensive educational remediation to address his academic deficits, and that he is entitled to compensatory services in the areas of OT and speech and language (SL) services. Student requests that these services be provided to him until he either begins to function at grade level, or reaches age 22, whichever comes first. Student also requests that the District fund a functional analysis assessment (FAA) and that, based upon the results of the FAA, an independent provider be retained to develop and implement a BIP for him, and that the independent provider develop a plan to consult with, train, and supervise Student’s teachers, aides, related service providers, and parents. Finally, Student requests an order that all District personnel providing education or related services to Student be trained in the areas of autism and behavioral interventions.

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Student is a 10-year-old boy who was born on February 3, 1998. The parties do not dispute that Student’s parents reside within the boundaries of the District or that Student is eligible for special education services.

BACKGROUND INFORMATION

2. Student first qualified to receive services from the San Bernardino County Early Childhood Assessment Team and Services (ECATS) program in January 2003, based upon a finding that he was eligible for special education and services under the classification of other health impaired (OHI). Student has a seizure disorder, asthma, mild

cerebral palsy, reactive hypoglycemia,² and a possible metabolic disorder. His doctors also noted that he has a sensory processing disorder. Student also had a severe feeding disorder as an infant, resulting in the placement of a gastrostomy tube to feed him, which was removed just after Student turned three. Student had two tumors removed from the area near his optic nerve, also before Student turned three. Student also received a diagnosis of attention deficit hyperactivity disorder (ADHD) around his fifth birthday.

3. Student also was diagnosed with a speech and language (SL) delay and other speech deficits. Student's IEP of January 14, 2003, focused upon those deficits. The IEP noted that Student's grammatical and syntactical errors made his speech difficult to understand. The IEP contained two SL goals for Student, and provided him with 90 minutes a week of speech and language services from a speech teacher in addition to 90 minutes a week of other ECATS services. The IEP indicates that Student was to receive the SL services until January 14, 2004.

4. In preparation for Student's three-year IEP review (commonly known as a triennial IEP), the SELPA prepared a multidisciplinary assessment plan, which Student's mother signed. The SELPA assessed Student in the areas of academic/pre-academic achievement, cognitive development and learning ability, motor development, language and speech development, social, emotional and behavioral development, self-help and adaptive development, and in the area of health and medical status. The assessment included interviews with Student's parents and observations of student. It did not include a

²Reactive hypoglycemia is a medical term describing recurrent episodes of symptomatic hypoglycemia (or low blood sugar) occurring two to four hours after a high carbohydrate meal (or oral glucose load). It is thought to represent a consequence of excessive insulin release triggered by the carbohydrate meal but continuing past the digestion and disposal of the glucose derived from the meal.

specific OT assessment.

5. At the time of the assessment, Student was taking medication to control his seizures, to treat his ADHD, to treat his metabolic disorder, and to control his asthma.

6. The multidisciplinary assessment, dated May 21, 2003, noted that Student was demonstrating behaviors that are characteristic of Asperger's Disorder, comparable to that of his older brother who already had a similar diagnosis.³ Student's mother noted that Student worried a lot, that he showed signs of depression and aggression, and that he cried easily and was prone to temper tantrums, some of which were side effects of his medications. Student would often be inattentive or overly focused on unimportant details. Student's mother also noted that Student would begin tasks and move on to another without completing the first. She further noted that Student's conversation and imaginative play were unusual and that he did not demonstrate interest in social play with his peers and did not respond to social cues. Student preferred his teachers to his classmates. As part of the assessment, Student's mother also noted that he would become fascinated with certain things, and would constantly repeat them. The SELPA's observations

³ Asperger's Disorder is a milder variant of autistic disorder. Both Asperger's Disorder and autistic disorder are in subgroups of pervasive developmental disorders. People with Asperger's Disorder often demonstrate social isolation and eccentric behavior in childhood. There are impairments in two-sided social interaction and non-verbal communication. Though grammatical, the speech of people with Asperger's Disorder may sound peculiar due to abnormalities of inflection and a repetitive pattern. Clumsiness may be prominent both in their articulation and in gross motor behavior. People with Asperger's Disorder often have a circumscribed area of interest, which usually leaves no space for more age appropriate, common interests. The name "Asperger's" comes from Hans Asperger, an Austrian physician who first described the syndrome in 1944.

of Student were consistent with the report Student's mother gave as part of the assessment process.

7. The multidisciplinary assessment concluded that Student demonstrated cognitive and pre-academic skills at or above his age level, although the assessment also noted that Student demonstrated a persistent pattern of inattention and hyperactivity consistent with his diagnosis of ADHD. Student's motor skills were assessed as being appropriate for his age as were his self-help and adaptive skills.

8. The multidisciplinary assessment referenced the SL assessment administered to Student the previous December. In that assessment, the SL pathologist found that Student tended to delete syllables when speaking, that he had problems with modifications to the pitch of his speech and to his intonational patterns, and that he made syntactical and grammatical errors, all of which contributed to the breakdown of Student's speech. The pathologist noted that people often had difficulty understanding Student, which resulted in his exhibiting signs of frustration.

9. With regard to Student's social and emotional development, the SELPA administered various tests to Student in response to his mother's concern about his demonstrating characteristics of Asperger's Disorder.⁴ The test results indicated that Student had a high probability of having Asperger's Disorder. Student was also tested to determine a measure of his dysfunctional behavior. The assessment team concluded from the test scores that Student appeared to have greater self-regulatory behavior difficulties than 99 percent of other children his age. The team also concluded that Student's adjustment behavior was significantly below that of his peers.

10. The assessment team also noted that Student did demonstrate many behaviors and skills that were age-appropriate, such as his ability to take turns, use toys

⁴The specific tests given are not at issue in this case.

appropriately, play computer games with his brother for up to 30 minutes at a time, and knew to say "thank you" and "please." The assessment concluded that Student should be able to function well in a classroom environment with appropriate supports. The assessment left final determination for Student's placement for Kindergarten to the IEP team. At the IEP team meeting for Student's transition to Kindergarten, which the IEP team held on June 23, 2003, the team changed Student's primary eligibility to Autism.

FAILURE TO CONDUCT A TIMELY OT ASSESSMENT AND/OR PROVIDE OT SERVICES

2003 – 2004 School Year

11. A school district must comply both procedurally and substantively with the IDEA. While not every procedural flaw constitutes a denial of FAPE, procedural flaws that inhibit a student's right to receive a FAPE, significantly prevent a parent's opportunity to participate in the IEP process, or cause a deprivation of educational benefit to a student, will constitute a substantive denial of FAPE.

12. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. 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. Occupational therapy is a related service.

13. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. All referrals for special education and related services shall initiate the assessment process and shall be documented; when a verbal referral is made, staff of the school district or special education local plan area shall assist the person in making a request in writing. A school district's failure to conduct appropriate

assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. If a district would have found that a student required OT services in order to access his education had an OT assessment been administered when requested by the student, the failure to do so results in a substantive denial of FAPE because it deprives the student of educational benefit.

14. Student contends that his mother requested the District to assess him in the area of OT when he first came to the District as a pre-school student in November of 2002, and that she informed the District that Student was receiving OT services through Loma Linda Medical Center. Student further contends that his mother and advocate reiterated the request for an OT assessment at the June 23, 2003 IEP but that the District did not present her with an assessment plan until the next school year. The District contends that there was no specific request for an OT assessment at this IEP and that Student's mother did not make a formal request for an assessment until spring 2004.

15. Student's mother credibly testified, and the documentary evidence confirms, that Student had been receiving sensory integration therapy, a type of OT, at Loma Linda Medical Center. Student's mother also credibly testified that she specifically requested an OT assessment at the June 23 IEP meeting. Karen Newlin, a family friend who was also Student's advocate for a number of years, corroborated her testimony. Ms. Newlin taught school for a number of years; she has been a school principal for the last 27 years. She has a variety of teaching credentials as well as a master's degree in school administration although she is not credentialed to teach special education. Ms. Newlin has been recognized as both school principal of the year and school administrator of the year for Northern California. Her testimony was direct and without hyperbole and was accorded significant weight by the ALJ.

16. Ms. Newlin testified that the subject of OT was discussed in some detail at the June 23 IEP meeting. She and Student's mother pointed out to the team that Student's

mother had verbally requested an OT assessment but that one had not yet been done. Ms. Newlin recalled that one of the District team members remarked that the request had not been reduced to writing. However, no one at the meeting informed her or Student's mother that the assessment request needed to be in written form in order for the District to administer the assessment, and no one offered to reduce the request to writing for Student's mother.

17. The comments to the June 23, 2003 IEP state that Student demonstrated several sensory issues that might need to be addressed in order to assist him in his educational setting. The comments continue by stating that once Student was enrolled (presumably in his Kindergarten placement) a referral would be made for a screening⁵ to provide classroom recommendations as well as to determine the need for an OT assessment.⁶ These comments substantiate Student's contention that the team discussed the issue of OT, and the desire of Student's mother for an OT assessment, at this IEP meeting.

18. Despite the request for an assessment, and the acknowledgement by the IEP team that Student had sensory needs, and possible OT needs, the District did not follow through and conduct either an OT screening or an OT assessment during the 2003 – 2004 SY.

⁵ Gayle Wray, the District occupational therapist who eventually assessed Student in the fall 2004 school semester, testified that a screening for the need of OT services is generally not a prerequisite to the District administering an OT assessment.

⁶ The IEP refers to the assessment as an "evaluation." The terms "assessment" and "evaluation" are synonyms. Federal statutes and regulations generally use the term evaluation. California statutes and regulations generally use the term assessment. This decision will use the term "assessment" since that is the common usage in California.

19. As will be discussed more fully below, the District eventually administered an OT assessment to Student as well as a sensory integration test during the 2004 – 2005 SY. Based on the sensory integration test, the District eventually found Student eligible for OT services. Based upon Student’s previous diagnosis of sensory integration disorder and the later finding by the District that he required OT services in order to access his education, the failure to assess Student for OT needs as requested by his mother resulted in the loss of educational benefit to Student. Therefore, Student has met his burden that the District denied him a FAPE by failing to administer an OT assessment as requested by Student’s mother.

2004 – 2005 School Year

20. Student contends that the District unreasonably delayed administering him an OT assessment and then initially failed to find him eligible for OT services in spite of his demonstrated need for them. The District contends that it promptly assessed Student once it received a signed assessment plan from Student’s mother. The District also contends that its initial OT assessment of Student properly determined that he did not require OT services in order to benefit from his education, and that only upon further assessment of Student did tests indicate that he was eligible for services.

21. On April 2, 2004, the District requested that the SELPA administer an OT assessment to Student. At the time the District made the referral, the law required that a district complete the assessment no later than 50 calendar days from the time the district received the parent’s written consent to the assessment unless the parties agreed in writing to extend the timeframes.

22. The IEP team held an annual IEP meeting for Student on May 24, 2004, to determine his educational needs and placement for the 2004 – 2005 SY. The IEP notes that the District had a signed assessment plan for the OT evaluation that the District had sent to the SELPA. Since the referral was dated April 2, 2004, either the SELPA or the District should

have administered an OT assessment by May 22, 2004, 50 days after the signed plan was sent to the SELPA. As of May 24, 2004, the date of the IEP meeting, neither the SELPA nor the District had done anything to start the assessment process and, therefore, had not administered the test.

23. Based upon a request from Student's mother for more assessments, the District conducted another multidisciplinary assessment of Student. The assessment plan, which Student's mother signed on August 19, 2004, included an OT assessment. The District contends that it could not find the earlier OT assessment plan signed by Student's mother. However, the District does not explain why the reference to a signed OT assessment plan in the May 24, 2004 IEP document did not serve to confirm that Student's mother had already given her consent for an OT assessment and that no other signed plan should have been required to initiate the assessment process.⁷

24. The IEP team held another meeting on August 23, 2004.⁸ The comments to the IEP document state that Student's mother again requested an OT assessment and but also note that Student's mother had not signed and returned the assessment plan. The District contends that this is why it had not completed the OT assessment. However, District witnesses were unable to explain why the District took the position that Student's mother had not signed an assessment plan in light of the fact that Student's mother had repeatedly requested that the District administer an OT assessment. Nor could they explain why no assessment was administered based upon the fact that the May 24, 2004 IEP document indicates that Student's mother had already signed an OT assessment plan, and in light of the fact that Student's mother signed an assessment plan on August 19, 2004,

⁷ Other than the OT component, the multidisciplinary assessment is not at issue in this hearing.

⁸ The IEP document, exhibit 29, is incorrectly dated September 23, 2004.

that called for an OT assessment. It appears that either the SELPA or the District misplaced the signed assessment plan. However, that does not absolve the District from its obligation to timely assess Student, particularly given Student's convincing evidence that his mother consistently brought the failure to assess to the District's attention, and given the documentation supporting Student's contention that the District was aware that his mother had signed an assessment plan.

25. On August 26, 2004, Student's mother wrote a letter to the District in which she, inter alia, reiterated her position that she had been requesting an OT assessment since late 2002 and her concern that because of the lack of an assessment, OT services were not available to Student. On August 30, 2004, Student received a neurology consultation from pediatric neurologist Dr. Stanford Shu, who had been treating Student since he was an infant. In addition to addressing other medical and educational needs he felt would benefit Student, Dr. Shu recommended that Student receive OT for treatment of Student's previously diagnosed sensory integration disorder.

26. As will be discussed below, the District changed Student's placement from a SDC at Crafton Elementary School to a general education classroom with resource specialist program (RSP) support at Mentone Elementary School, in early September 2004.⁹

⁹It is not entirely clear from the record why some of Student's IEPs and school records indicate he attended school at Crafton Elementary School and some indicate attendance at Kingsbury Elementary School for Kindergarten and for eight weeks of first grade in the summer of 2004. It appears that he probably attended Kindergarten at Kingsbury in Ms. Isaak's class and then attended eight weeks of first grade at Crafton in Dana Wood's class. However, the location of Student's placements is not at issue and therefore it is immaterial which school Student attended before ultimately transferring to Mentone Elementary School in September 2004.

The IEP team held a meeting on September 10, 2004, about a week after Student transferred to Mentone, in order to amend the August 23, 2004 IEP. The District had not administered the OT assessment by the time of this IEP meeting.¹⁰

27. SELPA Occupational therapist Gayle Wray administered an OT assessment to Student on or about October 1, 2004, approximately two years after Student's mother had first requested that the District (or SELPA) assess him. Ms. Wray administered the Bruininks-Oseretsky Test of Motor Proficiency (BOTMP) to Student, and conducted clinical observations of him. The BOTMP measures a sample of gross and fine motor functioning. There are various subsections to the test. Ms. Wray administered subsections that tested Student's balance, bilateral coordination, response speed, visual-motor control, and upper limb speed and dexterity.

28. Ms. Wray's testing placed Student's fine motor composite in the 18 percentile range. She explained that this score placed Student in the average range as compared to his peers. Although Ms. Wray noted that Student's bilateral motor coordination was moderately low, she still determined that Student was not eligible for OT services from the District.

29. At hearing, Ms. Wray explained that when she administered the OT assessment to Student, all the school districts that comprised the SELPA utilized a seven-percentile formula to determine if a given district would provide a student with OT services. The formula dictated that the districts would only provide OT services to those students who tested in the seventh percentile or less on an OT assessment.¹¹ Ms. Wray

¹⁰Although Student's parents had withdrawn their consent to the IEP they signed on August 23, 2004, they consented to the IEP of September 10, 2004.

¹¹It appears that the districts in the SELPA no longer apply this formula to determine a special education student's eligibility to receive related services.

acknowledged that the formula did not permit individualized determinations as to whether a given child required OT services in order to benefit from his or education, as required by California law.

30. The IEP team held another meeting on October 5, 2004. Ms. Wray was not available for the meeting so a district school psychologist, Patricia Vaughn, reviewed the report. The team set an additional IEP meeting for October 18, 2004, in order for the team to meet with the OT specialist. Student's mother signed the IEP.¹²

31. The team held the October 18, 2004 IEP team meeting as scheduled. Ms. Wray attended the meeting and reviewed her report. The team discussed Ms. Wray's finding that Student was not eligible for OT services since he did not score in the seventh percentile or lower on the OT assessment. Student's parents reiterated their concerns about Student's sensory integration¹³ issues. They emphasized that Student's teacher, Ms. Foss, had found Student hiding under a desk on several occasions although he had not

¹²Although the team met on October 18, 2004, and there is an IEP document so dated, the team also developed goals and objectives dated October 11, 2004. For reasons unclear in the record, the October 11, 2004, date became the operative date for the IEP meeting and is so referenced in subsequent IEP documents.

¹³Sensory integration disorder or dysfunction (SID) is a neurological disorder that results from the brain's inability to integrate certain information received from the body's five basic sensory systems. These sensory systems are responsible for detecting sights, sounds, smell, tastes, temperatures, pain, and the position and movements of the body. The brain then forms a combined picture of this information in order for the body to make sense of its surroundings and react to them appropriately. The ongoing relationship between behavior and brain functioning is called sensory integration (SI), a theory that was first pioneered by A. Jean Ayres, Ph.D., OTR, in the 1960s.

done so in the two weeks before the IEP meeting. Ultimately, based upon the concerns voiced by Student's parents and advocate, the IEP team agreed that Student would receive another OT assessment. Ms. Wray also suggested administering the Sensory Integration and Praxis Test (SIPT) to Student to obtain a better understanding of his sensory integration needs. The team agreed to meet again after Student received further testing.

32. Ms. Wray administered the SIPT to Student over four days between October 27, 2004, and November 3, 2004. The test evaluates sensory processing deficits related to learning and behavior problems. The SIPT measures visual, tactile, and kinesthetic perception as well as motor performance. It is composed of 17 brief tests. Only a therapist who has a SIPT certification may administer the test. Ms. Wray is SIPT certified.

33. The test results from the SIPT indicated that Student scored in the average range in the areas of space visualization, figure-ground, manual form perception, kinesthesia, finger identification, graphesthesia, constructional praxis, oral praxis, sequencing praxis, and motor accuracy. He scored slightly below average in the areas of localization of tactile stimuli and bilateral motor coordination. Although Student performed in the average range in the area of post-rotary nystagmus, Ms. Wray noted that his score was an indicator of vestibular dysfunction due to Student's prolonged response on the test.

34. Most significant were Student's scores in a few other of the areas tested. In the area of praxis on verbal command, which measures a child's ability to motor plan and move his body based upon verbal instructions, Student performed in the severe dysfunction range of performance. Ms. Wray noted that Student's low score was due in part to his lack of focus during the administration of the subtest; the test protocols did not permit the assessor to repeat instructions. Student also scored in the definite dysfunction range in the area of design copy, which measures a child's ability to copy shapes and designs. The subtest also records the child's approach to drawing tasks and motor planning. Student scored in the definite dysfunction range as well in the area of postural

praxis. This subtest measures the ability of the child to imitate postures of the assessor. Ms. Wray noted that Student's performance on this subtest was also affected by his lack of focus. Finally, Student also scored in the mild dysfunction range in the area of standing and walking balance. This subtest measures the ability of the child to balance on one foot or both feet, with eyes opened and eyes closed.

35. Ms. Wray concluded that Student's SIPT scores indicated that he suffered from dyspraxia on verbal command; that is, he had difficulty in performing coordinated movements when asked to do so. She recommended that educational staff working with Student get his attention visually before presenting him with new instructions or activities. Ms. Wray also noted that Student required frequent movement breaks and that tactile stimulus could also overwhelm Student. She recommended that the IEP team consider providing Student with 45 minutes per week of direct OT therapy.

36. The IEP team reconvened again on December 6, 2004. Based upon Ms. Wray's SIPT report and her recommendations, the District offered Student weekly OT sessions. However, Student's parents had concerns about the content of the IEP and did not approve it. The IEP team did not meet again until March 9, 2005. At that time, an addendum IEP document provided Student with one 45-minute session of OT services on a weekly basis. Student's parents signed this IEP document and the District thereafter began providing Student with OT.

37. The documentary evidence and witness testimony support Student's contention that his mother and advocate began requesting an OT assessment two years before the District actually administered one. The IEP documents, which the District generated, support Student's contention that his mother signed and returned an assessment plan to the District in the spring of 2004. Either the District or the SELPA misplaced the signed plan, and then required Student's mother to sign another one in order to initiate the assessment. Then, once the assessment was completed, the District

applied an arbitrary standard to its determination that Student did not require OT services. The more intensive SIPT that Ms. Wray administered to Student indicated that he had significant deficits that required OT services to assist him in benefiting from his education. The District's failure to initiate the assessment process and provide Student with OT services from the time the IEP team met on June 23, 2003, until the District offered Student OT services at the IEP meeting on December 6, 2004, deprived Student of OT services for a year and a half, services that the District later determined he needed. There is no evidence that Student's OT and sensory integration deficits only developed during the fall of 2004. To the contrary, Student had been diagnosed with a sensory integration disorder prior to the fall of 2002, of which his parents had advised the District. The weight of the evidence, therefore, supports Student's contention that he required OT services since his mother first requested that the District assess him. Student has therefore met his burden of proof that the failure to provide him with OT services during the 2004 – 2005 SY deprived him of a FAPE.¹⁴

¹⁴ Student's parents did not sign the December 6, 2004 IEP and did not otherwise indicate their agreement to any portion of it, including the provision of OT services. The delay between December 6, 2004, when the District first offered OT services to Student, and March 9, 2005, when Student's parents signed the IEP, is therefore attributable to Student's parents, and not to the District.

FAILURE TO CONSTITUTE A COMPLETE IEP TEAM

2003 – 2004 School Year: June 23, 2003 IEP Meeting¹⁵

38. The IEP team must include specified participants, including not less than one regular education teacher, if a student is, or may be, participating in the regular education environment. The team must also include either one special education teacher of the student, or, if appropriate, not less than one special education provider of the student. If a general education teacher was required, a harmless error analysis is applied to the failure to secure his or her attendance at the IEP meeting. The same applies to the participation of a special education teacher or special education provider. If harmless error is not found, the failure of the general education teacher and/or the special education teacher or provider to participate in the IEP process will result in a finding that the district substantively denied a FAPE to the student.

39. Student contends that the District's failure to assure the participation of a general education teacher was not harmless error because it prevented consideration of his

¹⁵When Student filed his complaint in Case No. N2006100159 on October 5, 2006, the statute of limitations under California law (Ed Code, § 56505(l)) was three years. The June 23, 2003 IEP took place outside the three-year period. However, the statute of limitations is a personal privilege, which a party must affirmatively invoke, or it is waived. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315, citing *Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; Witkin, California Procedure (4th Ed., 2003), Pleadings, section 1043.) In this case, there is no indication in the record that the District raised the statute of limitations as an affirmative defense by way of motion to dismiss or motion to strike Student's allegations pertaining to any time prior to October 5, 2003 (three years prior to the date Student filed his complaint). The issues were litigated at hearing and addressed in Student's closing brief. They are therefore addressed in this Decision.

placement in a general education environment and, since neither a general education teacher nor a special education teacher was present, the IEP team failed to propose any academic goals for Student's Kindergarten year. The District contends that there was no harm to Student by the failure to include either a general education or special education teacher at the meeting.

40. The District offers little explanation for the failure of the IEP team to include either teacher. Sandra Isaak, Student's Kindergarten teacher, testified that she was not present at the IEP meeting because placement had not yet been determined. Cheryl Sjostrom, the District's Director of Pupil Services, testified that no teacher was present at the meeting due to the District policy of not including any teacher when a child had not been participating in a preschool program. Since Student was only receiving services through the ECATS program, and was not attending a preschool, the District did not arrange for either a special education teacher or a general education teacher to participate at the meeting.

41. The District's explanation for the failure to include any type of teacher at the June 23, 2003, IEP meeting does not pass scrutiny. The District does not argue that the team reached the conclusion prior to the meeting that there was no possibility that the team would consider a general education placement for Student. Therefore, both state and federal law required that a general education teacher be a participant at the meeting. Nor does the fact that Student had not attended a preschool prior to the IEP meeting justify the failure to have any type of teacher participate in the formulation of the IEP. The fact that Student had not attended school previously and therefore had no prior teachers who could assist in the formulation of the IEP and in decisions regarding appropriate placement for Student does not justify the District's failure to constitute a legally mandated IEP team, District policy notwithstanding. Student has thus met his burden of proof that the failure to ensure participation of all required IEP team members was not harmless error and thus

denied him a FAPE.

2006 – 2007 School Year

42. Student contends that either a general education teacher and/or a special education teacher failed to attend IEP team meetings on June 30, 2006, August 8, 2006, October 4, 2006, June 1, 2007, June 22, 2007, or July 5, 2007. The District did not offer any justification for failing to have full IEP team members present at those meetings. The law in effect under the IDEA, as it was reenacted effective July 1, 2005, permitted parents to waive the presence of any required IEP team members.

43. Only a special education teacher was present at the June 30, 2006 IEP meeting. There is no evidence that Student's parents requested to waive, or did waive, the presence of a general education teacher at the meeting.

44. By the time of the June 30, 2006 IEP meeting, Big Springs, a non-public school (NPS) with a non-public agency (NPA) division, had assessed Student pursuant to his parents' request. The IEP team held the June 30 IEP meeting to review the assessment, to do Student's annual IEP review, and to discuss placement options for Student, particularly for his upcoming third-grade school year. At the time, the IEP team had not made a determination regarding an appropriate placement for Student. Although Student, as will be discussed below, had been receiving home hospital instruction at the time of the meeting, his placement for the prior two school years had been in general education classes with RSP support and related services. Student had been participating in a general education class, and, therefore, placement in a general education class for third grade was a very distinct possibility.

45. The absence of a general education teacher prevented the IEP team from considering a general education placement for Student. As will be discussed below, the placement that the team ultimately offered for the 2006 – 2007 SY had several deficits, depriving Student of a FAPE. The failure to have a general education teacher present at the

meeting, who could address Student's past performance and present needs with regard to his potential for benefiting from a general education placement, contributed to the denial of FAPE. The failure also prevented Student's parents from fully participating in the IEP process since it deprived them of access to pertinent information about Student and Student's appropriate placement. Student, therefore, has met his burden of proof that the failure to have a general education teacher at the June 30, 2006 IEP meeting denied him a FAPE.

46. Neither a general education nor special education teacher were present at the August 8, 2006 IEP meeting. The IEP team held the meeting to review the applied behavioral analysis (ABA)¹⁶ assessment administered by Big Springs. There is no evidence

¹⁶As explained by Student expert Dr. Betty Jo Freeman, and District expert Dr. Bryna Siegel, ABA, as an intervention for the treatment of autism, is often associated with specific behavioral methods, such as: discrete trial training (DTT); intensive behavioral intervention; incidental teaching; pivotal response training; and verbal behavior analysis. A discrete trial is a single cycle of a behaviorally based instruction routine. A particular trial may be repeated several times in succession, several times a day, over several days (or even longer) until the skill is mastered.

The method and technique of ABA therapy require that the ABA therapist reduce targeted behaviors to their most basic elements. The therapist attempts to train the child receiving the therapy by repetitious drilling in the redirected behaviors desired. The therapist uses contextual factors, established operations, antecedent stimuli, positive reinforcers, and other consequences, based on identified functional relationships with the environment, in order to produce practical behavior change in the child. The therapist generally ignores negative behaviors. Other techniques used in ABA therapy are prompts or other assistance, which the therapist times to assure correct responses. The therapist

that Student's parents waived the participation of any team members.

47. No general education teacher or special education teacher was present at the IEP meeting of October 6, 2006, when the team met to develop goals and objectives for Student for the 2006 – 2007 SY. There is no evidence that Student's parents waived the presence of any of the team members.

48. The IEP team held an annual review of Student's IEP on June 1, 2007. The team held an addendum IEP meeting on June 22, 2007. The specific purpose of the meetings was for the team to review Student's annual goals and objectives. Neither a general education nor a special education teacher was present at either meeting.¹⁷ There is no evidence that Student's parents waived the presence of any team member.

49. The District did not explain why neither a general education teacher nor a special education teacher was present at any of these IEP meetings. The Big Springs Director, Leslie Huscher, attended the meetings, as did Jamie Goertz, the supervisor of the ABA program Big Springs was providing to Student. However, neither of these women was

then gradually "fades" the prompts and other assistance to establish independence in the child. The therapist urges the child to repeat each task until it has been learned. Overall, the treatment focuses primarily on developing language, increasing social behavior, and promoting cooperative play with peers along with independent and appropriate toy play. Concurrently, substantial efforts are directed at decreasing excessive rituals, tantrums and aggressive behavior.

¹⁷ It is unclear from the evidence who attended the July 5, 2007 meeting. There is no IEP document dated July 5, 2007, in evidence and the recording of the meeting that Student moved into evidence does not identify the meeting attendees. Therefore, the ALJ makes no determination as to whether the District properly constituted the IEP team at this meeting.

providing direct educational services to Student.

50. Since there was always a possibility that Student might attend a general education class, and since Student always had special education services while attending school at, or through, the District, the law required that both a general education teacher and a special education teacher be present at all IEP meetings, unless their presence was waived by Student's parents. The failure to have either of these teachers present prevented a full dialogue of the educational possibilities open to Student and prevented Student's parents from gathering information and asking questions that would have assisted them in making decisions about Student's education. Student therefore has met his burden of proving that the failure to have a general education teacher or general education teacher present at the IEP team meetings held June 30, 2006, August 8, 2006, October 4, 2006, June 1, 2007, and June 22, 2007, denied him a FAPE.

FAILURE TO HOLD AN IEP MEETING PRIOR TO CHANGING STUDENT'S PLACEMENT FOR SY 2004 – 2005

51. Placement decisions concerning a student who is eligible for special education and related services must be made an IEP team. Under both federal and state law, the IEP team is required to review assessment results, determine eligibility, determine the content of the individualized education program, and consider local transportation policies and criteria before making program placement recommendations. A parent must be provided "written prior notice" when a school district proposes to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child.

52. There is no factual dispute that the first week of September 2004, the District transferred Student from Ms. Wood's SDC at Crafton to Ms. Foss' general education class at Mentone prior to holding an IEP meeting. Student contends that the District's failure to hold an IEP meeting before it transferred him to the new school was a procedural violation

that prevented his parents from participating in the IEP process and deprived him of educational benefits, resulting in the denial to him of a FAPE. The District contends that Student's parents agreed to the transfer and were instrumental in arranging it and, therefore, participated in the IEP process even if it was outside the context of an IEP meeting. The District further contends that the short delay in holding an IEP meeting did not substantively deny Student a FAPE.

53. The IEP dated May 24, 2004, placed Student in a SDC class with teacher Dana Wood. The placement was very similar to that of Student's Kindergarten year. Student's mother approved the placement by signing the May 24, 2004 IEP document.

54. At some time after the May 24, 2004 IEP meeting, Student received his last Kindergarten report card. Student's parents were surprised to learn that Student had not progressed as far as they – and other members of Student's IEP team – had anticipated. However, Student began first grade in Ms. Wood's class as determined by his IEP team. Ms. Wood's class was at a school that had a year-round schedule; Student began first grade there approximately early July 2004.

55. On Student's last Kindergarten progress report, his teacher, Ms. Isaak, noted that Student had made significant gains in social skills and language acquisition. Student had not had behavior problems of note and made friends with classmates. However, Student's experience in first grade did not begin as well. Within a few weeks of starting at Crafton, Student began recounting to his parents that other children were teasing him on the playground. In early August, Student admitted to his mother, after much prompting from her after she noticed skid marks on the back of his shirt, that another boy had dragged him on the ground and told Student that he was going to dump Student in the garbage can. Student told his parents that other children were calling him "stupid."¹⁸

¹⁸Luanna Kloepfer, the Principal at Crafton, conducted an investigation of the incident in which Student told his parents he had been dragged around the playground.

56. On August 5, 2004, Student's mother wrote a letter to Crafton Principal Luanna Kloefer requesting an IEP meeting to discuss the concerns Student's parents had about his lack of progress the prior year, the teasing and bullying Student was experiencing on the school playground, and to request that the District administer a full neuropsychological assessment to Student. The District decided to conduct a full multidisciplinary assessment of Student, including a psycho-educational assessment administered by school psychologist Patricia Vaughn.¹⁹

57. Ms. Vaughn has two master's degrees: one in curriculum and instruction and one in school psychology. She is also a credentialed special education teacher, with credentials to teach the learning handicapped as well as certification to teach resource specialist program (RSP) classes. She had not met Student or his family prior to his attendance at Crafton beginning in July 2004.

58. Ms. Vaughn assessed Student on August 17 and 18, 2004. For the assessment, Ms. Vaughn administered six tests: the Wechsler Intelligence Scale for Children – III (WISC – III); the Woodcock – Johnson Test of Achievement – Revised (WJ – R); the Bender – Gestalt Test of Visual – Motor Integration; the Asperger Syndrome Diagnostic; the Attention Deficit Disorder Evaluation Scales (ADDES); and the Connors' Teacher Rating Scale.

59. Although Ms. Vaughn's assessment report is dated August 20, 2004, it was

Although her investigation did not find any evidence to substantiate the incident, it is likely that the incident or some approximation of it did occur. The incident affected Student so much that he remembered enough details to recount them to a therapist some three years later.

¹⁹Neither the scope nor validity of any of the assessments the District administered in August 2004, are at issue in this case.

not discussed at Student's August 23, 2004 IEP team meeting and Ms. Vaughn acknowledged at hearing that the report was not fully completed until after Student had transferred to Mentone Elementary school. In any case, the assessment, in pertinent part, found that Student had a prorated full-scale intelligence quotient (IQ) of 106, which is mid-average range, and a prorated performance IQ of 119, which is the high – average to superior range. Although Ms. Vaughn noted that Student continued to display characteristics of Asperger's Disorder, and even mild symptoms of autism, she felt that his test scores placed him into what she describes as a "typical gifted/learning disabled" profile. While Student's test scores indicated a severe underachievement in reading acquisition, the overall test scores, as well as Student's IQ, were more commensurate with students receiving RSP programming than with students in an SDC placement. Ms. Vaughn felt that Student not only would benefit from, but also needed more mainstreaming opportunities. She felt that although he was not on par with grade-level peers, Student's tested aptitude suggested that he could absorb knowledge and skills faster than what was normally seen in a SDC. Ms. Vaughn, therefore, recommended that Student be transferred from his SDC to a less restrictive general education class with RSP support.

60. Ms. Vaughn discussed her testing results and her recommendation for an RSP placement with Student's mother sometime after the August 23 IEP meeting. Student's mother was receptive to the idea of changing Student's placement. She acknowledged as much in a letter to Principal Kloepfer dated August 26, 2004. However, the letter suggests that the issue of a new placement would be one of the issues that the IEP team would discuss at the next IEP meeting, which the District had scheduled for September 22, 2004. There is no suggestion in the letter that Student's parents had already agreed to a change in Student's placement. Student's mother did sign District paperwork requesting the intra-district transfer to Mentone, which was on a traditional school year schedule. Sometime between August 26, 2004, when Student's mother wrote to Principal Kloepfer, and the first

week of September 2004, when the Mentone school year began, Student was transferred to Mentone. No IEP meeting was held to describe his placement or related services, to draft goals and objectives for the new placement, or to discuss modifications or accommodations that Student might need at the new school.

61. Although the IEP team held a meeting on September 10, 2004, after Student had started at Mentone, Ms. Vaughn's report was not ready and therefore the team did not discuss it. The IEP team did not discuss the report, in fact, until the team met on October 5, 2004, a month after Student began school at Mentone. Student was already attending Mentone by the time of this September 10 meeting, assigned to Judy Foss' general education first grade class. Since the team held the IEP at Mentone, the teachers who attended the meeting (Ms. Foss and RSP teacher Chris Himes) taught at Mentone. The District did not invite either Ms. Isaak, Student's Kindergarten teacher, or Ms. Woods, student's first grade teacher for the eight weeks he spent at Crafton, to this or any future IEP meeting. Nor did the team consult either teacher before Student transferred to Mentone. The IEP team therefore had no input from the only two District teachers who had taught or worked with Student. Both teachers testified at hearing that they believed that their SDC classes had been appropriate for Student and that he had made, or was making progress in them. Both teachers testified that they felt Student should have continued in an SDC.

62. The failure of the District to hold an IEP meeting prior to moving Student to Mentone, the acquiescence of Student's parents notwithstanding, resulted in a significant loss of educational benefit to Student. He began the school year at Mentone without an IEP that addressed any aspect of his placement there, including the type of RSP services he should receive and the amount of time he was to spend in RSP as well as the type and frequency of any related services Student should receive. Nor did Student have goals and objectives that related to the new placement. The IEP team did not produce a full IEP,

including goals and objectives, until October 18, 2004, more than a month and a half after Student began school at Mentone. In addition, had the IEP team held a meeting prior to transferring Student to Mentone, it is likely either one or both of his SDC teachers would have attended the meeting and would have been able to give their opinions regarding their observations of Student and their beliefs as to what his continuing needs were. Student was therefore denied educational benefit, resulting in the denial of a FAPE to him, due to the District's failure to hold an IEP before effecting Student's transfer.²⁰

63. Additionally, Student's parents were deprived of their ability to participate in the IEP process due to the District's failure to hold an IEP meeting before his transfer. Solely the District, without parental input, determined Student's new program, including the class into which he was placed and the education he received prior to October 18, 2004.

64. The weight of the evidence, therefore, supports Student's contention that the District's failure to hold an IEP meeting before making such a major placement change was not harmless error, and that he is entitled to a finding that he was denied a FAPE by the District's failure to follow the procedural requirements of the IDEA.

FAILURE TO DEVELOP AN APPROPRIATE BEHAVIOR SUPPORT PLAN AND/OR BEHAVIOR INTERVENTION PLAN

2003 – 2005 School Year

65. When a Student's behavior impedes his learning or that of others, a school district is required to consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. The IEP team itself can develop a behavior

²⁰ Additionally, as will be discussed below, Student had escalating difficulties in this placement, some of which he may have avoided had an IEP team met and developed an IEP for him prior to his transfer to Mentone.

support plan (BSP) to address minor behavior issues that a student's teacher or other educational providers can implement in the classroom. However, when a child exhibits a serious behavior problem – defined as behaviors that are harmful to the child, to others, or to property – that significantly interferes with the implementation of the goals and objectives of his or her IEP, a district must develop a formal behavior intervention plan (BIP), which becomes part of the child's IEP. A BIP may only be developed after a District has administered a functional analysis assessment (FAA) to the child. An FAA is justified when the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment. The failure to perform an FAA when one is warranted is a procedural denial of a FAPE. As stated above, a procedural denial of a FAPE is actionable if it deprived Student's parents of the opportunity to participate in an IEP, or deprived Student of an educational opportunity.

66. Student contends that the District failed to develop an appropriate BSP and that the District should have administered an FAA to him due to Student's escalating inappropriate behaviors and that those behaviors warranted the development of a BIP. The District contends that the BSP it developed and implemented sufficiently addressed Student's behavioral needs.

67. Student began exhibiting behavioral issues at home in the summer of 2004, while he was still attending Ms. Wood's first grade class at Crafton. In a letter to Principal Kloepfer, Student's mother disagreed with the comments to the August 23, 2004 IEP that stated that Student liked school. She pointed out that Student often returned home from school crying because no one wanted to play with him. On a couple of occasions, Student had hid from his mother in an attempt to avoid going to school. However, there is no evidence that Student's behavior while at Crafton interfered with his education.

68. Based upon the concerns of Student's mother that Student had difficulty transitioning to school, and had a tendency to wander off, the IEP team was concerned

about Student's ability autonomously to get off the bus and go to class. Therefore, the IEP of September 10, 2004, provides that an aide would walk Student from the school bus to his classroom.

69. Student began exhibiting behavior problems soon after his transfer to Mentone. Judy Foss, Student's general education first grade teacher at Mentone, testified that Student's attention span was perhaps five minutes and that once his attention was lost, it was hard to regain. Student would often leave his seat and wander around the class, or, if he appeared to be under stress, climb under tables or chairs. Ms. Foss, who had never taught a child on the autism spectrum and who did not have any training in special education or in teaching children on the spectrum, was at a loss as to how to respond to Student's behavior, particularly when he hid under tables or chairs. Ms. Foss would either leave Student where he was or crawl under the table with him in an effort to cajole him back into his chair.

70. At the IEP meeting on October 5, 2004, school psychologist Ms. Vaughn reviewed her assessment with the IEP team. Her assessment noted that Student displayed high levels of distractibility in the classroom and difficulties with social cuing. Additionally, Ms. Foss discussed Student's classroom behavior, informing the team of Student's propensity for wandering around the classroom and hiding under classroom furniture. The IEP team did not discuss either developing goals to address Student's behavior or implementing a behavior support plan.

71. Student also continued to demonstrate difficulties socializing with his peers and continued to perseverate on issues. Janet Rabinowitz, a District speech and language pathologist (SLP), administered an assessment to Student, part of which took place after Student transferred to Ms. Foss' class. During her observations of Student, Ms. Rabinowitz noted that Student avoided interacting with classmates, insisting on eating with his teacher and refusing to drop the subject even after Ms. Foss told him that she was unavailable to

have lunch with him.

72. OT Gayle Wray also observed Student hiding under the desk when she went to get him from his classroom for his OT assessment. At the IEP team meeting held October 2004, Ms. Wray expressed to the IEP team her concerns that this type of behavior might pose a safety issue for Student. At this same meeting, Ms. Foss noted that Student had gone two weeks without hiding under any furniture, but that his attention span would last only five minutes. At hearing, Ms. Foss testified that Student engaged in what she considered "unusual" behaviors, such as walking on his toes, making strange sounds, failing to make eye contact as well as the previous described behaviors of hiding under furniture and wandering away.

73. Chris Himes was Student's RSP teacher. He also testified that Student's attention span was only about five minutes.

74. At the IEP meeting held on October 18, 2004, the team discussed Student's behavior issues and difficulties with paying attention in class. Student's mother told the team that Student's inattention meant that he was not completing assignments during the school day and, therefore, she was spending two or three hours an evening with Student helping him complete both school work and homework. Student's mother and his advocate, Ms. Newlin, informed the team that Student was not eating at school or using the bathroom because of his socialization deficits. Because of all these issues: Student's inattentiveness, his refusal to eat at school or use the bathroom, his wandering off, his hiding under furniture, and his failure to complete work in school, Student's parents requested that a one-to-one aide be provided to Student and/or a plan be developed to address the behaviors.

75. Neither Ms. Vaughn nor Mr. Himes, who both attended the October 18 IEP meeting, were concerned about Student's behaviors at the time. Both cautioned the IEP team not to over-emphasize Student's inappropriate behaviors. Mr. Himes warned the

team that they should “pick their battles” with Student and that they needed to “respect the Asperger’s.” In sum, Mr. Himes believed that since Student had good days and bad days, Student’s teachers should concentrate on Student’s good days and not pressure Student to perform on his bad days. However, the IEP team did request that a behavior specialist become involved to address Student’s social skill needs and to address his safety issues; Student’s parents believed that Student’s safety issues were paramount.

76. Although the District did not immediately respond to the request of Student’s parents for a one-to-one aide, the District, through Director of Pupil Services Cheryl Sjostrom, did arrange for a behavioral specialist to begin assessing Student’s need for a behavior plan shortly after the October 18 IEP meeting. The SELPA assigned Colleen Meland, a SELPA program specialist, to assess Student’s behavioral needs.²¹

77. Ms. Meland sent questionnaires to members of Student’s IEP team or telephoned them in order to gain information from them concerning Student’s behaviors. She also conducted her own observation of Student.

78. In response to the questionnaire, first grade teacher Ms. Foss reiterated what she had previously told the IEP team: Student could not pay attention for more than about five minutes, was often off-task, and disliked participating in non-preferred activities. Ms. Foss stated that she was unable to provide Student with the one-on-one attention he needed once he went off-task. Significantly, Ms. Foss told Ms. Meland that Student’s

²¹ Ms. Meland has a master’s degree in education, with an emphasis in special education, from Claremont College. She has a variety of special education teaching credentials. Her emphasis over the years has been on working with children who have Asperger’s Disorder, and she has had a significant amount of training in autism spectrum disorders. Ms. Meland also has considerable training in the area of behavior management, and has received training as a behavior intervention case manager (BICM).

behavior of climbing under and on top of furniture caused her to have concerns that Student would be injured if something fell on top of him.

79. Student's reading teacher for the Reading Recovery program, Mrs. McHarg, concurred that Student could only stay on task for five minutes. SLP Janet Rabinowitz stated that Student was concentrating for up to 10 minutes during his speech and language sessions with her, but only if Student enjoyed the task on which they were working. Ms. Rabinowitz further noted that Student was highly distractible and that his attention to task came and went. Ms. Rabinowitz stated that her primary concerns were with Student's lack of attention and self-control as well as with his inability to empathize with others.

80. Student's behaviors continued to increase during the time Ms. Meland was gathering information for her assessment of Student's behaviors. Her initial report notes that Student had sometimes hidden himself so well in Ms. Foss' classroom that Ms. Foss lost sight of him for a while. Ms. Foss had expressed concerns that Student could injure himself while he was out of her sight. Even more significantly, as noted in Ms. Meland's initial report, Student had begun to elope. On at least two occasions, Student had left the classroom unbeknownst to Ms. Foss and gone to the school office. On another occasion, he had left his classroom without Ms. Foss' knowledge and gone to another teacher's class. On yet another occasion, Student did not leave with Ms. Foss and the rest of his classmates to attend an assembly, remaining instead alone in his classroom. Ms. Foss did not realize that Student had remained behind until she and the class returned.

81. Ms. Meland wrote two reports concerning her observations of Student and the information she had received from his educational providers, teachers, and mother. Ms. Meland concluded that Student had specialized needs that had to be addressed if he was going to be successful in a mainstreamed placement. She also stated that Ms. Foss would benefit from receiving support in order to address Student's specialized needs.

82. Student's parents were not informed about all the incidents in which Student had left his class until some days after the incidents. Concerned that Student's safety was at risk, particularly because Mentone did not have a fence around the campus and was bordered by busy streets, Student's parents removed him from school on or around early November 2004. In a letter to Ms. Sjostrom on that date, Student's mother informed her that Student would not return to school until a plan was in place and an aide provided to address his safety issues. In an email to Ms. Sjostrom on November 15, 2004, Ms. Meland agreed with the concerns expressed by Student's mother, stating that she too believed that Student needed an aide in order to stay on task and to monitor his movements so that he did not wander away.

83. Based upon her observations of Student and the input from his educational providers and mother, Ms. Meland prepared a proposed BSP to address Student's behaviors. She presented the BSP to the IEP team at the IEP meeting held December 6, 2004. Ms. Meland did not collect any formal data regarding Student in preparing the BSP.

84. The BSP noted that Student's behaviors, which impeded his learning, were withdrawal from participation in class activities by going under furniture, leaving the classroom, or leaving the area of school in which Student was supposed to be. The BSP noted that these behaviors disrupted Student's learning process and put him at risk of possible injury if he were to wander off campus. The BSP indicates that the need for a BSP was "serious." Although Ms. Meland had only observed Student briefly, she indicated that the predictors for his behavior were environmental conditions that were stressful for Student, such as when he became over-stimulated by noise or activity around him, changes in Student's routine, and warm temperatures over 90 degrees. The BSP hypothesized that Student engaged in the behaviors due to a desire to escape, because of avoidance and anxiety, to withdraw, because of impulsivity, to be distractive, or to be manipulative.

85. The primary mechanisms that the BSP devised for addressing Student's behaviors was for Student to be given advance notice of upcoming changes in his schedule, and that he be given a place to go to if he was feeling uncomfortably over-stimulated, or was feeling sensitive to temperature conditions. Although Student had a significant speech deficit, the BSP proposed that he would have responsibility for verbally communicating to adults what was bothering him. The BSP states that an appropriate way was to be found for Student to communicate to supervising adults his need to remove himself from discomfort or stressful situations. However, the BSP does not delineate who was going to have responsibility for determining the method of teaching Student to communicate his needs or what would happen if Student were unable to be taught to verbalize those needs. In effect, the BSP places on Student, a child who was withdrawn, and had socialization and communication problems due to Asperger's Disorder and speech deficits, the responsibility for knowing when he was overburdened and communicating those needs to the adults supervising him.

86. Additionally, the BSP proposed responding to Student's avoidance behaviors by suggesting that he engage in more forms of avoidance by removing himself from the stressful environment rather than trying to focus on ways to teach Student to cope with his environment.

87. As stated above, Student's parents did not approve the December 6, 2004 IEP. Student remained at home until January 2005. His parents returned him to school after the District agreed to provide him with a one-on-one aide. Although Student's parents had not approved the IEP, and therefore had not approved the BSP, the District decided unilaterally to implement the BSP.

88. Student's aide, Tamara,²² did not have any behavioral training or training in

²²Tamara did not testify at the hearing.

working with autistic children. She, therefore, was not very effective in addressing Student's behaviors, although she demonstrated her desire to learn to do so by attending a training given by Ms. Meland. Even with Tamara's assistance, Student continued to engage in inappropriate behaviors. Tamara wrote notes almost daily to Student's mother with her observations of Student's behavior. Tamara noted that Student had many "bad days." There were many times when Student was unable to concentrate in one of his classes and was unpredictable with his behavior, had difficulty focusing, and continued to wander away impulsively. Tamara noted that Student's inappropriate behaviors were most notable when he was attending his Fast Forward reading program. Notably, Tamara was not specifically trained to implement the directives of the BSP.

89. The IEP team met again on March 9, 2005; Student's parents approved the IEP at that time. Although the team made plans to meet with Ms. Meland on March 28 to discuss Student's classroom needs, the only person other than Ms. Meland who attended the meeting was Tamara, who was not even an IEP team member.

90. In an email to Ms. Sjostrom on May 2, 2005, Ms. Meland confirmed that Tamara had most of the responsibility for monitoring and addressing Student's behaviors, including the implementation of an awards system with Student. Ms. Meland noted that Student consistently resisted getting on the school bus, which transported him to another school to receive his Fast Forward reading instruction program. Once Student did get on the bus and arrived at the other school, he often attempted to hide under the bus seat and then resisted getting off the bus. School personnel would then have to call Student's mother so that she could address the situation herself and convince Student to leave the bus.

91. For the remainder of the 2004 – 2005 SY, Student continued to display inappropriate behaviors and demonstrate a general and pervasive unhappiness in the school setting. He consistently was inattentive both at Fast Forward and in his general

education classrooms. He would shut down and refuse to participate in the classes, and would sometimes cry in class. He consistently refused to go to Fast Forward. During classroom instruction, Student would often withdraw into himself, put his head on his desk, and refuse to participate in the class or respond to the teacher. He would become uncooperative and non-responsive. In spite of the assistance of his aide, Student continued to try to wander off. Student's behaviors were so uncontrolled that in late May 2005 he had an episode where he curled up in a ball on the floor during class. One of his general education teachers²³ picked him up and placed him with the rest of the class, even though Student's BSP did not address using this type of physical response to his behaviors, and even though his teacher was not trained in using physical responses to student inappropriate behaviors.

92. District staff instituted a reward system to address Student's behavior although it was not specified in his BSP. No training was provided to either Student's teachers or aide in how to implement such a system and no data was collected in an attempt to determine the antecedents of Student's behavior. While Tamara, Student's aide, religiously wrote notes to Student's mother detailing his good days and his bad days, she was not trained to address the behaviors and therefore could do nothing to assist Student in learning to replace his inappropriate behaviors with appropriate ones. Ms. Foss also was a caring and devoted teacher. However, she was not trained to teach autistic children and was never given any guidance on how to deal with Student's behaviors, behaviors that she had never seen previously in any of the children in her classrooms. Ms. Foss was simply not equipped to address the complexity of Student's behaviors and the District' BSP did little to assist her.

93. Three experts who testified at hearing gave opinions regarding Student's

²³Ms. Foss was team teaching with another teacher, Ms. Jones.

BSP: Student's experts Dr. Betty Jo Freeman and Bob Chen, and District expert Dr. Bryna Siegel.

94. Dr. Freeman is a professor emeritus of medical psychology at the University of California, Los Angeles (UCLA). She received her doctorate degree from Southern Illinois University in 1969. Dr. Freeman has taught at UCLA since 1973. Her education and training emphasize the treatment of autistic children. She has presented numerous lectures and papers on the subject of autism and has published on the subject since 1969. Dr. Freeman has been licensed in California as a psychologist since 1976. In addition to many other honors, Dr. Freeman received an award as Professional of the Year from the California Autism Society in 1996. She has worked or consulted with numerous school districts in California. Dr. Freeman assessed Student in January 2007.

95. In reviewing the District's BSP for Student for the 2004 – 2005 SY, Dr. Freeman noted that the District attempted to write a BSP but that she felt the BSP evidenced a total lack of understanding of autism. Dr. Freeman felt that the District educators, such as first grade teacher Ms. Foss, were well meaning, and requested help at the IEP meetings, but that the District failed to respond appropriately. Dr. Freeman testified that Student's inappropriate behaviors, which increased over time, required a behavior assessment in order to determine the antecedents of the behavior and determine appropriate methods of addressing and redirecting the behaviors.

96. Dr. Freeman testified that the major deficiency in the BSP (as well as in Student's behavioral goals) was that it required Student to learn to manage his stress, self-regulate, and communicate his needs to the adults around him, but did not establish any method or program to teach Student how to do those things. Dr. Freeman stated that Student's behavioral issues required a more formal assessment (such as an FAA) of Student based upon multiple observations of him in his classroom, with his peers, and in other school environments, particularly since Student related better to adults than to his own

peers. Additionally, Dr. Freeman found the BSP to be insufficient because it did not require data collection of Student's behaviors and responses to interventions to his behaviors. She stated that without collecting data, the District could not know if Student was meeting his behavioral goals or if the behavior interventions were effective, needed to be revised, or needed to be replaced.

97. Dr. Freeman referenced several other deficiencies of the BSP. She noted that the BSP did not define alternate behaviors that the District staff would teach to Student and did not address what staff would do once Student informed them that he was under stress. She noted that Student did not have any alternative behaviors because he had not been taught any. Significantly, the BSP failed to focus on the reinforcement of Student's positive behaviors; instead, the BSP directed staff to wait until an inappropriate behavior occurred but then failed sufficiently to address how staff was supposed to respond to the inappropriate behavior. Further, without data collected, the District could not know when, where or why Student's behaviors were occurring and, therefore, could not properly address them.

98. The testimony of Dr. Freeman is highly credible and is deserving of significant weight. Dr. Freeman is an expert in the field of autism spectrum disorders, including their evaluation, diagnosis, and treatment. She spent considerable time assessing Student and reviewing numerous documents related to Student's education and health. Dr. Freeman works neither for a school district nor as a private therapist. She, therefore, does not have any particular bias against or for school districts. She was forthright in her testimony and did not appear to be responding to questions in an evasive manner.

99. Student's expert Bob Chen agreed with Dr. Freeman's critique of the District's BSP. Mr. Chen is the Executive Director of the Center for Behavior Research and Education (CBRE), a NPA that conducts behavior assessments of children and provides them with ABA therapy. He has a master's degree in marriage and family counseling from California State

University, Los Angeles. Mr. Chen assessed Student in July 2007.

100. Like Dr. Freeman, Mr. Chen felt that the District should have developed a BIP for Student after conducting a behavior assessment, rather than attempting to implement an informal BSP without collection of data based upon observations of Student's behavior across environments. Mr. Chen reiterated Dr. Freeman's observation that the lack of data collection before the District proposed a behavior plan resulted in a lack of understanding of when, why and how Student's inappropriate behaviors were occurring. Mr. Chen also believed that the BSP was deficient because it failed to include any descriptions of the antecedents to Student's inappropriate behaviors, which contributed to the lack of understanding of when and why the behaviors were occurring.

101. With regard to the interventions the BSP proposed, Mr. Chen, like Dr. Freeman, believed that they were not significant or encompassing enough. The interventions did not sufficiently address Student's inappropriate behaviors because the BSP did not focus on the function of the behaviors. Mr. Chen, like Dr. Freeman, emphasized that both the BSP and the behavior goals the team developed for Student during this school year merely replaced one type of avoidance behavior with others, such as encouraging Student to leave an activity or an area when he felt he was under stress.

102. Mr. Chen stated that a more appropriate behavior plan would suggest curriculum modifications and/or accommodations aimed at ensuring Student's success in school. This would require first doing a task analysis, breaking down the components of Student's tasks and school, then focusing on each task separately so that Student could learn to be successful a component at a time. The focus would be first on simple tasks, with the teachers building to tasks that are more complex once Student began to demonstrate success and independence.

103. Mr. Chen also gave credible testimony. Unlike the District, Mr. Chen administered a full FAA to Student. He is experienced in assessing behavior problems in

children, developing behavior plans, and in providing behavior therapy. Although Mr. Chen may have had a financial incentive to give biased testimony in Student's behavior, this was balanced by his need to maintain relationships with the District since his company is a NPA used by school districts and since he wished to maintain the past relationship he had already established with this District. Therefore, the ALJ credited Mr. Chen's opinions regarding the deficiencies of Student's BSPs.

104. Significantly, District expert Dr. Bryna Siegel substantially corroborated the deficits in Student's BSP identified by Dr. Freeman and Mr. Chen. Dr. Siegel is currently the Director of the autism clinic at the University of California, San Francisco's Langley Porter clinic. She is also an adjunct professor of psychiatry at that university. She earned her doctorate degree in child development from Stanford University and spent four years doing post-doctorate research in the area of autism. Dr. Siegel has assessed thousands of children for autism spectrum disorders and has published several books and numerous articles in peer-reviewed journals in the field. Dr. Siegel also is a credentialed teacher and has a master's degree in education. She did not assess Student.²⁴ However, she reviewed many of his records.

105. Dr. Siegel agreed with Dr. Freeman and Mr. Chen that data needed to be collected in order to prepare any type of behavior plan for a child. She agreed that the District staff did not collect data prior to developing its BSP for Student. Dr. Siegel testified that the District should have had a baseline of information with regard to Student's inappropriate behaviors. For example, the District should have collected data on the number of times Student crawled under furniture. The District should have noted the time

²⁴Dr. Siegel testified that she did not feel it necessary to assess Student but would have liked to observe him. It appears from the evidence that Student's parents did not permit her to conduct the observation.

the behavior occurred and recorded the incident. Dr. Siegel stated that it was important to try to develop a hypothesis for what the antecedents were to Student's inappropriate behaviors, observing what was happening right before Student engaged in the behavior. The District did not do so before it developed Student's BSPs. Dr. Siegel also stated that it might have been appropriate to collect data regarding Student's behaviors at home to determine if inappropriate behaviors there were carrying over to the school environment. Student was often engaging in behaviors that were undesirable or noncompliant. Dr. Siegel stated that the District needed to know something about the family's ecology so that the District's BSP and response to Student's behaviors would have consistent limits that it and Student's parents could implement across both settings. Dr. Siegel agreed with Mr. Chen that Student's parents needed behavior training so that they could be consistent with the behavior interventions that the District was, or should have been, implementing.

106. District witnesses, particularly Ms. Meland, sincerely believed that they had put considerable effort into developing and implementing a behavior plan for Student, including providing him with a one-to-one aide. Ms. Meland was a very credible witness. She was professional and sincere. It is apparent that she works hard and puts extraordinary effort into her work with students in the SELPA, beyond the basic requirements of her position. However, Ms. Meland's lack of experience preparing BSPs and the extent and intricacies of Student's needs prevented her from developing an adequate BSP for Student. The evidence supports Student's contention that his inappropriate behaviors began almost as soon as he began attending Mentone, that they escalated during the school year, and that they did not respond to the District's BSP. The evidence also demonstrates that the aide provided to Student was not trained to address his inappropriate behaviors. It is apparent from reading the notes written by Tamara that she was involved with Student and was empathetic to his needs. However, a reading of those notes also indicates that the only function Tamara served was to prevent Student from wandering away and potentially

hurting himself. She simply was not trained to implement any behavioral interventions needed by Student.

107. The parties do not dispute that Student had behaviors that impeded his learning. For that reason, the District developed the BSP for Student during the 2004 – 2005 SY. However, the evidence demonstrates that Student’s behaviors did not decrease during the 2004 – 2005 SY. The evidence, in fact, indicates that Student’s behaviors escalated. As noted above, an incident occurred during the last month of the school year in which Student was under so much stress that he curled up in a ball position on the floor of his classroom and would not voluntarily get up. His teacher physically had to move him, still curled up in a ball, to a safer place. As stated above, a district is supposed to conduct a FAA and develop a BIP when a child exhibits serious behaviors that are self-injurious and which interfere with the implementation of his goals and objectives, and thus interfere with his ability to benefit from his education. Student’s behaviors did not decrease in response to the District’s BSP, indicating that the instructional and behavioral approaches in Student’s BSP and goals were ineffective. As will be discussed below, there is overwhelming evidence that Student was substantially unable to access his education and failed to progress in the curriculum during this year, despite the fact that he possesses the cognitive capability to have been able to do so. The weight of the evidence therefore supports Student’s contention that the BSP was deficient and that the District should have conducted an FAA and developed a corresponding BIP to address Student’s behavior needs. The failure to conduct an FAA, and develop a BIP, constituted a procedural violation, which amounted to a substantive denial of FAPE because the failure deprived Student of educational benefit and impeded his right to a FAPE.

2005 – 2006 School Year

108. The District placed Student in the general education second grade class taught by Jodi Jeffers at Mentone for the 2005 – 2006 school year. The District provided

Student with an aide. Student's parents had requested that the District pay for the Southern California Diagnostic Center (Center) to assess Student. After some months of delay, the District agreed. However, the assessment had not yet occurred as of August 29, 2005, the date on which the IEP team held a follow up to Student's annual IEP meeting. The District IEP team members did not discuss or develop a new BSP, or suggest conducting a FAA for Student, although Student's parents and advocate requested that the District conduct one. Second grade teacher Ms. Jeffers did not have any prior training or experience with children on the autism spectrum and did not have any training in behavior management or intervention.

109. The Center assessed Student in the middle of September 2005. As part of the assessment, school psychologist Nancy Gronroos, who worked for the Center, conducted an observation of Student in his classroom and interviewed Ms. Jeffers. Ms. Gronroos discussed issues touching upon Student's diagnosis of Asperger's Disorder with Ms. Jeffers and asked Ms. Jeffers to give her periodic updates regarding Student's behaviors in class.

110. The evidence indicates that Student's behaviors overwhelmed Ms. Jeffers and that she was not equipped to address them. Soon after meeting with Ms. Gronroos, Ms. Jeffers wrote her a note remarking that Student had had a series of what she termed "Asperger's days," that having Student in her class was a "cruel Asperger's awakening" and that the "honeymoon" was over. Ms. Jeffers also kept a behavior calendar posted on the wall for the students in her class. Whenever Student engaged in behavior that was inappropriate, defiant, or volitional, Ms. Jeffers described it as an "Asperger's Day" and she wrote that on Student's behavior calendar. The calendar was visible to all students in the class and to anyone who entered the room.

111. Ms. Jeffers was not able appropriately to respond to Student's behaviors. She testified that she occasionally physically restrained him from moving to a place that he should not, and she refused to permit Student to attend field trips with her class unless

one of Student's parents accompanied him because of her inability to manage his behaviors. Student's behaviors escalated during his tenure in Ms. Jeffers' class; the evidence indicates that he occasionally became physically aggressive in class, kicking out at his teacher or aide, something he had not done previously. Student continued to crawl under furniture in class, often grabbing onto the furniture so that he could not be removed from underneath it. The District did not conduct an FAA to address this behavior and did not develop any plan or training for Student's teacher or aide to teach them how to respond to the behaviors and how properly to remove Student from areas that posed a danger to him. Ms. Meland testified that she did not believe Ms. Jeffers' class was an appropriate placement for Student given Ms. Jeffers' lack of understanding of Student's issues and inability to cope with them.

112. Ms. Jeffers herself testified that the December 6, 2004 BSP, which was the only behavior plan in effect during the 2005 – 2006 SY, was not helpful to her and did not address all of Student's inappropriate behaviors. In response, rather than requesting that the IEP team meet to revise the BSP, Ms. Jeffers simply began implementing her own strategies to respond to Student's behaviors, such as giving him a "time out." The strategies, which may have been appropriate for a child who did not have Student's needs, did not succeed with Student.

113. In November 2005, the Center convened a meeting to discuss the results of its assessment of Student. It invited Student's teacher, aide, and other District personnel to the meeting, along with Student's parents. The only District staff member who attended was Mentone Principal O'Neill.

114. With regard to behavior management, the Center observed that Student responded well to clear, firm directions, structure, accommodations to his sensory needs, and to positive reinforcement. The Center noted however, that Student often would become impulsive, distractible, and oppositional. At such times, he would not respond to

positive reinforcement. The Center determined that the primary cause of Student's behaviors was neurological rather than volitional; therefore, his behaviors were not amenable to usual behavior interventions. Thus, reasoning with Student and insisting on compliance were not helpful. Nor was mild punishment such as response cost,²⁵ threats of consequences, or scolding. Instead, these types of responses would merely serve to escalate Student's behaviors rather than help him gain control.

115. The Center recommended various strategies for responding to and redirecting Student's behaviors. It recommended that staff working with Student take a supportive stance, working with Student to determine what could help him when he was having a hard time. The Center suggested that staff avoid escalating the problem by requiring conformity from Student, or by talking about his behavior or consequences of it. It also stated that it would be appropriate to take Student to a quiet place where staff could wait out his resistance. The Center recommended that school staff receive training in nonviolent crisis intervention techniques for preventing and deescalating crises. It further recommended that school staff try offering food and other sensory input that were calming to Student, but that staff should discontinue this type of input if Student resisted it. The Center recommended against the use of computer or video games to help calm Student, but did recommend offering other preferred activities to him, such as reading or other short, preferred tasks, once Student started calming down. The Center recommended that a reinforcement/reward system be implemented for Student, and that he be reminded that he would still have time to earn rewards after he calmed his behaviors and returned to class. Finally, the Center recommended that after a behavior episode, staff initially offer low

²⁵A response cost system generally uses tokens or some preferred item, like cookies, which a child earns when he engages in correct behavior and loses when he behaves in inappropriate behavior.

challenging tasks to Student until he appeared to be ready to concentrate on tasks that required more concentration.

116. The District IEP team never convened a meeting to discuss the Center's assessment and report, and never discussed it at any subsequent IEP team meeting. At hearing, the District did not explain its failure to do so.

117. Student's inappropriate behaviors increased throughout the first semester of the 2005 – 2006 SY, as did his stress. He began biting his nails through his finger beds, drawing blood, and began experiencing bouts of diarrhea. Student's seizures, which his physicians had controlled for about five years, returned. Student's mother wrote to Ms. Sjostrom in November 2005, expressing her concern that Student's behaviors were escalating but that the District was not addressing them through an appropriate behavior plan. Student's mother again requested an FAA.

118. On December 2, 2005, Student's treating neurologist, Dr. Shu, wrote a prescription placing Student on home hospital instruction²⁶ for the remainder of the school trimester due to Student's stress and the inappropriate behaviors he was exhibiting in response to it. On February 23, 2006, Dr. Shu updated his prescription and directed that Student be placed on home hospital instruction for the remainder of the school year. Student did not return to Mentone, and has not attended a District school since that time.

²⁶The term "home hospital instruction" refers to a type of home study program for students whose medical conditions preclude their attendance in a regular school setting. The program must be recommended by the student's IEP team (Cal. Code Regs., tit. 5, § 3051.4, subd. (a)) based upon a medical report from the student's physician or other appropriate medical practitioner. The report must certify that the severity of the student's condition prevents the student from attending school in a less restrictive placement. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

119. The IEP team convened a meeting on December 8, 2005, in order to implement a home hospital program for Student. Ms. Meland presented a revised BSP that she intended for implementation at school.²⁷ Since Student did not return to school, the District never employed the BSP.

120. Student's behaviors escalated during the time he attended Mentone for the first semester of the 2005 – 2006 SY. The District implemented the same BSP that was ineffective the previous school year, did not conduct an FAA, even in response to the request of Student's parents, and did not respond to Student's escalating stress and behaviors by revising his BSP until Student's physician directed that Student transfer to a home hospital program. Most notably, the District did not attempt to implement the recommendations of the Center, which had done an extensive behavior assessment of Student.²⁸ Student demonstrated very little progress toward accessing the curriculum during second grade, much as he had the previous year. His failure to progress is attributable in substantial part to the District's failure to address Student's inappropriate behaviors so that he could benefit from his education. Student has met his burden of proof that the BSP the District implemented for Student for the 2005 – 2006 SY was inadequate and that the District should have conducted an FAA for Student and developed a corresponding BIP. The District's failure to do so denied Student a FAPE.

2006 – 2007 School Year and ESY

121. As will be more fully discussed below, Student's IEP team placed him at a

²⁷ Dr. Freeman and Mr. Chen both noted that the revised BSP also failed to address Student's behavioral needs and failed to incorporate the recommendations of the Center.

²⁸ Dr. Freeman testified that the recommendations of the Center appropriately addressed Student's behavior needs and that the District should have implemented them.

NPS for the 2006 – 2007 SY. At the June 30, 2006 IEP team meeting, Student’s annual IEP meeting to determine placement for the upcoming school year, the team suspended implementation of Student’s BSP pending completion of the ABA assessment the NPS was conducting. The team indicated on the IEP document that Student did not require either a behavior management plan or a behavior intervention plan.

122. The team held an addendum IEP meeting on August 8, 2006. By this time, Big Springs, the NPS, had completed its ABA assessment of Student. Based upon the results of the assessment, Big Springs determined that Student’s inappropriate behaviors made him ineligible to attend class at Big Springs. The District IEP team therefore recommended that Student primarily continue receiving services at home. The program the District offered consisted of 25 hours a week of in-home ABA services, five 50-minute per week sessions of “educational therapy” at Big Springs to address Student’s academic needs, and 50 minutes each per week of vision therapy, occupational therapy, and speech and language therapy, also to be provided at the Big Springs campus. Student’s parents ultimately accepted this IEP offer at Student’s October 4, 2006 IEP meeting.²⁹ Despite Big Springs’ determination that Student’s maladaptive behaviors prevented the school from enrolling him in one of its classrooms, the IEP team neither re-implemented Student’s previous BSP nor proposed developing a new one.

123. At an addendum meeting to Student’s annual IEP meeting, which the IEP team held on June 22, 2007, Student’s mother informed the District that Student’s behaviors were worsening. Student’s mother expressed her concern that the ABA program Big Springs was providing to Student was inadequate and was not addressing his needs. Student’s mother requested that the District contract with a different ABA provider and transition Student back to the classroom. The District did not propose either implementing

²⁹The October 4, 2006 IEP was the IEP still operative as of the hearing in this matter.

Student's previous BSP, conducting an FAA, or implementing any other type of behavior interventions for Student.

124. The IEP team reconvened on July 6, 2007. Student's mother testified at hearing that between the date of the previous IEP on June 22, 2007, and the reconvened IEP meeting, Student's parents had to hospitalize him twice because of Student's escalating aggression toward his younger sister and other maladaptive behaviors at home. Mr. Chen attended this IEP meeting and reviewed his FAA of Student, along with his recommendation for behavioral services for Student. The District declined to consider Mr. Chen's recommendations at the time because it was in the midst of conducting its triennial assessment of Student. The District did not propose to implement any behavior plan or other behavior interventions for Student at this time.

125. Dr. Freeman, Dr. Siegel, and Mr. Chen all testified that Student required a behavior plan and behavior interventions during the 2006 – 2007 SY. The District provided none. Rather than conducting a FAA when Big Springs informed the IEP team that Student's behaviors made him ineligible to attend class there, the District merely offered less than five hours per week of "educational therapy" for Student to replace placement in a classroom. The District offered no evidence at hearing that responding to maladaptive behavior by removing a Student from any sort of classroom placement was appropriate. Big Springs' finding that Student's behavior were so extreme that he could not attend class at its NPS should have been a red flag for the District to either address the behaviors head on, or to find an appropriate placement for Student. The District's inability or refusal to address Student's inappropriate behaviors resulted in a direct loss to him of classroom participation at Big Springs and a corresponding loss of educational benefit to him. Student has met his burden of proof that the District's failure to conduct an FAA and otherwise to address his behaviors during the 2006 – 2007 SY denied Student a FAPE.³⁰

³⁰The District should also have addressed Student's behaviors at home. The majority

FAILURE TO OFFER AND/OR PROVIDE AN APPROPRIATE EDUCATIONAL PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT, AND FAILURE TO PROVIDE APPROPRIATE RELATED SERVICES

2003 – 2004 School Year

126. A school district provides a FAPE to a student if it designed its program or placement to address the student's unique educational needs and if the program was reasonably calculated to provide some educational benefit in the least restrictive environment. The law mandates that a child with disabilities be educated to the extent appropriate with his or her non-disabled peers. A school district is also required to provide a student with special needs a program, including support services, designed to address the child's unique needs. If the school district's program met the substantive factors, then it provided a FAPE. The district's program must provide some educational benefit; it need not maximize the student's potential. Finally, an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight.

127. Student contends that the District only offered him placement in a District special day class (SDC) without considering whether Student could be educated in a general education classroom with supports. Student also contends that the speech and language services provided to Student during the 2003 – 2004 SY were inadequate. The District maintains that the SDC was the least restrictive environment for Student and that

of the educational program the District provided to Student during the 2006 – 2007 SY was delivered there. Indeed, by the June 22, 2007 IEP meeting, Big Springs had decreased the services it provided to Student outside his home. Since the home program was such an integral part of Student's educational program, his inappropriate behaviors at home interfered with the ABA services provided by Big Springs, and therefore interfered with Student's access to his education.

the program offered in that classroom was appropriate for Student.

128. The multidisciplinary assessment, which the District administered to Student in preparation for his triennial IEP on June 23, 2003, included interviews with Student's mother, observations of Student, and standardized testing. The results of the assessment indicate, and there is no dispute between the parties, that Student's unique needs at the time of the assessment were primarily in the areas of speech development and socialization. The assessment noted that Student demonstrated characteristics of a child with Asperger's Disorder. He was often inattentive and made careless mistakes. He would often fail to finish a task before moving on to another, or would become fixated with certain things and would engage repeatedly in the task or activity. Student's mother and the assessment team noted that Student would often behave in socially inappropriate ways and was not aware of social cues. When Student did learn appropriate manners or behaviors, he would become very rigid about them. The assessment team, and later the IEP team, including Student's mother and advocate, noted that Student had the ability to learn the skills that he needed to be happy and successful in a general education class, but that, at the time of the IEP team meeting on June 23, 2003, he still required additional help to get to that point.

129. Significantly, the multidisciplinary assessment and the June 23, 2003 IEP both note that Student's older brother, who also has a diagnosis of Asperger's Disorder, blossomed in a District SDC. Student's mother told the assessment team and the IEP team that her older son had learned to make appropriate eye contact, take turns in conversations, empathize, greet people and say goodbye appropriately, use proper voice inflection and volume when speaking, in addition to other skills, from attending the SDC of District teacher Dana Wood (who later would briefly be Student's first grade teacher). Student's mother specifically told the assessment team, and later the IEP team, that she believed that it was imperative that the Student receive from the District the intensive help

Ms. Wood had provided to her older son. Student's mother told that team that she believed that only with that intensive help in Kindergarten could Student, like his older brother, progress to a general education classroom.

130. Student also had significant speech deficits. His speech was not very intelligible. He dropped syllables, had poor modification of pitch and intonational patterns, and demonstrated both grammatical and syntactical errors when speaking.

131. The IEP team on June 23, 2003, considered all the above factors in determining both an educational program and an educational placement for Student. Student presented no evidence that the team, when it met, did not consider all options for Student's placement, or that any team member believed that a general education placement was appropriate for Student at the time of the meeting. To the contrary, the evidence indicates that all team members, including Student's mother and advocate, agreed that, at the time, a SDC was the appropriate placement for Student.

132. Ms. Isaak was the teacher for the SDC classroom at Kingsbury elementary where the IEP team placed Student. She was uniquely qualified to be Student's Kindergarten teacher. Ms. Isaak holds both a bachelor's degree and master's degree in communicative disorders. She is certified as a speech language pathologist and has a communicatively handicapped certification as well. At the time Student entered her class, she had over eight years of teaching experience, most of which had been specializing in autistic children and in children with communication disorders. Her classroom was designed specifically to meet the needs of children on the autism spectrum and for children with speech deficits and the class itself integrated socialization of the children and working with their speech deficits into the every day class structure. Because of her training and experience, Ms. Isaak was able to work on each of the 10 goals the IEP team developed for Student; the evidence shows that Student substantially met all his goals by the end of Kindergarten.

133. The IDEA requires, to the maximum extent appropriate, that children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. Four factors are evaluated and balanced to determine whether a placement is in the LRE: (1) the academic benefits of placement in a general education setting, with any supplementary paraprofessionals and services that might be appropriate; (2) the non-academic benefits of a general education placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students in the general education setting; and (4) the cost of educating the student in a mainstream environment.

134. In this case, neither the negative effects of placing Student in a general education classroom nor the cost of a general education placement is at issue. Rather, the issue is whether Student would have been able to receive academic benefit from his education in a general education classroom. The burden of proof was on Student to show that he would have been able to do so. Student failed to meet his burden in this regard. Student presented no evidence that at the time of his June 23, 2003 IEP he would have been able adequately to access his education in a general education classroom. Student had never attended a general education preschool, or any school for that matter other than specialized speech and language classes through the ECATS program. None of his witnesses specifically testified that Student's academic, social or language needs could have been met in a general education class or specified the facts that would support such a contention. To the contrary, the evidence of the IEP and the testimony of Ms. Isaak support the District's position that the SDC was the least restrictive environment for Student. He had significant social deficits and other characteristics of Asperger's Disorder that both his parents and the District thought would best be addressed in a SDC setting

where Student would receive intensive instruction from a teacher specifically trained to address those deficits. At the time, the expectation of all the IEP team members, including Student's mother and advocate, was that the intensive, more individualized education offered in the SDC would address Student's deficits and prepare him to transition to a general education classroom in the near future. The weight of the evidence therefore supports the District's contention that a District SDC class was the least restrictive environment for Student based on the IEP team's knowledge of Student at the time of the June 23, 2003 IEP meeting. Student has therefore failed to meet his burden of proof that the District denied him a FAPE when the IEP team placed him in a SDC rather than in a general education classroom.

135. Likewise, the weight of the evidence supports a finding that the SDC class, in and of itself, provided Student with an adequate amount of speech and language instruction. Ms. Isaak is a speech and language pathologist in addition to being a credentialed special education teacher. She integrated speech and language services into the day-to-day class activities; the evidence supports that she worked on all of Student's goals, including his speech and language goals, and that the speech and language goals were substantially met by the end of Student's Kindergarten year. As stated above, in order to provide a FAPE, a district's program and services must permit the child to access his education and must provide educational benefit to the child. The district's program is not required to maximize the child's potential. Although the District did not provide additional speech and language related services to Student, the program it offered met the legal standard of providing educational benefit to Student, which included a significant amount of emphasis on his speech and language needs. Therefore, Student has failed to meet his burden that the District did not provide him adequate speech and language services during the 2003 – 2004 SY.

2004 – 2005 SY

136. The IEP team initially placed Student in Ms. Wood's first grade SDC at Crafton for the 2004 – 2005 SY. Student contends that the District IEP team did not even consider placing him in a general education class at that time and that the SDC was not the least restrictive environment for him. Student lauds the recognition by school psychologist Patricia Vaughn that the SDC placement was inappropriate for Student because of his cognitive abilities, which resulted in her recommendation that Student transfer to a general education class.

137. Student only spent eight weeks in Ms. Wood's class. Crafton was on a modified year – round school schedule and classes had begun there sometime in early July 2004. Mentone, the school to which Student transferred, was on a traditional school schedule. When Student transferred there to Ms. Foss' class, he did so at the beginning of the Mentone school year. Therefore, even assuming *arguendo* that Student's placement in Ms. Wood's SDC was inappropriate, it did not deprive him of any educational benefit because he received the benefit of beginning the school year again at Mentone.

138. Student also contends that his placement in Ms. Foss' classroom was inappropriate because she lacked training in autism and /or behavioral intervention. However, Ms. Foss' lack of training is not the primary issue. Student does not contend that a regular education classroom was not an appropriate placement for him at this time. There is no requirement that the general education teacher giving the classroom instruction have special education training. Rather, the District must assure that a special education student which it places in a general education classroom receives appropriate support through accommodations, modifications to the curriculum or environment, and from school staff, so that he or she can benefit from his or her education in that placement. The student may also require behavioral support as well. As Dr. Seigel testified at hearing, it is more important that a special education student's aides have adequate

training in behavior interventions and in the needs of autistic children than it is for the teacher to have that training.

139. Student has therefore failed to meet his burden of proving that the District's decision to place him in Ms. Foss' class denied him a FAPE. Rather, as discussed above, it was the lack of an appropriate BSP and, later, an appropriate BIP, as well as the lack of training the District provided to Tamara, Student's one-to-one aide, which prevented Student from benefiting from his education in Ms. Foss' class. As discussed above, one of the factors that contributed to Student's inability to benefit from his education was the District's failure to have an appropriate BSP in place for Student during this school year. As will be discussed below, another contributing factor was the District's failure to propose adequate goals and objectives for this school year. It was these two factors, rather than inadequacies in Ms. Foss' training, which resulted in the inability of Student to benefit from his education.

140. Student also contends that the District provided him with inadequate speech and language services during the 2004 – 2005 SY. Student presented the expert testimony of Karen Schnee, a speech and language pathologist and board certified educational therapist (BCET), who assessed Student in July 2006, and July 2007. Ms. Schnee has a master's degree in special education with an emphasis on learning and reading disorders as well as a master's degree in communication disorders. Her professional experience includes many years as a speech pathologist and five years teaching a SDC class for elementary school children.

141. Ms. Schnee testified that Student had significant deficits in both expressive and receptive language and that he had difficulty verbally expressing his emotions, thoughts and ideas. Ms. Schnee's assessments of Student also revealed that he had great difficulty with pragmatics, which affected Student's ability to express himself. Ms. Schnee opined that the District failed to provide adequate speech and language services to

Student because he needed one-on-one services every day to address all of these speech and language needs rather than the small group services twice a week for 20 minutes a session, which the District offered for the 2004 – 2005 SY.

142. The District offered the testimony of Janet Rabinowitz, the speech and language pathologist who provided Student with speech and language services for approximately two years while he attended school at Mentone, in response to the testimony of Ms. Schnee. Ms. Rabinowitz is a professor at the University of Redlands and owns a company that provides speech therapy to children. She has a master's degree in communication disorders that she received in 1996. Ms. Rabinowitz has been providing speech and language services to children since that time.

143. Ms. Rabinowitz assessed Student for speech and language needs in August and September 2004. Her assessment consisted of several observations of Student, review of his records, interviews with Student's teachers, and the administration of various standardized tests.³¹ Based upon the test results, Ms. Rabinowitz determined that Student had difficulty with the articulation of certain letters, word discrimination, phonemic analysis, and word articulation. Although Ms. Rabinowitz determined that Student's conversational speech was intelligible and that his voice quality and fluency were within normal limits, her test results also showed that Student's conversation was impaired by excessive voice volume and restricted use of pitch and intonation. Testing also indicated that grammar and language usage were areas of concern for Student as were some areas of his language development. Additionally, Student demonstrated deficits on subtests where he had to remember long strings of unrelated words, where he had to repeat sentences with exact meaning and with the grammar intact, and where he had to

³¹Neither the type nor scope of the tests Ms. Rabinowitz administered as part of her assessment is at issue in this case.

discriminate between single sound differences. In the areas of academic and linguistic concepts, Student demonstrated deficits in half of the areas tested.³² Student scored well in the area of pragmatic language skills.

144. Based upon the results of her assessment, Ms. Rabinowitz believed that Student qualified for speech and language services. She testified that based upon the testing, and Student's needs in the fall of 2004, the amount of speech and language services the District offered to Student were sufficient to meet his needs and for him to access his education.

145. Although Ms. Schnee testified that the District's provision of speech and language services for the 2004 – 2005 SY were insufficient for Student, this testimony was not persuasive in light of the totality of the evidence. Ms. Schnee did not assess Student before July 2006. She, therefore, had little knowledge of what Student's needs were at the time Ms. Rabinowitz assessed him. Nor had she worked with Student prior to assessing him. In contrast, Ms. Rabinowitz assessed Student in the fall of 2004, and then worked with him for almost two years after her assessment. As stated above, the relevant inquiry is twofold: what were Student's needs at the time he was assessed, and did the District offer services that provided educational benefit to him? Student has presented insufficient evidence that the District should have known in the fall of 2004 that Student required one-on-one speech and language services for more than two sessions a week. Likewise, Student has presented insufficient evidence that the speech and language services he received in the 2004 – 2005 SY failed to offer him educational benefit. Student has not met his burden of proof in this regard.

³²Ms. Wood, not Ms. Rabinowitz, administered testing to Student in the area of academic and linguistic concepts.

2005 – 2006 School Year

146. Student contends that the District failed to provide him with necessary supplementary aids and services, including curriculum modification and behavioral support during the 2005 – 2006 SY in order for him to benefit from his education in a general education classroom. He further contends that the District failed to provide him an appropriate placement since second grade teacher Ms. Jeffers, like first grade teacher Ms. Foss, did not have training in autism or behavioral interventions. Student also contended at hearing that the placement in Ms. Jeffers' class was inappropriate because the District failed to provide him with adequate supports so that he could access the curriculum. Finally, Student argues that the District failed to provide him with an appropriate placement and related services during the time he was placed on home hospital. The District contends that the placement it provided to Student met, at the least, minimum legal standards for a FAPE.

147. As stated above, Student's argument that he was denied a FAPE because his general education teachers did not have specific training in autism or behavioral interventions is not persuasive. Rather, Student was deprived of a FAPE during the 2005 – 2006 school year because the District failed to provide him with proper behavioral interventions and proper supporting services.

148. The District did not make an offer of placement to Student at his annual IEP meeting on June 2, 2005. The District did, however, offer related services in the areas of speech and language for 30 minutes two times a week, adaptive physical education for 30 minutes once a week, OT once a week for 45 minutes, and the services of a one-to-one aide for 300 minutes a day. The District convened another IEP meeting on August 29, 2005. At that time, it offered Student a placement in Ms. Jeffers' second grade general education class with related services. However, although the District acknowledged, and the evidence demonstrates, that Student required support through RSP classes in order for him to be

successful in a general education class, it did not offer Student RSP support for second grade.

149. The evidence presented by both Student and the District supports a finding that Student required supplemental academic support to the general education curriculum. There is no evidence that Student was able to progress in a general education curriculum without supports. The District's decision to terminate Student's RSP support was not based upon a determination by the District that Student no longer required any support in order to be successful in his class. Instead, the District based its decision solely on logistics: instead of an air conditioner, the RSP classroom had a swamp cooler, which works with water and is susceptible to the growth of mold, to which Student is allergic. Rather than develop an alternative means of giving Student RSP support or suggesting an alternative placement, the District simply terminated a support that was essential to the ability of Student to benefit from his education. The District did not offer any persuasive explanation or justification for its failure to provide Student with the supports he needed in Ms. Jeffers' class for him to be able to successfully access his education. Student's report cards for second grade, as well as later assessments of him by Ms. Schnee, demonstrate that he made little or no progress academically. The District's failure to provide Student with RSP support in second grade, along with its failure to provide him with proper behavioral support, directly contributed to Student's lack of progress during this school year. Ms. Jeffers' class, without RSP support, failed to meet Student's unique needs and was not reasonably calculated to provide Student with educational benefit. Student has therefore met his burden of showing that the District failed to provide him with a FAPE during the first

semester of the 2005 – 2006 SY.³³

150. As stated in Factual Finding 118 above, Student's physician placed him on home hospital instruction in December 2005 in response to Student's increased stress and anxiety about going to school. Because of his stress and anxiety, Student's seizures had returned and he was engaging in self-injurious behaviors as well as demonstrating continued inappropriate behaviors at school. The IEP team reconvened on December 8, 2005, at which time the District offered Student 60 minutes a day of home instruction along with related services for adaptive physical education and OT. The District did not offer speech and language services to Student. Student began receiving the home hospital instruction and related services in early April 2006, after his mother approved the IEP.

151. Student's previous IEP had offered him 300 minutes a day of instruction in a general education classroom; he was also supposed to receive 40 minutes a day of RSP support as part of those 300 minutes once the District resolved the air-conditioning issue in the RSP classroom. The District's explanation for offering to Student only an hour of home hospital instruction per day was that an hour was District policy for home hospital instruction for all children. However, special education services are required to be determined on a child-by-child basis and must address the unique needs of each child. There is no indication in the IEP document, and the District witnesses did not testify at hearing, that the District made an individual determination that Student only required one hour a day of academic instruction to meet his special needs.

152. Likewise, the District offered no persuasive rationale as to why it did not offer Student speech and language services while he received home hospital instruction. Student

³³However, for the same reasons detailed in Factual Finding 145, Student has failed to meet his burden of proof that the speech and language services the District provided to him during the 2005 – 2006 SY did not provide him with educational benefit.

has specific speech and language deficits that the District itself had previously determined needed to be addressed through speech and language therapy albeit in a small group setting. The District provided no evidence that Student had ceased requiring those services while he was on home hospital instruction. Indeed, Student's IEP for the following school year reinstated speech and language therapy.

153. The weight of the evidence, therefore, supports Student's contention that the District failed to provide him with an appropriate placement and services during the second school semester of the 2004 – 2005 SY while he was on home hospital instruction. The District's failure to do so denied Student a FAPE.

FAILURE TO DEVELOP GOALS AND OBJECTIVES THAT ADDRESSED STUDENT'S UNIQUE NEEDS AND ALLOWED STUDENT TO ACCESS THE GENERAL EDUCATION CURRICULUM AS CIRCUMSCRIBED BY THE CALIFORNIA CONTENT STANDARDS

2004 – 2005 School Year

154. Student contends that the goals and objectives in his IEPs for the 2004 – 2005 SY were not appropriate for Student because they did not address his unique needs and did not allow Student to access the general education curriculum required by the California Content Standards.³⁴ The District contends that the goals and objectives it

³⁴ In his closing brief, Student requested that the ALJ take official notice of the District's grade level standards in mathematics, English/language arts, history/social studies, and science, for grades Kindergarten through third grade. The District has not opposed Student's request. A review of the standards and the California Content Standards already in evidence substantiate the District's contention that the two standards are the same. Student's request for official notice is granted. The ALJ has marked and admitted into evidence the District's content standards, submitted as an attachment to Student's closing brief, as Student's exhibit 296.

developed for Student met all legal requirements and that, at a minimum, permitted Student to receive some educational benefit from his education.

155. Federal and state law require an IEP to include a statement of measurable annual goals, including academic and functional goals, designed to meet the unique needs of a child with a disability. The goals and objectives are supposed to enable the child to be involved in and make progress in the general curriculum and meet the child's other educational needs that result from the child's disability. The IEP must include a description of the manner in which the IEP team will measure the progress of the child toward meeting the annual goals. However, the law does not require the goals to be perfect or that they maximize the child's ability to receive educational benefit. Rather, the goals are the method devised by those who wrote the educational laws to determine if a child with special needs is making progress in his or her education. The law additionally requires that a District have an appropriate IEP in place prior to the start of each academic year.

156. Initially, the IEP team determined that it would place Student in a SDC for the 2004 – 2005 school year. Student has not presented any persuasive evidence that the goals and objectives developed by the IEP team at the May 24, 2004 IEP team meeting, as amended and supplemented at the August 23, 2004 IEP meeting, failed to provide Student with educational benefit in the context of that SDC placement.

157. However, as discussed above, in response to the concerns of Student's parents that Student was not progressing educationally and that he was being teased and perhaps bullied at school, the District offered Student a transfer from Crafton to Mentone. The placement it offered at Mentone was in a general education class with 40 minutes of daily RSP support and pull-out related services rather than placement in a SDC. The change from a SDC to a general education placement was a significant change in the manner in which the District proposed to educate Student. As indicated in Student's IEPs, and as confirmed by school psychologist Patricia Vaughn at hearing, she and the District IEP team

members believed that Student had the capability, based upon his IQ scores, of accessing the general education curriculum.³⁵

158. As discussed above, the District failed to convene an IEP team meeting prior to transferring Student from the SDC at Crafton to the general education class at Mentone. Therefore, Student began his school year at Mentone without any goals and objectives to address the new placement. The IEP team did not develop new goals for Student at either the team meeting it held on September 10, 2004, or the team meeting held on October 5, 2004, although the team noted that it needed to develop RSP goals for Student. Dr. Freeman, Mr. Chen, and Ms. Schnee, three of Student's witnesses, all credibly testified that that the goals and objectives, which supported Student's placement at the SDC, were not appropriate to support the general education curriculum at Mentone. The District does not contend that the Student was supposed to be educated under a modified curriculum at Mentone and the IEPs that his team developed during the time Student attended school there do not give any indication that Student was not supposed to be accessing the general education curriculum for his grade level.

159. The District IEP team members developed some goals for Student in a document dated October 11, 2004, which the District presented at an addendum IEP meeting on October 18, 2004. The IEP document for that day notes that the team still needed to develop and review other goals to meet all of Student's unique needs.

160. Ms. Vaughn's assessment determined that Student was performing at beginning Kindergarten range for mathematics (a full school year behind where he should

³⁵The State of California has specific curriculum content requirements for general education for each school grade and for each subject. The District also has standards that align with those of the State. The ALJ has received into evidence the California and District standards for grades K – 3.

have been), significantly below grade average in written expression, and in the low-average range for reading. However, in spite of this information, the District proposed goals in which Student was expected to meet ending first grade standards by the time he completed first grade. In other words, the District proposed that Student, who had not met standards for Kindergarten by the end of the year in a Kindergarten SDC, would be able to complete the equivalent of two years' progress in one year of school with just 40 minutes a day of RSP small group instruction.

161. Chris Himes, Student's RSP teacher, strongly disagreed with the goals proposed by the other members of the District's IEP team. The IEP team noted his disagreement on the IEP dated December 6, 2004. In his candid and colorful testimony at hearing, Mr. Himes stated he disagreed intensely with the goals since the few months he had spent with Student demonstrated that Student did not have the ability to make up two years of schooling in one school year. Mr. Himes informed the IEP team that in order to come near to meeting the stated goals, Student would need a significant amount of additional RSP instruction. Otherwise, Mr. Himes stated that the team had to rewrite the goals to make them reflect more realistically a positive outcome for Student.

162. Mr. Himes reiterated his concerns in private discussions with Ms. Vaughn and in his response to Ms. Meland's behavioral questionnaire for Student. Ms. Meland agreed with Mr. Himes' concerns that Student's goals were unrealistic, and so stated in her report on Student's behavior. At hearing, Mr. Himes testified that he believed that Student should have received about 90 minutes a day of language arts and about 20 to 30 minutes a day of mathematics instruction in the RSP classroom, similar to what most of his other RSP students received, in order for Student even to come close to meeting his goals. However, the District did not follow the recommendations of Mr. Himes or Ms. Meland, never proposed new goals for Student, and never increased Student's RSP instruction.³⁶ At

³⁶In fact, the evidence indicated that instead of receiving 40 minutes a day of RSP

hearing, District expert Dr. Siegel also stated that the goals for the 2004 – 2005 SY were inappropriate for Student because it was unreasonable for the District to expect him to complete two years of educational progress during one school year.

163. Student did not meet his goals of mastering the first grade curriculum by the end of first grade. He was significantly behind first grade standards, particularly in reading, written expression, and other language arts. In fact, Student was so behind academically, that his first grade teacher, Ms. Foss, was unable to give Student grades for any areas of reading, writing, or mathematics for the first trimester of the school year. For the second and third trimesters, Ms. Foss gave Student a grade of “unsatisfactory” in both reading and writing, and “needs to improve” in mathematics. Although an average student finishes first grade at a running reading level³⁷ of 15, by the end of first grade, Student was only at level

instruction during the 2004 – 2005 SY, Student only received five to 10 minutes of instruction a day because of his inability to focus for more than that amount of time. The decrease in instruction was also due to Mr. Himes having to direct his attention to other students in the RSP room. Because of conflicts with Student’s other activities and services, the District sent Student to the RSP classroom at a time when the other RSP students there were much older than Student and at significantly different educational levels. Mr. Himes therefore could not instruct Student as part of that group; he had to give Student individual instruction and he had only five to 10 minutes left of the time Student was in RSP to be able to do so.

³⁷Running reading levels are numerical designations, which indicate a student’s ability to read. The numbers increase with each grade. Ms. Vaughn’s testing indicated that Student was at a running reading level of four when she tested Student before he transferred to Mentone. On average, a student beginning first grade is expected to be at level seven. Student was therefore almost a half a year behind in reading when he started

seven according to Ms. Foss. With regard to the academic areas of social studies and science, Ms. Foss testified that the “satisfactory” grades she gave Student in each trimester were based upon his efforts and not on his actual achievement.

164. All of Student’s witnesses who reviewed his goals testified to their deficiencies. District witnesses Mr. Himes, Ms. Meland, and Dr. Siegel, all corroborated that the goals were unreasonable for Student. The evidence, therefore, amply supports Student’s contention that the goals developed for him by the District in the 2004 – 2005 SY were not appropriate for him, did not address his unique needs, and prevented him from making more than minimal progress in the curriculum. The District’s failure to develop appropriate goals for Student therefore denied him a FAPE.³⁸

2005-2006 School Year

165. Student’s IEP team met on June 2, 2005. The team did not review Student’s progress on most of his previous goals. The team proposed new goals for Student. One of his reading goals stated that Student would progress one full year in the area of reading. However, the team did not develop the goal in context of Student’s progress on his previous year’s goals because the team did not review Student’s progress on the previous goals. Nor did the goal, or Student’s other goals for writing and language arts, explain how Student was to achieve the goal. The District also developed a number of mathematics goals; like the reading goals, the District did not base them on a review of Student’s progress with his previous year’s mathematics goals and did not explain how Student was

first grade.

³⁸ Since the ALJ has determined that the goals were not appropriate for Student for the 2004 – 2004 SY, it is unnecessary to reach the issue of whether the goals for that year did not allow Student to access the California Content Standards.

going to master the new goals.

166. Significantly, although the District determined that Student was considerably behind his peers in mastering language arts and mathematics, the District did not provide Student with any support in his second grade class that would assist him in meeting his goals. Student did not receive RSP instruction due to the lack of air conditioning in the RSP classroom. The Diagnostic Center's assessment of Student indicated that Student continued to have significant deficits in a variety of areas of reading capability, notably phonemic awareness, written expression, and expressive and receptive language. The Center noted that Student's writing was slow, his spelling poor, as were his reading and decoding skills, and that Student forgot how to form letters. Although Student was already in second grade at the time the Center assessed him, and although he has at least average cognitive abilities, Student was only able to add and subtract numbers up to eight, well below the expectations for a student of his age and intelligence.

167. The District, however, did not review the Center's assessment at an IEP meeting, did not write new goals to address the findings of the assessment, and did not implement the assessment's recommendations. The District did not explain this failure, and offered no explanation as to how Student was supposed to make progress toward his goals or in the curriculum in a general education classroom without RSP support.

168. As stated above, Student's physician placed him on home hospital instruction as of December 2005. The IEP team held a meeting to implement home hospital instruction on December 6, 2005. However, the team did not develop new goals to address Student's change in placement. The District offered no evidence that Student's goals were able to be, or were actually addressed, during the time he received instruction at home in the spring of 2006. To the contrary, Ms. Sjostrom testified that Student did not have access to the general education curriculum during the time he was on home hospital instruction.

169. The weight of the evidence therefore supports Student's contention that the

goals and objectives the District developed for him for the 2005 – 2006 SY, were inappropriate and failed to provide him with educational benefit. Student, therefore, has met his burden of proof that the District denied him a FAPE based on its improper development and implementation of Student's IEP goals.

FAILURE TO PROVIDE A FAPE DURING THE 2006 – 2007 SCHOOL YEAR

170. Student contends that his placement at Big Springs denied him a FAPE due to both procedural and substantive missteps by the District. Student contends that the District failed to develop a legally sufficient IEP because the IEP team never reviewed Student's progress on his previous goals and objectives prior to developing and implementing his IEP. Student also contends that the District violated the IDEA because the IEP team did not develop goals and objectives prior to the start of the 2006 – 2007 SY, and that the goals and objectives that the District finally developed in conjunction with the Big Springs were inappropriate. Student also asserts that the District denied him a FAPE because it failed to develop a plan to transition him to Big Springs from home hospital instruction. Student contends that his placement at Big Springs was inappropriate because it did not provide him with sufficient academic instructions, did not provide him with access to California's third grade general education curriculum, and because the ABA services provided by Big Springs were inadequate. Student also contends that the related services offered by the District for this school year were insufficient, and that the placement at Big Springs was not in the least restrictive environment. Finally, Student contends that the District failed to implement all of the services identified in Student's June 30, 2006 IEP, and that the District failed to consider the recommendations of Big Spring staff due to pending litigation. The District responds that it provided Student with a FAPE during this year that at least met minimum legal requirements.

Failure to Offer Student an Appropriate Placement in the Least Restrictive Environment; Failure to Review Past Progress; Failure to Develop Goals Prior to the Start of the School Year; Failure to Implement Appropriate Goals and Objectives

171. As stated in Factual Finding 126, a school district provides a FAPE to a student if it designed its program or placement to address the student's unique educational needs and if the program was reasonably calculated to provide some educational benefit in the least restrictive environment (LRE).

172. The LRE means a student should be removed from the regular education environment 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. To the maximum extent appropriate, special education students should have opportunities to interact with their general education peers. However, the concept of the LRE is viewed within the context of the continuum of placement options available to a student with special needs. Within that continuum, a general education classroom is the least restrictive. Viewing the continuum, a placement in an RSP would be more restrictive than a general education placement and a placement at a NPS would be more restrictive than a RSP placement, and so forth through the list of possible placements that an IEP team could consider. The law requires that an IEP team place a student in the least restrictive placement that meets the unique needs of that Student.

173. Student's parents originally contacted Big Springs for it to assess Student. Upon their request, the District ultimately agreed to contract with Big Springs and pay for it to administer an ABA assessment to Student. The IEP team did not review Student's progress on any past goals and objectives. In spite of failing to do so, the District determined that Student now required a non-public school placement and that Big Springs could meet Student's unique needs, which the District determined it could not meet in its public school setting. Although the IEP document does not specifically note that Student

required extended school year (ESY) services, the IEP team agreed that Big Springs would provide Student with 50 minutes a day of educational therapy during the summer months. This was a tacit acknowledgment that Student required ESY services.

174. Based upon its educational assessment of Student, Big Springs determined that Student was not ready to attend a Big Springs class. Therefore, the program Big Springs recommended at the addendum IEP meeting the IEP team convened on August 8, 2006, did not include classroom instruction. Big Springs recommended, and the IEP team accepted, a program for Student that consisted of 25 hours of in-home ABA therapy to be provided by Big Springs, related services in the areas of speech and language, OT, and vision therapy, and 50 minutes per day of educational therapy services, to be provided by Big Springs at its campus. The educational therapy consisted of individual tutoring for Student for all his academics. The IEP did not specifically delineate which areas of academics the therapy would address. Nor did it describe how the educational therapy was going to address Student's academic deficits. Neither Big Springs nor the District developed goals and objectives to present at the August 8 IEP meeting.

175. The District offered no explanation, other than that it was following the recommendations of Big Spring and that Student's parents agreed to the IEP, of why it felt that five hours of academic instruction per week was sufficient to meet Student's academic needs. Ms. Schnee assessed Student in July 2006, just as he began receiving educational therapy at Big Springs, and in July 2007, after Big Springs had provided Student with almost a full year of the educational therapy. Ms. Schnee's second assessment indicated that Student had not responded at all to the academic intervention he received from Big Springs in the areas of reading and writing. Ms. Schnee's second assessment indicated that in a year's time Student's auditory processing skills had declined, as had his phonological processing ability. Both of Ms. Schnee's assessments indicated that Student's Broad Reading scores on standardized testing were in the extremely low range, and that his

ability to read sight words remained in the borderline range. In some areas of reading, Student's scores had declined from the borderline range to the extremely low range. Student's scores for writing interpretation remained in the extremely low range. Ms. Schnee testified that Student simply had not ever been taught how to read and write, and that the educational therapy he had received from Big Springs did not improve his ability to do so.

176. The District offered no persuasive rationale for implementing an academic program for a third grade student that consisted of just a little more than four hours a week of educational instruction. Both Dr. Freeman and Ms. Schnee credibly testified that the academic program Big Springs instituted for Student was inadequate. Student had demonstrated significant academic deficits for most of his school career with the District. He required specific focus on those deficits, and an educational program that addressed them. Big Springs had determined that Student's behaviors prevented it from offering him a placement in one of the Big Springs regular classrooms. The response of the District to Big Springs' decision should have been an investigation of other appropriate placements for Student, not acquiescence to a placement that on its face was inappropriate.

177. Nor was the program developed by Big Springs designed to provide Student instruction in the LRE. The majority of Student's program consisted of in-home ABA therapy. The few hours of services Big Springs provided on its campus were primarily delivered in a one-on-one setting. The program did not provide Student with more than minimal interaction with his other students. Both Dr. Siegel and Dr. Freeman testified that the program was inappropriate for Student because it isolated him from his peers. In so isolating Student, the program was more restrictive than a residential placement where students are at least educated alongside other children. The District presented no evidence that Student required the isolation created by the Big Springs program. Nor did it explain failing to find another NPS that could offer Student a classroom placement after Big

Springs determined that it was unable to do so. The evidence supports the determination of the District IEP team that Student needed a NPS placement after ceasing home hospital instruction. However, the evidence does not support the decision of the District and Big Springs to place Student in a program that offered him only minimal opportunities for interaction and socialization with other children. Student has therefore met his burden of proof that the placement at Big Springs was not in the least restrictive environment for him. The placement at Big Springs, as implemented, denied Student a FAPE.

178. Big Springs presented the goals and objectives it had developed at the IEP team meeting held on October 4, 2006. The IEP adopted them at this meeting. The goals included one behavior goal, one receptive and expressive language skills goal, two mathematics skills goals, two goals for decoding and encoding skills, and two goals to address visual and perceptive skills. None of the academic goals addressed how or what Big Springs would do to assist Student in meeting the goals. Additionally, Student's IEP did not indicate that the team was modifying Student's curriculum although neither the IEP document nor the goals explain to what extent the IEP team expected Student to be working on the core third grade curriculum. It is therefore unclear what the purpose of each academic goal was. The uncertainty of the IEP was exacerbated by the IEP team's failure to review Student's progress toward his previous year's goals. This resulted in the development of goals that were not based upon Student's progress to date, and that were not based upon an expectation that Student would advance in a specific curriculum. The goals and objectives were insufficient to address Student's unique needs and did not afford him educational benefit. Student has met his burden of proof that the failure to develop appropriate goals and objectives denied him a FAPE.

179. The District IEP team also offered and implemented a 25 hour per week in-home ABA program for Student, which Big Springs provided and oversaw. The behavior assessment conducted by Big Springs had determined that Student engaged in self-

stimulatory behaviors, that he was easily frustrated and became non-compliant, and that Student lacked emotional control. The assessment also determined that Student lacked appropriate communication, play, and social skills. These were Student's identified behavior deficits that the ABA program was supposed to address. However, the ABA program implemented by Big Springs for Student was inappropriate and ineffective.

180. Student expert Dr. Freeman testified that all Big Springs accomplished was a "systematic teaching of inappropriate behaviors." She testified that Student's progress in the program was "meaningless."

181. Student expert Bob Chen reviewed the Big Springs ABA logs and records for Student, and observed Student in his home receiving the direct ABA therapy from Big Springs. He testified that the data collected by Big Springs was "appalling" and was not consistent with a proper ABA program because it was not objective. Mr. Chen also stated that Big Springs failed consistently to identify antecedents to Student's behaviors and failed to identify the consequences of the behaviors. He also found that the Big Springs therapists consistently failed to administer reinforcements to Student. This had the effect of negating the therapy. Mr. Chen summed up his view of the Big Springs ABA therapy by stating that it amounted to "really bad babysitting."

182. District expert Dr. Siegel agreed with Dr. Freeman and Mr. Chen. She testified that the ABA program Big Springs provided to Student did not resemble her view of what a behavioral program should look like. Rather, Dr. Siegel opined that the program resembled one-on-one teaching rather than a program that was supposed to be using discrete trial training as a tool to address Student's behavioral needs. SELPA autism specialist Loni Kuhn also agreed that the data maintained by Big Springs was inconsistent with what is normally recorded in an ABA program. She agreed with Mr. Chen that the Big Springs therapists did not keep proper ABA logs and that their anecdotal notes were not an objective measure of Student's progress. Ms. Kuhn also agreed that the behavioral aspects of the program Big

Springs was providing to Student were below his functioning level.

183. The weight of the evidence supports Student's contention that the District failed to assure that it developed a complete IEP for Student prior to the start of the 2006 – 2007 school year, and that it failed to review progress on past IEP goals and objectives, which prevented the District and/or the NPS from formulating appropriate goals for Student. Most notably, Student has met his burden of proving that the educational placement the District offered Student at Big Springs was inadequate. The offer of just over four hours a week of educational therapy to Student did not address his academic deficits and therefore did not provide him with educational benefit. The lack of classroom instruction for Student, and the resulting isolation of him from his peers, did not provide Student with an education in the least restrictive environment. Finally, the ABA program was not properly developed or implemented and did not produce any positive results. Student has met his burden of demonstrating that the education program and related services provided to him by the District were substantially deficient in addressing his needs and thus failed to provide him with a FAPE for the entire 2006 – 2007 school year.

Failure to Provide Student with Access to California's Third Grade General Education Curriculum

184. Student alleges that the placement offered by the District at Big Springs failed to provide him with access to California's third grade general education curriculum. Student, in his closing brief, correctly quotes from the United States Supreme Court's decision in *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*). In pertinent part, the Court stated that if an IEP team places a child with special needs in a regular classroom, then the child's programs should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (*Rowley*, 458 U.S. 176 at pp. 203 – 204.) Based on his reading of *Rowley*, Student posits that the District should have ensured that he was able to

access the general education third grade curriculum during the 2006 – 2007 SY while Student was in third grade.

185. The flaw in Student’s argument, however, is that the IEP team determined that Student was not capable of receiving instruction in a general education class during this school year. Student’s physician had written a prescription a few months earlier placing Student in home hospital instruction, one of the most restrictive school placements on the placement continuum. The IEP team sought to have Student move to a less restrictive environment at a NPS. The original placement contemplated by the IEP team consisted of ABA instruction, related services, and placement in a classroom at Big Springs, which is a NPS. Given Student’s anxiety and stress issues at this time, the IEP team properly rejected placing Student in a general education classroom. Student provided no evidence that he was capable of accessing the third grade curriculum; in fact, the evidence he presented at hearing in support of his entire case was that he had failed to progress from grade to grade as he would have had he received a FAPE during the years in question. Student also failed to present any evidence that a general education class would have been appropriate for him during the 2006 – 2007 school year. Indeed, Dr. Freeman, Ms. Schnee, and Dr. Spiegel, all testified that a general education placement would have overwhelmed Student. Therefore, Student’s citation to *Rowley* in the context of the placement at Big Springs is inapposite and unpersuasive. The District’s failure to provide Student with access to the California’s third grade curriculum did not deprive him of a FAPE.³⁹

³⁹ Even some children who are placed in general education classes may not be capable of accessing their grade equivalent curriculum. There are many why an IEP team might place in a general education class a child who is not competitive academically with his peers, even if the result was that the child received different instruction from the other children in his class. Student’s argument is therefore only relevant to a child who attends a regular education class and who has the cognitive ability to access the grade equivalent

Failure to Offer Appropriate OT and Speech and Language Services

186. Student contends that one 50-minute session of OT services and one 50-minute session of speech and language services as offered by the District for the 2006 – 2007 SY failed to meet his needs. The District believes that these related services adequately met Student’s needs.

187. Student offered no evidence from any of his witnesses that Student required more than 50 minutes a week of OT services in order for him to access his education. Student presented no evidence that he was not making any progress in the area of OT. While more OT services would certainly assist Student in maximizing his potential, the District is not legally required to offer services that do so. Student has not met his burden of proof that the District denied him a FAPE by not offering him additional OT services.

188. Student also contends that he required more than one 50-minute per week session of speech and language services. However, the evidence neither supports Student’s contention that he required more SL services nor supports his contention that the District should have known that he required more than what it offered at the time the offer was made. Although Ms. Schnee testified extensively regarding Student’s language deficits, her assessment of Student in July 2006 only recommends that Student receive one 60-minute session of speech and language therapy. The District offered Student one 50-minute session, nearly the same amount recommended by Ms. Schnee. Furthermore, Ms. Schnee did not testify that her original recommendation was incorrect at the time that she made it in July 2006. There was thus no reason for the District to believe at the beginning of the 2006 – 2007 SY that Student required more services than those the District offered.

curriculum. If the child is functioning below his grade level, the school district would not be depriving him of a FAPE if the goals and objectives and educational program it designs address the child’s actual level of functioning.

Furthermore, Student did not present any evidence of just how much more speech and language therapy he required if 50 minutes per week was insufficient as he argues. Student has therefore failed to meet his burden of proof that the District failed to provide him with a legally adequate amount of speech and language therapy during the 2006 – 2007 SY.

Failure to Develop an Appropriate Transition Plan

189. Student contends that the District should have developed a plan to transition him from his home hospital program to the Big Springs program for the 2006 – 2007 school year. However, Student’s arguments that the District was required to do so are misplaced. First, California education law only requires a transition plan if a student is transferring from a special class or non-public school into a regular class at public school. Here, Student transferred from a special class – his home hospital program – into another special program at a non-public school. He did not transfer into a regular class at a public school for any portion of his day. Additionally, the statute only requires a transition plan “if appropriate.” Student failed to provide persuasive evidence that he required a plan for the brief amount of time he was going to spend on the Big Springs campus. Student, therefore, has failed to meet his burden of proof that the District denied him a FAPE by its failure to develop a transition plan for him.

Failure to Consider the Recommendations of Big Springs Due to Pending Litigation

190. Student contends that the District was required to consider recommendations made by Big Spring with regard to his education but that it failed to do so because the District maintained that the IEP team could not modify Student’s IEP due to the then- pending due process hearing. Student contends that the District’s refusal to consider the recommendations of Big Springs and the District’s concomitant refusal to discuss the recommendations deprived his parents of meaningful participation in the IEP

process. District special education coordinator Pam Bender, who attended various IEP meetings as the District's administrative representative, acknowledged at hearing that the District took such a position. Ms. Bender conceded during her testimony that she subsequently learned that the District's position was not legally supportable.

191. Although a district does not have to implement recommendations made by any party or consultant, Student is correct that a District must at least consider recommendations of outside sources offered by the Student or by other IEP team members. Big Springs was part of Student's IEP team. Additionally, Student's mother testified that she supported the recommendations made by Big Springs and wanted to discuss them. The failure to consider and discuss its recommendations therefore deprived Student's parents of the opportunity to participate fully in the IEP process, and denied Student a FAPE.⁴⁰

Failure to Fully Implement Student's June 30, 2006 IEP

192. Under state and federal law and federal precedent, one of the factors used in determining whether a school district provided a FAPE to a student is whether the services provided to the student conformed to his or her IEP as it was written. A failure to implement any provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material; a material failure to implement an IEP occurs when the services provided to the student fall significantly short of the services required by his or her IEP.

193. Student contends that his attendance records at Big Springs substantiate that he was not receiving the full amount of educational therapy services at the Big Springs campus as indicated on his August 8, 2006 IEP. Both his mother and the Big Springs

⁴⁰The ALJ makes no finding as to whether the recommendations of Big Spring would have offered Student educational benefit.

Director confirmed this. However, the fact that Student did not attend school every day that he was scheduled to attend does not prove that the District failed to implement the IEP. Rather, the evidence from the attendance records merely proves that Student, for any number of reasons, did not attend school on the days in question.

194. However, Student also presented evidence that the District totally discontinued his program at Big Springs by the end of June 2007. Leslie Huscher, the Big Springs Director, testified that Student had missed numerous sessions of his educational therapy and his related services. Student's mother testified that he often missed sessions because she was unable sometimes to drive him to Big Springs, which was located a significant distance from her home, and that the District had not offered to provide transportation to the school for Student.⁴¹ Due to Student's absences, Big Springs decided to cease providing services to Student at its campus so that it could offer the therapy slots to other students. Ms. Huscher informed parents of this in a letter dated June 8, 2007.

195. At the IEP meeting on June 22, 2007, the team discussed the cessation of these services. At this meeting, Student's parents also expressed their dissatisfaction with the ABA services provided by Big Springs and requested that the District contract with another provider. The District immediately directed Big Springs to cease providing ABA services to Student. Therefore, by the end of June, Student ceased receiving any services whatsoever from Big Springs. The District did not contract with another provider to replace

⁴¹The evidence at hearing substantiated that the District initially did not offer its own transportation to Student and, instead, offered to reimburse Student's parents for the cost of transporting him to school. The District did not offer to provide transportation until approximately May 2007. However, Student did not raise this as an issue and it is not stated as one in the prehearing conference order. Therefore, the ALJ has not addressed it in this Decision.

the Big Springs services. As of the date of the hearing in this case, some five months after Big Springs terminated its services to Student, the District still was not providing any education program or related services to Student.

196. The ALJ asked the parties at hearing whether this case encompassed ESY 2006 – 2007. The parties agreed that it did. As stated above, the provision of services to Student in the summer of 2006 was a tacit admission that Student required ESY services. Finally, the District did not offer any evidence at hearing that Student should not have continued receiving services during the summer of 2007. Since Big Springs ceased providing any services to Student and the District did not replace the services, the District's failure to do provide the services constituted a material failure to implement Student's IEP, and therefore denied Student a FAPE.

Compensatory Education

197. Compensatory education is a permissible remedy where a child has been denied a FAPE and proves that he or she needs additional education or services to make up for education and related services the child was denied. Compensatory education is an equitable remedy to ensure that a child is appropriately educated within the meaning of the IDEA. Remedies may be limited if a parent's actions are found to be unreasonable or where a weighing of the evidence does not support awarding of a particular remedy.

198. The ALJ has found that Student met his burden of proof that the District delayed conducting an OT assessment of Student even after numerous requests for the assessment by Student's mother. The weight of the evidence also supports Student's contention that the District delayed providing services after it assessed Student. The results of the District's assessments ultimately demonstrated that Student had OT needs. The District ultimately offered OT services to Student in December 2004, approximately a year and a half after Student's June 23, 2003 IEP meeting, at which time Student's mother had requested an OT assessment. The evidence also supports Student's contention that he still

has OT deficits. District occupational therapist re-assessed Student on July 11, 2007. As part of the assessment, Ms. Wray administered three OT tests to Student (the Wide Range Assessment of Visual Motor Abilities, the Bruininks-Oseretsky Test of Motor Proficiency 2, and the Sensory Processing Measure). She also conducted an observation of Student and conducted interviews with Student's parents. Ms. Wray determined that Student continues to demonstrate difficulty with foundational processing of tactile, proprioceptive, and vestibular information, which affect his fine motor skills. Ms. Wray recommended that Student continue to receive direct OT services once a week to address his deficits.

199. There is no evidence in the record which addresses what Student's OT needs would have been at the time of the hearing had he received an assessment and corresponding OT intervention at the time his mother requested it in June 2003. However, the evidence does support the finding that Student had OT needs in June 2003, and continued to suffer from those deficits at least at the time of the hearing in this case. Therefore, the ALJ finds it appropriate to order that the District provide Student one 50-minute session of OT a week, in addition to any OT already determined to be necessary by the IEP team, for a period of 38 weeks. The 38 weeks is the amount of time spent by students in a typical school year. The District will be ordered to provide the additional OT services to Student only during the time the school Student is attending is in session.

200. In addition to the findings regarding the provision of OT, the ALJ has also found that the District denied Student a FAPE during the 2004 – 2005, 2005 – 2006, and 2006 – 2007 school years, for all the reasons stated in this Decision. As a remedy, Student requests in his closing brief that the ALJ order the District to fund compensatory education, to be provided by qualified individuals and agencies not directly affiliated with the District. Student requests that the ALJ award compensatory education until the earlier of two dates: either until Student demonstrates he is functioning at grade level, or until Student turns 22 years of age.

201. Student, in effect, is requesting the ALJ to retain jurisdiction over this case, in the manner of a Special Master in a court proceeding, until the ALJ can determine that Student has met either of the two milestones he suggests. Student offers no statutory or case law support for his request in the context of a special education administrative proceeding, and the ALJ is unaware of any. The ALJ therefore declines to retain jurisdiction over this case.

202. Rather, the ALJ must determine to how much compensatory education Student is entitled and for what finite period. The results of the assessments administered to Student in the summer of 2007 are instructive regarding what was then Student's present level of academic ability, and in what areas he still demonstrated deficits.

203. Student expert Karen Schnee initially assessed Student in July 2006. Ms. Schnee reassessed him on July 26, 2007, in the areas of auditory and phonological processing, academic achievement and language. Ms. Schnee's testing demonstrated that Student's auditory processing scores declined in the year between the two assessments she administered to him, indicating that Student was struggling more with his ability to interpret incoming language than he was a year earlier. In the area of phonological processing, the results of Ms. Schnee's July 26, 2007 assessment indicated that Student had also declined in this area. Ms. Schnee's testing results indicated that Student was likely to demonstrate reduced fluency in reading as well as difficulty in retrieving words efficiently in conversation. With regard to reading interpretation, Student's scores remained in the borderline or extremely low range in most of the areas tested. Student's ability to decode nonsense words had declined in a year from borderline to the extremely low range. Student's scores had also declined in the areas of reading rate, reading accuracy, reading fluency, and reading comprehension. The results of the testing demonstrated that Student had not responded to the academic interventions provided to him by Big Springs during the previous year.

204. With regard to language interpretation, Student continued to demonstrate scattered performance, with scores ranging from extremely low to bright average. However, Student's scores had declined in a number of areas, notably in the area of receptive comprehension of language, indicating that in this area Student also had failed to respond to the interventions attempted by Big Springs.

205. SELPA autism specialist Loni Kuhn and District school psychologist DeDe Aldama also administered a psycho-educational assessment to Student in July 2007. Student was nine years and five months old at the time of testing and should have been entering fourth grade. However, the majority of his scores in academic achievement, particularly in the areas of reading and written language, were significantly below grade level. Student scored as follows:

<u>AREA TESTED</u>	<u>GRADE EQUIVALENT</u>
BRIEF ACHIEVEMENT	2.0
BROAD READING	1.9
BROAD MATH	3.2
BROAD WRITTEN LANGUAGE	1.2
BRIEF READING	1.9
BRIEF MATH	3.2
MATH CALC. SKILLS	2.8
BRIEF WRITING	1.3
WRITTEN EXPRESSION	1.3
ACADEMIC SKILLS	1.8
ACADEMIC FLUENCY	1.6
ACADEMIC APPS	2.1

Letter/Word Identification	1.9
Reading Fluency	2.0
Passage Comprehension	1.8
Storey Recall	5.6
Math Calculations	2.9
Math Fluency	2.6
Applied Problems	3.6
Spelling	1.1
Writing Samples	1.4
Writing Fluency	<K.2

206. The District’s testing also indicated that Student scored low in areas of auditory perceptual skills, notably in phonological segmentation, number memory forward, and sentence memory. On the Kaufman Brief Intelligence Test, Second Edition, Student scored below average on both the verbal and nonverbal tests. The District assessors noted that Student’s academic skills, ability to apply academic skills, and fluency with academic skills all were in the low to very low range for his age. The testing indicated that Student demonstrated a severe discrepancy between his previous cognitive ability scores and his academic performance in the areas of basic reading skills, reading comprehension, and written expression, indicating that Student appeared to suffer from a specific learning disability.

207. The District assessors did not propose any definite methodologies that they believed should be utilized to address Student’s reading and writing deficits. Ms. Schnee, however, made specific recommendations for remedial instruction for Student. In pertinent

part, she recommended that he receive reading instruction from the Lindamood-Bell agency, a NPA that specializes in teaching children with processing, decoding, and other reading deficits, with the number of instruction hours to be determined by Lindamood-Bell. She also recommended that Student receive an hour a day of one-on-one instruction from an educational therapist in the areas of mathematics and writing. At hearing, Dr. Bryna Siegel, the District's expert, also opined that reading intervention from Lindamood-Bell would benefit Student.

208. Subsequent to the hearing, Lindamood-Bell administered an assessment to Student.⁴² Lindamood-Bell's results corresponded to those obtained by Ms. Schnee and the District. Student demonstrated considerable difficulty in writing and spelling, phonemic awareness, and symbol imagery. He demonstrated moderate difficulty in oral language and severe weakness in following directions. Student also showed difficulty in mathematical computation. Lindamood-Bell recommended that Student receive a minimum of 240 hours in its Seeing Stars program to address his deficits in phonemic awareness, reading and spelling. It also recommended Student receive a minimum of 120-160 hours of instruction in Lindamood-Bell's Visualizing and Verbalizing program to address Student's deficits in

⁴²On January 3, 2008, Student filed a motion to admit additional evidence of the Lindamood-Bell testing and the recommendations made by that agency for intensive reading intervention for Student. The District filed an opposition on January 22, 2008. At a telephonic status hearing held January 31, 2008, the ALJ asked the District if it would like an additional day of hearing to respond to Student's proffered evidence regarding the necessity and efficacy of Lindamood-Bell intervention. The District declined the additional day of hearing. On January 31, 2008, the ALJ granted Student's motion to admit additional evidence, consisting of the declaration of Lindamood-Bell Center Director Kim Zakaryan, with attachments. The exhibit was marked as Student's 295.

oral and written language comprehension. Finally, Lindamood-Bell recommended that Student receive a minimum of 120-160 hours in its On Cloud Nine math program to address Student's math deficits.⁴³

209. The evidence supports Student's contention that he has at least average cognitive abilities and that he should have been able, with proper educational and behavioral support, to progress in the curriculum along with his peers, and advance from grade to grade. Instead, Student is at least two grade levels behind where he should be in reading and language expression. Therefore, to remedy the violations of FAPE as determined in this decision, the ALJ shall order the District to provide Student with 240 hours of the Lindamood-Bell Seeing Stars program and 150 hours of the Lindamood-Bell Visualizing and Verbalizing program. At the discretion of Student's parents, the program shall be provided either during the school year or during Student's summer vacation, for a maximum of four hours per day, until the total hours are completed. The Lindamood-Bell services shall be provided either at a Lindamood-Bell center, or by a provider who was trained directly by Lindamood-Bell, utilizes the Lindamood-Bell curriculum, and has at least two years experience giving Lindamood-Bell instruction.⁴⁴

⁴³Other than its argument that Lindamood-Bell has not been scientifically researched or peer-reviewed, the District offered no evidence that the Lindamood-Bell program would be inappropriate or ineffective for Student. The District did not offer the testimony of any of Student's prior reading teachers or provide any evidence of any other reading intervention programs that might address Student's reading and/or writing deficits.

⁴⁴Neither the District's assessments, Ms. Schnee's assessments, nor the Lindamood-Bell assessments, indicate that Student suffers from deficits in mathematics to the extent that he suffers deficits in language and written expression. Therefore, the ALJ is not

210. To address Student's deficits in mathematics and writing, which are attributable to the District's denial of FAPE, the ALJ shall order the District to provide Student with an hour per day of one-on-one instruction for a period of 86 weeks (two school years, less periods of non-instruction, plus two five-week sessions of ESY), for a total of 430 hours. The instructor for the one-on-one instruction shall be either a Board Certified Educational Therapist, or a teacher who has a California credential to teach elementary school mathematics and writing or language arts. The District shall provide the instruction at the school Student is attending, or at his home school, at the option of Student's parents. The provision of this one-on-one instruction is in addition to any educational program Student receives through his IEP. Either the instructor shall be trained in autism and behavioral interventions, or the District shall provide Student with a one-on-one aide to accompany him to the instructional sessions.

211. As determined in this Decision, the ABA services the District provided to Student through Big Springs were improperly developed and delivered during the 2006 – 2007 school year. The ALJ shall therefore order that Student receive 50 weeks of ABA in-home services for 25 hours a week, for the 2008 – 2009 school year. However, these shall be total ABA hours provided to Student, not hours in addition to those Student's IEP team may determine he requires. The ABA hours should not conflict with Student's other schooling, and the scheduling of the hours shall be at the discretion of Student's parents in consultation with the ABA provider. The District shall also provide 10 hours per month of supervision, and three hours per month of parent training. The ABA therapy shall be provided by the Center for Behavior Research and Education, or, if that NPA is unable or unwilling to provide the ABA therapy, by another provider certified to provide in-home

ordering the District to provide Lindamood-Bell mathematics instruction to Student.

Rather, the ALJ shall order Student to receive tutoring in mathematics from the District.

ABA therapy.

212. Finally, Student has met his burden of proof that he required an FAA, which was never conducted by the District. Although Mr. Chen administered a functional behavioral assessment to Student in June 2007, that assessment is almost 10 months old as of the date of this Decision. It is appropriate for Student to be formally assessed again, and the ALJ will so order that the District provide an FAA by an independent, qualified behaviorist of its choice.

CONCLUSIONS OF LAW

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

2. The allegations Student raises with regard to SY 2003 – 2004 and 2004-2005 pertain to the period prior to the reauthorization of the IDEA, which became effective July 1, 2005. Thus, this case spans both versions of the IDEA. If provisions of the former version of the IDEA differ from the reauthorized version, and such differences bear directly upon the determination of any issue in this Decision, they will be specifically noted. In most, if not all instances, however, the provisions of the former IDEA that bear directly upon the determination of the issues in this Decision were not amended by the reauthorized IDEA.

3. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed.

Code, § 56363; 20 U.S.C. § 1401(26).)

DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FREE APPROPRIATE PUBLIC EDUCATION (FAPE) DURING THE 2003-2004 AND 2004 – 2005 SCHOOL YEARS (SY), IN VIOLATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) BY TIMELY FAILING TO CONDUCT AND/OR PROVIDE AN OCCUPATIONAL THERAPY (OT) ASSESSMENT AND OT SERVICES?

4. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*))

5. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) 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 and appropriate public education. (*W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483 (hereafter *Target Range*.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way Sch. Dist.* (9th Cir. 2004) 394

F.3d 634.)

6. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. (Ed. Code, §56029, subs. (a)-(b).) All referrals for special education and related services shall initiate the assessment process and shall be documented; when a verbal referral is made, staff of the school district or special education local plan area shall offer assistance to the person in making a request in writing. (Cal. Code Regs., tit. 5, § 3021, subd. (a).) All school staff referrals shall be written and include a brief reason for the referral and documentation of the resources of the regular education program that have been considered, modified, and when appropriate, the results of intervention. This documentation shall not delay the time-lines for completing the assessment plan or assessment. (Cal. Code Regs., tit. 5, §3021, subd. (b).) Upon initial referral for assessment, parents shall be given a copy of their rights and procedural safeguards. (Ed. Code, § 56301, subd. (c).) A pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

7. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code, § 56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code, § 56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may ⁴⁵ begin immediately upon receipt of the consent. (Ed. Code,

⁴⁵ California law refers to the "assessment" of a pupil (Ed. Code, § 56320) while

§ 56321, subd. (c).) Thereafter, a school district must develop an individualized education program required as a result of an assessment no later than 60 calendar days from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (d).) The 60 day period does not include days between regular school sessions, terms, or school vacation in excess of five schooldays. (Ed. Code, § 56043, subd. (f)(1).)

8. 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. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds. (e) & (f).) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025 at pp.1031-1033.)

9. Based upon Factual Findings 11 to 37 and Conclusions of Law 3 through 8, the District denied Student a FAPE during the 2003 – 2004 and 2004 – 2005 school years by failing timely to conduct an OT assessment for him and then later initially failing to find him eligible for OT services. The documentary and testimonial evidence amply support Student's contention that his parents made numerous requests for an OT assessment, beginning in November of 2002. Student's mother requested an assessment in the spring of 2003 while the District was preparing its multidisciplinary assessment for Student. The District failed to include an OT assessment at that time. Student's mother and advocate reiterated the request for an OT assessment at Student's IEP meeting on June 23, 2003. The IEP notes that the District will "screen" for Student's OT needs after he started school.

federal law refers to the "evaluation" of a child (20 U.S.C. § 1414(a).) These terms mean the same thing.

However, the District was required under California law to reduce to writing the oral request for assessment made by Student's mother and by his advocate, and then proceed with the assessment process. "Screening" before initiating a requested assessment is not a procedure recognized by California law.

10. In any case, the District did not screen for Student's OT needs or in any way act upon the assessment request of his mother until the spring of 2004. At that time, the District made a referral to the SELPA for the OT assessment. Student's IEP of May 24, 2004 notes that the District had a signed assessment plan from Student's mother. However, the District later took the position that it had never received a signed assessment plan from Student's mother. She, therefore, made another request at Student's August 23, 2004 IEP team meeting for an OT assessment, following up the request with a letter to the District on August 26, 2004. The District finally conducted an OT assessment for Student on October 1, 2004. The District therefore delayed almost two years from the time that Student's mother first requested an OT assessment until the time it first assessed Student. Since Student was ultimately determined to require OT services, as discussed below, the procedural failure to assess Student resulted in a substantive denial of educational benefit to him, and therefore denied him a FAPE.

11. However, the District initially failed to find Student eligible for OT services because he did not fall within the seventh percentile or lower of students with OT needs. The District does not give a persuasive legal justification for mechanically denying a student related services rather than determining if the unique needs of a specific student warrant OT services. As stated in Conclusion of Law 3, a student with special needs is entitled to receive related services, such as OT, if this service is required to assist the child in benefiting from special education. Upon the request of Student's mother, the District re-assessed Student. Based upon the results of this second assessment, and the input from Student's parents and physician, the District offered Student OT services at his December 6,

2004 IEP meeting.

The District's delay, based upon an unsupported legal position, resulted in the denial of a FAPE to Student since he required the services in order to access his education.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO CONSTITUTE A COMPLETE INDIVIDUALIZED EDUCATION PROGRAM (IEP) TEAM AT THE IEP MEETING HELD ON JUNE 23, 2003, AND AT IEP MEETINGS HELD DURING THE 2006 – 2007 SY?

12. Under IDEA, the IEP team consists of: (1) the parents of a child with a disability; (2) "not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment)"; (3) "not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child"; (4) a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the local educational agency; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) whenever appropriate, the child with a disability. (20 U.S.C. § 1414(d)(1)(B).)

13. Education Code section 56341, subdivision (b)(2), provides that the IEP team shall include not less than one regular education teacher of the pupil, "if the pupil is, or may be, participating in the regular education environment." The regular education teacher shall, "to the extent appropriate," participate in the development, review, and revision of the pupil's IEP, "including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil and supplementary aids and services and program modifications or supports" pursuant to 20 U.S.C. § 1414(d). In *M.L., et al., v. Federal*

Way Sch. Dist., supra, 394 F.3d 634, the Court of Appeals for the Ninth Circuit concluded that as long as a general education placement was a possibility, the participation of a general education teacher in the creation of the IEP was required, and the absence constituted a denial of FAPE. In *Clyde K. v. Puyallup School District No. 3* (9th Cir. 1994) 34 F. 3d 1396, the Ninth Circuit found that either a teacher from a student's current placement, or one from his or her proposed placement, was required to participate in the IEP process.

14. As stated in Findings of Fact 38 to 50, the District failed to ensure the participation of either a general education teacher, a special education teacher, or both, at IEP team meetings held on June 23, 2003, June 30, 2006, August 8, 2006, October 4, 2006, June 1, 2007, and June 22, 2007. The District does not factually dispute that it failed to ensure the participation of all necessary team members for the IEP meetings in question. With regard to the IEP meeting of June 23, 2003, the District explained that since Student had never attended either a District school or a private school it did not believe it was required to have either a special education teacher or general education teacher present at the meeting. However, the District's position does not find support either in the law or in case precedent. As stated in Legal Conclusions 12 and 13, the District was required to have both a special education teacher and a general education teacher from Student's proposed placement (since he did not have a current placement) attend the IEP meeting. Under *M.L. v. Federal Way Sch. Dist.*, the failure to do so denied Student a FAPE.

15. The IDEA was amended effective July 1, 2005. One of the amendments enacted at that time expressly permits a parent to waive the participation of a regular IEP team member even if that member's area of curriculum or related services is being modified or discussed at the meeting. However, both of the following must occur: (1) the parent and the local educational agency consent to the excusal after conferring with the IEP team member and (2) the excused IEP team member submits in writing to the parent

and the individualized education program team, input into the development of the individualized education program prior to the IEP meeting. The parent's consent must be in writing. (20 U.S.C. § 1414 (d)(1)(C); Ed. Code, § 56341, subds. (g) & (h).) This amendment applies to the IEP team meetings held during the 2006 – 2007 SY.

16. However, the District presented no evidence that Student's parents were requested to waive, and thereafter did waive in writing, the presence of any required IEP team members at the IEP meetings held during the 2006 – 2007 SY. The District does not offer any justification for their absence. Therefore, as explained in Conclusions of Law 12 and 13, the failure to have all required IEP team members attend the IEP meetings listed in Conclusion of Law 14 denied Student a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2004 – 2005 SY BY FAILING TO HOLD AN IEP TEAM MEETING PRIOR TO CHANGING STUDENT'S PLACEMENT?

17. Once an IEP team has determined a student's placement and services at his or her annual IEP meeting there are certain procedures the team must follow if it decides to make changes to the IEP after the annual meeting. The entire team must meet to make the changes or, if both the student's parents and the District agree, the team may develop a written document to amend or modify the student's current IEP. (20 U.S.C. § 1414 (d)(3)(D), (F); 34 C.F.R. § 300.324 (a)(4), (6).) Another procedural requirement, found in both State and federal law, requires that the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) Thus, parents are required members of the IEP team. (§ 1414(d)(1)(B)(i); 34 C.F.R. § 300.321(a) (1); Ed. Code, § 56341, subd. (b)(1).)

18. Based upon Factual Findings 51 through 64, the District failed to hold an IEP team meeting prior to transferring Student from a SDC class at Crafton Elementary School to a general education class with RSP support at Mentone Elementary School. Nor did the

District develop an amended IEP document and provide the document for approval to Student's parents before effecting Student's transfer to a different school and, most importantly, before changing Student's placement from an SDC to a general education class with RSP support. The failure to hold the meeting until after Student had transferred schools and placements was a procedural violation of the IDEA. Based upon Conclusions of Law 5 and 17, the District may be found to have violated Student's rights to a FAPE only if the District's actions impeded Student's right to a FAPE, significantly impeded his parent's opportunity to participate in the decision making process regarding the provision of a FAPE to him, or caused Student a deprivation of educational benefits. As stated in Finding of Facts 62 through 64, the District's decision not to hold an IEP meeting before transferring Student to Mentone and changing his placement met all three criteria. Student has therefore met his burden of proof that the District substantively denied him a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2004 – 2005, 2005 – 2006, AND 2006 – 2007 SCHOOL YEARS BY FAILING TO DEVELOP AN APPROPRIATE BEHAVIOR SUPPORT PLAN (BSP) AND/OR A BEHAVIOR INTERVENTION PLAN (BIP)?

19. When a child's behavior "impedes the child's learning or that of others," a school district must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i).) When a child "exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives" of the child's IEP, a district must develop a formal behavior intervention plan (BIP), which becomes part of the child's IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) Serious behavior problems are defined as "behaviors which are self-injurious, assaultive, or cause serious property damage or other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches in the student's IEP are found to be ineffective." (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Before a BIP is developed, the district must conduct a functional analysis assessment (FAA). (Cal.

Code Regs., tit. 5, § 3052, subd. (a)(3).) An FAA is a detailed assessment of a child's behavior, which includes, among other things, systematic observation of the occurrence of the targeted behaviors, systematic observation of immediate antecedent events associated with the behavior and the consequences of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)

20. As stated in Factual Findings 67 and 68, Student began to exhibit troubling behaviors while he still attended the SDC at Crafton. His stress on the playground and resulting bouts of crying at home were two of the reasons his parents were interested in changing his placement and the reason why they acquiesced to the Student's transfer to Mentone. However, Student began exhibiting inappropriate behaviors at school almost as soon he began school at Mentone. He was inattentive in class, and was only able to focus on any instruction for more than about five minutes at a time. He would crawl under furniture, often refusing to return to his seat, he began hiding in his classroom or actually eloping from the class, resulting in his teacher being unaware of Student's whereabouts. Student's parents were justifiably concerned about his safety, particularly given his age and the fact that the school had no fencing and was bordered by busy streets. As stated in Factual Findings 69 through 75, the District delayed offering Student a one-on-one aide or developing a BSP until after Student's parents removed him from school.

21. Additionally, as explained in Factual Findings 76 through 107, the BSP the District developed for Student after he returned to school, and the aide it provided to him, were inadequate to meet his behavior needs. By the end of the 2004 – 2005 SY, the District was still not addressing Student's behaviors and the behaviors were escalating. By the end of that school year, Student had begun to exhibit aggressive behaviors, such as kicking out at teachers. He was also so stressed and incapable of coping with that stress that he was once found curled up in a ball on the floor and had to be physically picked up by his teacher and moved to a safe place because he would not do so on his own.

22. Student's behaviors escalated during his second grade year at Mentone. Moreover, as stated in Factual Findings 108 through 120, even after the Diagnostic Center assessed Student and recommended specific behavior interventions, the District failed to implement them or conduct an FAA for Student. The failure to develop an adequate BSP and the later failure to conduct an FAA and develop a BIP for Student resulted in the escalation of Student's inappropriate behaviors at school and in the escalation of his stress-related ailments and behaviors. Student began experiencing seizures during the first semester of the 2005 – 2006 SY, which had been dormant since Student was three years old. He began having bouts of diarrhea, and began biting his nails through his nail beds. As a result, Student's treating neurologist wrote a prescription removing Student from school to home hospital instruction.

23. As stated in Factual Findings 121 through 125, the District failed to implement a proper IEP for Student or to conduct an FAA and develop a BIP for him after he began school at Big Springs. The District failed to do so even though Student's maladaptive behaviors were the reason Big Springs refused to enroll Student in one of its classrooms, and even though Big Springs determined that Student's behaviors required 25 hours per week of ABA therapy.

24. As stated in Factual Findings 69 through 125, the failure of the District appropriately to address Student's behavior issues during the 2004 – 2005, 2005 – 2006, and 2006 – 2007 school years, directly impeded his ability to access his education. Student's teachers in first and second grade were not trained to address the type of behaviors Student exhibited and Student was not capable of independently controlling them. Student could not learn because his inattentiveness and his other inappropriate behaviors interfered with his ability to be taught. Therefore, based upon Conclusions of Law 19, Student has met his burden of proving that the District's delay in developing a BSP for him, the inadequacies of the BSP and of the one-on-one aide the District provided to

Student, and the District's failure to administer an FAA and develop a BIP for Student, all contributed to his loss of educational benefit and resulted in the denial to him of a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2003 – 2004, 2004 – 2005, 2005 – 2006, AND 2006 – 2007 SCHOOL YEARS BY FAILING TO OFFER AND/OR PROVIDE HIM WITH AN APPROPRIATE EDUCATIONAL PLACEMENT AND RELATED SERVICES?

25. In *Rowley, supra*, 458 U.S. 176, 201, the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The intent of the IDEA was 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.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) To constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

26. Both federal and state law requires school districts to provide a program in the LRE to each special education student. (See 34 C.F.R. §§ 300.114, et seq.) A special education student must be educated with nondisabled peers "[t]o the maximum extent

appropriate,” and may be removed from the regular education environment only when the nature and severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (Ed. Code, §§ 56001, subd. (g), 56345, subd. (a)(5), 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031; see also 20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181, fn. 4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.)⁴⁶

27. When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary paraprofessionals and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (hereafter *Rachel H.*))

28. Additionally, the courts have held that an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

⁴⁶ The terms “regular education” and “general education” mean the same thing as it relates to the IDEA, and are often used interchangeably by the parties here.

29. Pursuant to Factual Findings 126 through 135 and Conclusions of Law 3, and 25 through 28, Student failed to meet his burden of proving that the District did not offer him a placement in the least restrictive environment, or failed to provide him with necessary related services, in the 2003 – 2004 SY. Student did not present persuasive evidence that he would have obtained sufficient academic benefit from placement in a general education class even with added supports. None of his witnesses testified that a general education placement would have been appropriate for Student during Kindergarten or testified that the SDC was too restrictive for him. Student’s parents urged the team to place Student in a SDC because they had seen the benefits that a similar placement had afforded to Student’s older brother. They believed Student would gain similar benefits as well. Student had never attended school so had no history in a classroom that would demonstrate his ability to navigate a general education class. Additionally, he demonstrated socialization deficits and language deficits that indicated that an SDC classroom was his least restrictive environment. Both his SDC teachers testified that their classrooms were appropriate for Student and that he made some progress there; Student presented no witnesses who testified to the contrary.

30. Likewise, as stated in Factual Finding 134, there is no evidence that the District’s failure to provide Student with specific speech and language therapy sessions during Kindergarten denied him a FAPE. Ms. Isaak is a speech language pathologist. She integrated speech therapy into her classroom as part of the class structure. As stated in Conclusions of Law 25, the District was not required to maximize Student’s potential with regard to meeting his speech and language needs. Therefore, pursuant to Conclusions of Law 3, 25, and 26, Student has failed to meet his burden of proof that the District failed to provide him a FAPE by failing to provide him with speech and language therapy in Kindergarten.

31. Based upon Factual Findings 136 through 145, and pursuant to Conclusions

of Law 3, 25, and 26, Student has likewise failed to meet his burden of proof that the District failed to provide him with an appropriate educational placement or with appropriate related services during first grade.

32. However, based upon Factual Findings 146 through 148 and 152, and pursuant to Conclusions of Law 3, 25, and 26, Student has met his burden of proof that the District failed to provide him with an appropriate placement and related services during the first semester of second grade. Although Student demonstrated significant learning deficits and special needs, which prevented him from accessing his education without supports, the District ceased providing him with RSP support at the beginning of second grade. The District's decision was not informed by any change in Student's needs or by any assessment that indicated that Student no longer required the RSP support. Rather, the District made its decision solely because it had not installed air conditioning in the RSP classroom and Student, because of allergies, could not tolerate the swamp cooler, which provided cooling to the room. The District did not explore other educational alternatives for Student, such as a transfer to a school with an air-cooled RSP class, and did not ensure that the classroom had air conditioning before the start of the school year.

33. Additionally, based upon Factual Findings 149 through 152, and pursuant to Conclusions of Law 3, 25, and 26, the District failed to provide Student with an appropriate educational placement and related services from April 10, 2006, when his mother signed the IEP placing Student in home hospital instruction, until the end of that school year. The District failed to make an individualized review of Student's needs when it offered him only one hour of home hospital instruction per day. The District failed to offer any persuasive argument in support of the offer of one hour per day of instruction. Additionally, the District failed to offer Student speech and language therapy while he received home hospital instruction, despite the fact that his previous IEP had mandated it, and despite the fact that he still exhibited significant speech and language deficits. Student has therefore

met his burden of proof that the District failed to provide him with an appropriate educational placement and related services during the 2005 – 2006 school year.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2004 – 2005 AND 2005 – 2006 SCHOOL YEARS BY FAILING TO DEVELOP GOALS AND OBJECTIVES THAT ADDRESSED STUDENT’S UNIQUE NEEDS AND THAT WOULD ALLOW STUDENT TO ACCESS THE GENERAL EDUCATION CURRICULUM AS CIRCUMSCRIBED BY THE CALIFORNIA CONTENT STANDARDS?

34. Both California and federal law require an IEP to contain “a statement of measurable annual goals, including academic and functional goals,” which are designed to “meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum” and “meet each of the child's other educational needs that result from the child's disability.” (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed Code, § 56345, subd. (a)(2).) The IEP must also contain “a description of how the child's progress toward meeting the annual goals. . .will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.” (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).)

35. As stated with more specificity in Factual Findings 154 through 164, and pursuant to Conclusions of Law 3 and 34, the District failed to develop appropriate goals for Student’s first grade year at Mentone. The District timely failed to develop the goals and objectives for Student; it did not propose them until the October 18, 2004 IEP meeting, a month and a half after Student began school at Mentone. Significantly, the goals, once developed, were inappropriate for Student. All of Student’s witnesses who reviewed his goals testified to their deficiencies. District and SELPA staff also believed the goals were inappropriate. Both Mr. Himes, Student’s RSP teacher, and Ms. Meland, the SELPA program

specialist who developed Student's BSPs, cautioned other District IEP team members that the goals, which proposed that Student would complete two year's of education in just one year of first grade, were beyond Student's capabilities at the time and thus were unreasonable. The evidence therefore amply supports Student's contention that the goals developed for him by the District in the 2004 – 2005 SY were not appropriate for him, did not address his unique needs, and prevented him from making more than minimal progress in the curriculum. Student has therefore met his burden of proof that the District's failure to develop appropriate goals for him in the 2004 – 2005 school year denied him a FAPE.

36. As set forth in Factual Findings 165 through 169, and pursuant to Conclusions of Law 3 and 34, Student has met his burden of proof that the District failed to develop appropriate goals and objectives for him during the 2005 – 2006 school year. The goals that the District developed for him during the first semester of this school year were not based upon a review of the progress Student had made during the previous year. The goals contemplated that Student would make a full academic year's worth of progress, but did not supply him with the necessary support of an RSP class, or other specific support that would enable Student to succeed in a general education classroom. The goals simply did not address the manner in which Student would access his curriculum and did not provide him the support he needed to do so. Additionally, as stated above, Student's physician placed him on home hospital instruction as of December 2005. The IEP team held a meeting to implement home hospital instruction on December 6, 2005. However, the team did not develop new goals to address Student's change in placement. The District failed to counter Student's evidence that the goals failed to allow him to progress in the general education curriculum. It offered no evidence that Student's goals were able to be, or were actually addressed, during the time he received instruction at home in the spring of 2006. To the contrary, Ms. Sjostrom testified that Student did not have access to the

general education curriculum during the time he was on home hospital instruction.

37. Student has therefore met his burden of proof that the District failed to offer him appropriate goals for the 2005 – 2006 SY, and therefore denied him a FAPE.

DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE DURING THE 2006 – 2007 SCHOOL YEAR?

Failure to Offer Student an Appropriate Placement in the Least Restrictive Environment; Failure to Review Past Progress; Failure to Develop Goals Prior to the Start of the School Year; Failure to Implement Appropriate Goals and Objectives

38. As stated in Conclusions of Law 26 and 27, Federal and state law require school districts to provide a program in the least restrictive environment to each special education student. Additionally, a placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.)

39. In *Rachel H., supra*, 14 F.3d at pp. 1400 – 1402, the Ninth Circuit’s decision dealt with an issue of whether a child should be “mainstreamed” in a regular education class. However, it is still helpful to consider the *Rachel H.* factors in analyzing whether the District offered a placement in the least restrictive environment appropriate for the Student in the 2006 – 2007 SY. The case, and its analysis, is applicable in the instant case even though the focus on Student’s placement during this school year is on the difference between placement in a NPS and placement in a home program with tutoring support, rather than placement in a general education class.

40. Additionally as stated in Conclusions of Law 4, to determine if a district has violated a student’s right to a FAPE, the court must determine first if the district has

complied with the procedural requirements of the IDEA and state law. Under the circumstances stated in Conclusions of Law 5, a procedural violation may result in the substantive denial of a FAPE.

41. Furthermore, the law requires a district to have an IEP in place at the beginning of each school year for every child who is eligible for special education. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 56344, subd. (b).) This is a recognized procedural requirement of IDEA. (*Ms. S. v. Vashon Island School District, supra*, 337 F.3d at p. 1130.)

42. As described in detail in Factual Findings 170 through 183, Student's placement at Big Springs for the 2006 – 2007 SY had difficulties from the start. Student has met his burden of proof that several procedural violations contributed to the District's denial of a FAPE for him. The District and Big Springs failed to review Student's progress on his past year's goals and objectives, which led to a failure to develop appropriate goals and objectives for him. The District IEP team also failed to develop goals and objectives prior to when Student began school at Big Springs; therefore, there was no understanding of what his educational program should be geared to. In addition, when the goals were developed, they failed to address Student's unique needs.

43. However, as fully specified in Factual Findings 171 through 179, the principle defect in the IEP for Student's 2006 – 2007 SY was the inappropriate educational program the District developed for him. The IEP's component was a 25 hour a week in-home ABA program that involved one-to-one behavioral instruction for Student. In addition to related services in areas of OT, SL, and vision therapy to be provided at the Big Springs campus, the only education program offered to Student on the Big Springs campus was just over four hours a week of "educational therapy" which basically amounted to four hours a week of one-on-one tutoring. Based upon its assessment of Student, Big Springs had determined that Student's behaviors prevented him attending a classroom at his campus. Instead of proposing an alternative placement, the District acquiesced to the program

proposed by Big Springs. This deprived Student of interaction with any other children for the majority of his school week. The District does not offer any persuasive argument that would justify placing Student in such a restrictive educational setting. Other than home hospital instruction, where a student needs to receive his or her education at home based upon illness, there is no other potential placement option that would isolate a child to this extent. The placement deprived Student of a FAPE because the four hours of educational instruction did not offer him an educational program that met his unique academic needs, and because it was not the least restrictive environment for him.

44. Additionally, as detailed in Factual Findings 121 through 125, the ABA services that Big Springs provided to Student were inadequate because they were not properly developed or implemented. Student has persuasively demonstrated that he failed to benefit from the ABA services because he made no progress toward improving his behaviors. The evidence supports a finding that his behaviors, in fact, worsened during the year he received the services from Big Springs.

45. Therefore, based on all these factors, and on Conclusions of Law 3, 4, 5, 25, 26, 27, 28, and 38 through 44, Student has met his burden of proof of demonstrating that the totality of the educational and ABA program the District provided to him in the 2006 – 2007 school year failed to afford him a FAPE.

Failure to Provide Student with Access to California's Third Grade General Education Curriculum

46. As stated in Conclusions of Law 3, a FAPE consists, in pertinent part, of special education and related services, which meet state educational standards. As stated in Factual Finding 184, the United States Supreme Court applied this principal in the *Rowley* case. The Federal Regulations state that an IEP means, in pertinent part, "a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and

progress in the general education curriculum.” (i.e. the same curriculum as for non-disabled children.) (34 C.F.R. § 300.320 (a)(1)(i).) However, as stated in Factual Finding 184 – 185, contrary to the position advanced by Student, not every child can, or should, have an IEP in which his or goals and objectives are directed at accessing the grade level standards for his or her state. As stated in Conclusions of Law 3, special education is instruction specially designed to meet the unique needs of a child with a disability. As stated in Factual Findings 172 – 174, Student’s academic needs for the 2006 – 2007 SY could not be met in a general education classroom. For this reason, his IEP team determined that placement at an NPS, with ABA in-home support, was the appropriate program for Student. Student has failed to demonstrate that he was capable of being educated in a general education third grade classroom during this year, and has failed to demonstrate that he was capable of accessing the general education third grade curriculum. Student has therefore failed to meet his burden of proof that the District denied him a FAPE by failing to provide him with access to the California third grade curriculum during the 2006 – 2007 school year.

Failing to Provide Appropriate Related Services in the Areas of Speech and OT

47. Pursuant to Conclusions of Law 3, a FAPE consists of special education and related services that are available to a child with special needs, at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. “Special education” is instruction specially designed to meet the unique needs of a child with a disability. “Related services” are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. In California, related services are also called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education.

48. Student contends that the OT and SL services provided to him by the District

in the 2006 – 2007 school year were inadequate to meet his unique needs. However, as detailed in Factual Findings 186 through 188, the weight of the evidence fails to support Student’s position that the OT and SL services that the District provided to Student at the Big Springs campus did not provide him with at least the minimum legal standards of a FAPE. As stated in Conclusions of Law 25, the United States Supreme Court in *Rowley, supra*, 458 U.S. at pp. 176, 201, held that a district is not required to maximize a child’s potential. Rather, the district’s program must provide the child with some educational benefit. Furthermore, as stated in Conclusions of Law 26, the pertinent inquiry is what was appropriate at the time the District developed the IEP, not what hindsight reveals. The evidence demonstrates that at the time the IEP team offered SL and OT services to Student at the beginning of the 2006 – 2007 SY, 50 minutes a week of each service would provide him with at least some educational benefit. Student has therefore failed to prove that he required additional OT or SL services in order to be given the benefit of a FAPE.

Failing to Provide an Appropriate Transition Plan

49. If appropriate, an IEP must also include a provision for the transition of a child from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including a description of the activities provided to transition the child into the regular program. (Ed. Code, § 56345(b)(4); *T.P. and S.P. v. Mamaroneck Union Free Sch. Dist.* (S.D.N.Y. May 10, 2007) 47 IDELR 287, 107 LRP 27096.) As detailed in Factual Finding 189, Student has failed to demonstrate that the District had an obligation to develop a transition plan for him when he moved from home hospital instruction to an in-home ABA program supplemented by related services and educational therapy at Big Springs. Even assuming that home hospital instruction is a special class, there is no question that Big Springs was not providing Student with any regular classes on a public school campus. Therefore, the Education Code section relied upon by Student did not apply to Student’s change in placement for the 2006 – 2007 school year. The District’s

failure to develop a transition plan did not deny Student a FAPE.

Failure to Consider the Recommendations of the Non-Public School

50. Both IDEA and California law contemplate that the parents of a child will be part of the IEP team and that the school district will consider input from those parents. (See, e.g., 34 C.F.R. 300.501.) As set forth in factual Findings 190 – 191, the District erroneously took the position that it could not consider changes to Student’s IEP while litigation was pending in the instant case. The District therefore refused to consider or discuss proposed modifications to Student’s IEP recommended by Big Springs. As stated in Conclusions of Law 5, a procedural violation of the IDEA which constitutes a serious infringement of parents’ opportunity to participate in the IEP formulation process results in the substantive denial of a FAPE to the student. Here, the failure to permit discussion regarding Student’s IEP prevented Student’s parents from meaningful participation in the IEP process because the District’s decision precluded discussion of possible changes to Student’s educational program. Student has therefore met his burden of proof that the District’s failure to permit discussion on the recommendations of Big Spring denied him a FAPE.

Failure to Implement all of the Services Identified in Student’s June 30, 2006 IEP

51. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 813.) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Ibid*)

52. The evidence substantiates Student’s contention that Big Springs informed the District and Student’s parents in June 2007 that it was ceasing to provide Student with

any educational or related services at its campus. After Student's parents requested at the June 22, 2007 IEP meeting that the District contract with a different ABA provider to provide therapy to Student, the District directed Big Springs to terminate provision of ABA to him. The District did not contract with another provider to replace any of the services previously provided to Student. Student simply was left with no educational program or related services after June 22, 2007. Therefore, pursuant to Factual Findings 192 through 196 and Conclusions of Law 48, the failure to implement Student's IEP during the 2006 – 2007 ESY was material and, therefore, Student has met his burden of proof that the District denied him a FAPE by its failure to replace the services previously provided by Big Springs.

Determination of Relief

53. The court has long recognized that equitable considerations are appropriate when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (hereafter *Puyallup School*), citing *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].) Compensatory education is an equitable remedy; it is not a contractual remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Puyallup School, supra*, 31 F.3d at p. 1497.) Relief is appropriate if it is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid*) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

54. Based upon the Factual Findings in this Decision, and more particularly, Factual Findings 197 through 212, and Conclusions of Law 53, Student is entitled to an order for compensatory education. Student gave every indication at the time he entered

Kindergarten and the time he entered first grade, that he was capable of accessing the curriculum for each grade. The District's decision to move Student from a SDC to a general education classroom with RSP support was based upon the opinion of District school psychologist Ms. Vaughn that Student was too advanced for an SDC and would obtain more benefit from a general education class. The fact that Student is two or more years behind his grade level reading and writing is attributable to the denial to him of a FAPE by the District.

55. Therefore, as stated in Factual Findings 197 through 212, the order for relief provides Student with compensatory education in the areas of reading, decoding, and phonemic awareness, as well as in writing and mathematics. The order shall provide that Student's parents have the option of determining, on a week-by-week basis, how the one-hour a day of tutoring shall be apportioned between writing and mathematics instruction. The order also addresses Student's behavioral deficits by ensuring that the District provides him with at least one more year of in-home ABA therapy. All tutoring is in addition to Student's regular classes and should take place after normal school hours so that it does not interfere with Student's classes or other educational programs or services.

ORDER

1. Within 10 school days of the issuance of this Order, the District shall promptly make available to Student individual tutoring after regular school hours as follows:
 - a. The District shall provide tutoring to Student by either a Board Certified Educational Therapist or a teacher credentialed to teach elementary mathematics and writing/language arts, for an hour a day during all school days. The District shall provide up to a maximum of 430 hours of tutoring over the next two years, starting from the date this Order is issued, including up to 25 hours during any ESY period that occurs during the next two years. The tutor shall either be

trained in autism and behavioral interventions or the District shall provide a one-on-one aide, trained in autism and behavioral interventions, to support Student during his tutoring sessions.

- b. Student's parents will determine the focus of the tutoring and shall inform the District in writing by noon on the Thursday of each school week of the amount of time for the following week they want to dedicate to mathematics instruction and the amount of time they want to dedicate to writing and/or language arts instruction. If Student is attending school at the time this Order issues, his parents may choose to have the tutoring provided at that school or at Student's home school, unless the parties mutually agree to another location. If Student is not attending school, the District shall provide the tutoring at Student's home school, unless the parties mutually agree to another location.

2. The District shall provide 240 hours of Lindamood-Bell's Seeing Stars program and 150 hours of the Lindamood-Bell Visualization and Verbalization program to Student, during Student's school vacations or other times school is in recess for more than a week. The District shall provide the service either at a Lindamood-Bell center, or by a person trained by Lindamood-Bell, who has at least two years of experience giving Lindamood-Bell instruction, and delivers the instruction according to the dictates of the Lindamood-Bell agency. The program shall not exceed four hours a day.

3. The District shall provide 25 hours a week of in-home ABA services to Student for the 2008 – 2009 school year, for a total of 50 weeks. The District shall also provide 10 hours of supervision a month and 3 hours of parent training a month. The ABA shall be provided by the Center for Behavioral Research and Education unless that NPA is unable or unwilling to provide the services. If so, the District shall provide another qualified ABA provider to deliver the services. The ABA services shall be provided outside of Student's school hours if he is attending school, and the time of delivery shall be

coordinated between Student's parents and the ABA provider.

4. Within 30 days of this Order, the District shall contract with a qualified independent assessor who shall administer an FAA to Student.

5. All other relief requested by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d) requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. Student fully prevailed on issues 1, 2, 3, 4, 7(a), 7(b), 7(c), 7(d), 7(h), and 7(i). Student substantially prevailed on issues 5 and 6. The District partially prevailed on issues 5 and 6, and fully prevailed on issues 7(e), 7(f), and 7(g).

RIGHT TO APPEAL THIS DECISION

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

Dated: March 17, 2008


DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings
Special Education Division