

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

In the Consolidated Matter of:

NEWPORT-MESA UNIFIED SCHOOL

Petitioner,

v.

STUDENT,

Respondent,

OAH CASE NO. N 2007070947

STUDENT,

Petitioner,

v.

NEWPORT-MESA UNIFIED SCHOOL

Respondent.

OAH CASE NO. N 2007090686

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter in Laguna Hills, California, on November 5 through 9, 2007, and November 19 and 20, 2007.

S. Daniel Harbottle, of Rutan & Tucker, represented the Newport-Mesa Unified School District (District). Diana Casato, Director of Special Education, attended the hearing on behalf

of the District.

Robyn S. Ginney and Michelle Ortega, of Roberts & Adams, represented Student (Student). Student's mother attended the hearing on behalf of Student. Student's father also attended several days of the hearing.

The District filed its request for due process hearing on July 27, 2007. Student filed his request for due process hearing on September 26, 2007. OAH consolidated the matters on October 4, 2007. Hearing commenced on November 5, 2007, and the record closed on January 2, 2008, upon receipt of written closing arguments.

## ISSUES

The issue for determination on behalf of the District is:

1. Whether the District's initial assessment dated April 18, 2007, was appropriate and conducted in accordance with the IDEA and Education Code section 56320.

The issues for determination on behalf of Student are:

2. Whether the District failed to appropriately assess Student in all areas of suspected disability pursuant to Education Code section 56320.
3. Whether the District failed to develop appropriate goals and objectives in all identified areas of need.
4. Whether the District failed to offer appropriate supports and DIS services.<sup>1</sup>
5. Whether the District failed to implement peer reviewed research.
6. Whether the District failed to offer Student placement in the least restrictive environment.
7. Whether Student is entitled to reimbursement for Independent Expert

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<sup>1</sup> Student's issue regarding the District's offer of appropriate behavioral interventions is included as a DIS service in Issue No. 3 for clarity.

Evaluations (IEE).

8. Whether Student is entitled to reimbursement and compensatory relief.

## CONTENTIONS

In early April 2007, the District completed its initial assessment of Student. The District's assessments indicated that Student qualified for special education and related services under the category of autistic-like behaviors. Subsequently, at the IEP meeting on April 18, 2007, Student disagreed with the District's offer of placement and services derived, in part, from the recommendations contained in the assessments. As a result, Student requested that the District fund IEEs, specifically a new psychoeducational assessment, occupational therapy (OT) and speech and language (S/L) assessments, as well as a behavioral assessment. The District declined Student's request, and, in turn, filed its Request for Due Process Hearing. The District contends it appropriately assessed Student in all areas of suspected need, and that Student's assessments were properly administered by its preschool multi-discipline assessment team in a manner that complied with federal and state law. Therefore, the District should not be required to fund Student's IEEs.

Student, in response, filed his own Request for Due Process Hearing which as been consolidated with the District's case. Student contends that the District failed to appropriately assess Student in all areas of suspected needs. As a result, the District failed to provide relevant information to the Individualized Education Program (IEP) team. Specifically, Student contends that the District's OT assessment, S/L assessment, and psychoeducational assessments were flawed. Therefore, Student should be entitled to IEEs at public expense.

Student contends that as a further result of the flawed assessments, the IEP team had inaccurate information and was unwilling to provide Student with DIS services at a significantly higher level than offered. Further, without accurate assessments, the IEP team did not identify many areas of deficit, and was, therefore, unable to create appropriate goals for Student. Most significantly, Student contends that the offered placement in the "Seahorse"

special day class (SDC) is contrary to multi-expert opinions, and would result in Student's regression both behaviorally and academically.

In response to Student's contentions, the District maintains that the Seahorse SDC is a "structured autism classroom," which has been specifically designed for students with autism and which utilizes applied behavioral analysis (ABA) principles. The Seahorse SDC would most appropriately address Student's significant behavior problems, and would be the least restrictive environment (LRE) for his initial educational placement. Student's placement in the Seahorse SDC would be supported by designated instructional services (DIS) recommended by Student's IEP team. Further, the District's recommendations, as to Student's initial placement, was a methodological decision appropriately made by highly trained district staff.

## FACTUAL FINDINGS

1. Student, age three, has a medical diagnosis of autism, and qualifies for special education and related services under the eligibility category of "autistic-like" behaviors.

2. As of July 3, 2006, prior to his third birthday, Student began receiving S/L services and OT from Cornerstone Therapies (Cornerstone) to address delays in gesturing, receptive and expressive language, pragmatics, play skills and cognitive language development. He initially received 13.5 hours of direct programming with one-half hour of parent education per week. According to information from Cornerstone, Student exhibited excellent progress within this program. In December 2006, Student transferred to Autism Spectrum Consultants (ASC) for his ABA service to address continuing behavioral issues. At that time Student received 10 hours of ABA from ASC and 3.5 hours of services from Cornerstone. Student's ABA time increased to 20 hours of ABA on March 9, 2007. At the time of his District assessment, Student attended A Child's Place Learning Center, a private preschool with typical peers, supported by a one-on-one shadow aide provided by ASC. Additionally Student received two hours of S/L therapy and one hour of OT per week from Cornerstone.

3. Student was referred to the District in February 2007, and the District commenced its initial assessment of Student in March 2007.

ASSESSMENT OF STUDENT:

4. The District has an obligation to ensure that it appropriately assesses a child. Education Code section 56320 provides the various requirements necessary to appropriately assess children in California. Specifically, the assessment must not be racially or culturally discriminatory and must be in the child's native language. A variety of tools and strategies must be used to ascertain the child's functional and developmental levels. Parental input and observations are required. Standardized tests must be validated for the purposes used, and those tests must be administered by trained and knowledgeable personnel in accordance with test instructions. The selected assessment tools must assess all areas of suspected deficit, and must be able to cope with a child's limited sensory, manual or speaking skills. Not only must a District utilize the above criteria, but it must also assess a child in all areas of suspected disability in a comprehensive manner so that all of the child's special education and related services needs are identified, whether or not commonly linked to the disability category in which the child has been classified.<sup>2</sup>

5. Michelle Lepak administered the psychoeducational assessment of Student and wrote the Assessment Report dated April 18, 2007. She has been employed by the District since 2005, and is currently the District's lead school psychologist. Ms. Lepak holds a M.A. in Educational Psychology and also holds an Educational Specialist degree. She is currently working on her Ph.D. in Education/School Psychology. Ms. Lepak has conducted over 80 psychoeducational assessments while employed with the District, many of them involving

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<sup>2</sup> Prior to the hearing, Student indicated that the Adaptive Physical Education and Health assessment were not at issue, therefore the reports of Sandy Hart-Thomas, A.P.E., and Debbie Norman, R.N. are not discussed.

children with autistic-like behaviors.

6. Kathy Sostaric tested Student's readiness skills. Ms. Sostaric has a B.S. and M.S. in Education. She is currently a special education teacher for the District. Ms. Sostaric has conducted approximately 180 assessments, with an estimated 50 percent representing autistic-like children. Ms. Sostaric has autism training from the FOCUS Academy, but no specific training in ABA.

7. Kathleen Bryan, M.S., CCC-SLP, assessed Student's S/L skills. Ms. Bryan has a B.A. in Communication Disorders, Audiology and Deaf Education and an M.S. in Communication Disorders. Ms. Bryan is licensed and Board certified as a Speech-Language Pathologist. She has a Certificate of Clinical Competence, Speech and Language Pathology, a California teaching credential, and a Professional Clear Clinical/Rehabilitative Services credential, Language, Speech and Hearing. She has extensive experience as a speech and language pathologist and lecturer. Ms. Bryan assesses approximately 100 preschoolers per year for the District, a significant number of whom are autistic/autistic-like.

8. Stephanie Roberts, M.A., OTR/L, tested Student's fine motor skills and sensory processing areas for the District.<sup>3</sup>

9. Each member of the District's assessment team possessed sufficient education, training, and professional experience to administer Student's assessments.

#### PSYCHOEDUCATIONAL ASSESSMENT:

10. Based upon information available to the District at the time of the assessment, the District suspected that Student had one or more impairments in the area(s) of listening comprehension, oral expression, oral-motor, speech, receptive language, expressive language (including association, conceptualization and expression), gross motor, fine motor, sensory

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<sup>3</sup> Ms. Roberts did not testify at hearing, however, the parties stipulated to her qualifications as an OT and assessor.

processing, sensory-motor processing, motor planning, behavioral organization, attention, behavior, social skills, social-emotional functioning, autistic-like behaviors, and self-help/adaptive behaviors. Ms. Lepak gleaned this information from the Cornerstone and ASC reports, medical/health records, and interviews with Mother and ASC staff.

11. Ms. Lepak crafted Student's psychoeducational assessments to examine suspected impairments in the areas of health, limited strength, vitality or alertness, auditory processing, visual processing, visual-motor integration, listening comprehension, oral expression, basic reading skills, written expression, memory, oral-motor, speech, receptive language, expressive language (including morphology, syntax, semantics or pragmatics), general intelligence, cognitive abilities (including association, conceptualization and expression), gross motor, fine motor, sensory processing, sensory-motor processing, motor planning, behavioral organization, attention, behavior, social skills, social-emotional functioning, autistic-like behaviors, and self-help/adaptive behaviors. Ms. Lepak noted that further data would also be gleaned from the assessments concurrently being conducted by the school nurse, occupational therapist, speech and language pathologist, adaptive physical education teacher and preschool special education teacher.

12. The District is required to use a variety of materials and tools to assess a student. Those tools must include materials tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quota.

13. Student's assessment materials included the Mullen Scale of Early Learning (Mullen), the Assessment, Evaluation and Programming System (AEPS-R), the Child Behavior Checklist (CBCL), Adaptive Behavior Assessment System, second edition (ABAS-II), and the Childhood Autism Rating Scale (CARS). The assessment also included clinical observations of muscle tone, balance, coordination, motor planning, postural control, attention to task, and quality of movement. Although Student's expert, Dr. Christine Majors, Psy.D.,<sup>4</sup> indicated she

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<sup>4</sup> Dr. Majors is a licensed psychologist currently in private practice. In addition to her

did not use several of the assessment protocols used by the District, Student presented no evidence to suggest that the District's assessment materials were inappropriate. It is noted that, while Dr. Majors is a highly qualified assessor, she completed her assessment of Student several months after the District assessed Student, at a time when additional assessment tools were available due to the increase in Student's chronological age. As a result, her assessment report is of little persuasive value.

14. In addition to administering the assessments, Ms. Lepak reviewed two ASC Progress reports dated February 21, 2007, Cornerstone Addendum goals dated March 2007, and a Cornerstone CAP Progress/Transition report dated February 2007. Ms. Lepak also interviewed Mother, and Cindy Underwood,<sup>5</sup> the Assistant Clinical Director for ASC. Lastly, Ms. Lepak conducted observations of Student at home, during a play date and during the assessments. Mother and Ms. Underwood indicated that Student was having an "off day" on the date the District completed its home observations.

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Psy. D., Dr. Majors has a B.A. and M.A. in Psychology, and a degree in Nursing. Dr. Majors currently performs neuropsychological assessments predominantly of pediatric patients with a broad spectrum of neuropsychological and psychological problems. She also is involved with the ongoing development and provision of social skills groups for children, adolescents, and young adults with pragmatic language deficits, e.g., high functioning autism, Asperger's Disorder and nonverbal learning disorders. Dr. Majors completed an independent assessment of Student on September 19, 2007.

<sup>5</sup> Cindy Underwood is the Assistant Clinical Director for Autism Spectrum Consultants. She has a B.A. in Health Science/Social Psychology, and M.A. in Counseling Psychology, and has a Certificate in Applied Behavioral Analysis (awaiting results for BCBA). Her duties at ASC include providing clinical supervision services and program development and review to 13 ASC clients and management and supervision of 25 ABA therapists.



15. Ms. Lepak administered the Mullen Scale which is a comprehensive measure of cognitive functioning for infants and preschool children. The Mullen assesses a child's ability in visual, linguistic and motor domains, and distinguishes receptive and expressive processing. While Student's overall composite score placed him "Below Average," his scores were scattered. Student also scored in the average range in two of the four sub-scales.

16. Student contends that although Ms. Lepak correctly administered the standardized assessment of Student's cognitive abilities, the scores did not present an accurate representation of Student's abilities due to his behavior and inattention. Mother reiterated that Student was having an off day at the time of the assessment. Ms. Lepak confirmed that there were times on the test where Student could not be redirected to complete an activity to gain credit, and other times where his attention to task and impulsivity may have impeded his performance. Ms. Lepak further indicated, however, that this situation is not uncommon in testing children with autistic-like behaviors. Student argues that Student may have been able to score higher if attention and impulsivity were not factors in his performance, and Ms. Lepak does not disagree. The assessment report contained its own caveat that ". . . standardized cognitive measures with preschool students are often difficult to administer due to the child's immaturity. Cognitive structures are continuing to develop in the preschool years and the following results may not represent long term cognitive abilities."

17. The fact remains, however, that Ms. Lepak properly administered the Mullen and accurately reported Student's scores as Student actually performed on that day. Further, those behavioral observations were sufficiently confirmed in other observations and reports to constitute important trends in Student's behavior. While Student's expert, Dr. Majors might have reassessed Student "on a good day," Student's cognitive results would not have differed greatly. Ultimately, the District's assessments report concluded that Student's cognitive ability presented in the average range for a child his age. More importantly, Student's cognitive abilities are not truly at issue in this matter. Rather, the issues center on Student's behavior and readiness skills for placement in a general education setting. As Ms. Lepak indicated,

although cognitive ability is an important factor in determining educational placement, behavior is just as great a concern.

18. Ms. Lepak also administered the ABAS-2 which measures behaviors and skills that are important to everyday life. Mother completed an adaptive measure to assess Student's skills in home and community settings. Mother's data indicated that Student scored in the average range in the areas of functional pre-academics and motor skills. Student scored substantially lower in all other areas. In conceptual domains, which include verbal and non-verbal communications, listening skills, vocabulary, as well as skills needed for independence, self control, and following directions, Student's overall score fell in the below average range of functioning. In the social domain, which includes socially interacting with others, having friends, and showing and recognizing emotions, Student scored in the extremely low range. In practical domains, which include community behavior, home and classroom skills, health and safety, and self-care, Student scored in the borderline range.

19. Kathy Sostaric administered the AEPS-R, which is a comprehensive, curriculum-embedded assessment system designed to evaluate children from birth to six years who have disabilities or are at-risk for developmental delays. The AEPS-R is designed to identify educational strengths and needs in order to formulate the most developmentally appropriate IEP goals. Ms. Sostaric also observed Student, interviewed Mother and reviewed Student's records. Ms. Sostaric assessed Student in fine motor, adaptive, cognitive and social areas. Mother completed a parent report which was utilized in Student's assessment and determination of Student's present levels of performance across settings. The adaptive domain skills included those skills which are involved in being able to take care of oneself, such as eating, toileting and undressing. The cognitive domain skills are those which involve mental processes and reasoning, such as problem solving, recalling, imitating and categorizing. The social domain skills are those that involve interaction and participation with others, such as showing affection, playing with others, and sharing.

20. After completing her assessments, Ms. Sostaric determined that Student

presented with age appropriate skills in many areas such as color and shape concepts, identifying age-appropriate body parts, math skills, and quantitative concepts. She concluded, however, that Student had several areas of unique need such as readiness/functional academic skills, social/emotional skills, behavior, and self-help/domestic skills.<sup>6</sup> Ms. Sostaric's observations of Student's social skills are significant. She reported that Student does not yet meet his observable physical needs in socially appropriate ways. Student can be very difficult transitioning and throws himself to the ground and hits. He displays no impulse control. Student has difficulty paying attention and focusing for more than two minutes. He gets aggressive when he does not get his own way. Student does not like to share. When he gets frustrated, he hits rather than talk. Mother disagrees with these conclusions, and again indicated that Student was having a bad day during the home observation. It is noted, however, that Mother also reported similar behavior in her interviews and questionnaires.

21. The CBCL is designed to screen for behaviors and emotional concerns which may be present in the home setting. In completing the CBCL, Mother confirmed many behavioral concerns for Student. Student's results indicated behaviors in the clinically significant range in areas such as attention problems, and borderline in the areas of somatic complaints and aggressive behaviors.

22. Ms. Lepak, Mother, and Cindy Underwood, Student's ABA provider, completed the CARS. Though it is noted that the CARS is a subjective test in which observations and scores may vary between raters, the raters' general impressions scored Student with mild autism.

23. The District conducted appropriate cognitive functioning and readiness assessments. Ms. Lepak and Ms. Sostaric are trained and knowledgeable in administering

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<sup>6</sup> The complete list of unique needs in cognitive areas is enumerated on pages 26 and 27 of the Assessment Report.

assessment materials. Although Dr. Majors would have used different testing materials, Student presented no convincing evidence to suggest the District's assessments were not valid or administered in accordance with test instructions. The District used a variety of tools and strategies to ascertain Student's functional and developmental levels. Mother participated in the assessments. The assessors observed Student at home and in his ABA program. Admittedly, Dr. Majors is a highly qualified neuropsychologist who conducted a much more extensive assessment of Student. She assessed Student, however, at a later chronological age, and had the additional advantage of access to information from Student's preschool teacher.

#### SPEECH AND LANGUAGE ASSESSMENT:

24. Student's S/L skills were assessed by Kathleen Bryan. Ms. Bryan noted that prior to the District's assessment, Student had participated in a global multi-disciplinary intervention program through Cornerstone, commencing in June 2006. During that time, Cornerstone administered several standardized tests, including the Preschool Language Scale-4 (PLS), the Rossetti Infant Toddler Language Scale (Rossetti), the Peabody Picture Vocabulary Test-4 (PPVT-4), and the Expressive Vocabulary Test-2 (EVT-2). Student's receptive and expressive language abilities for vocabulary and grammar, as well as his spontaneous language, scored in the average range for his chronological age. Tests available for assessing language in children under three years of age are limited and cannot be readministered within a calendar year. Due to the multiple standardized language tests given by Cornerstone, Ms. Bryan did not administer additional standardized language tests. In reviewing the Cornerstone data, Ms. Bryan indicated that the tests appeared to be appropriately administered and the scores correlated with her own observations of Student.

25. Ms. Bryan administered the Clinical Assessment of Articulation and Phonology (CAAP) to assess Student's speech sound production. Overall, Student scored average for his chronological age.

26. Based upon the Cornerstone testing and her own testing and observations of Student, Ms. Bryan concluded that Student had unique needs in the areas of speech and language. Specifically, Student exhibited unique needs in receptive and expressive language, but primarily in the area of pragmatics.<sup>7</sup> While Student contends that the District failed to properly assess Student in all areas of speech and language, the testimony of Student's experts, Nina Welch,<sup>8</sup> owner and Director of Cornerstone Therapies, and Barbara Moore,<sup>9</sup> owner and Clinical Director of Speech Pathology Associates, did not significantly dispute the District's S/L assessments or the determination of Student's unique needs in the area of speech and language. The District appropriately assessed Student in the area of speech and language.

#### OCCUPATIONAL THERAPY ASSESSMENT:

27. Stephanie Roberts, M.A., OTR/L, tested Student's fine motor skills and sensory processing areas for the District. Student contends that the OT assessment was flawed, as Ms.

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<sup>7</sup> The complete list of unique needs for speech and language are listed on page 31 of the assessment report.

<sup>8</sup> Nina Welch is the Co-director and owner of Cornerstone Therapies. Ms. Welch is a licensed Speech Pathologist. She has a B.A. in Communicative Disorders, and M.A.s in communicative Disorders and Education. Cornerstone Therapies provides speech and language, physical therapy, occupational therapy and behavioral therapy for children birth to 18 years of age. Cornerstone services children with autism.

<sup>9</sup> Barbara Moore is a licensed Speech Pathologist and the Executive Director of Speech Pathology Associates. Ms. Moore has a B.A. in Speech Pathology and an M.A. in Speech Pathology and Audiology. She has extensive experience with autism and autism related speech disorders.

Roberts failed to conduct any formalized assessments of Student to determine his unique needs. Ms. Roberts' assessment consisted of clinical observations of Student at preschool, a parent interview, observation of Student in his OT session, an interview with Student's OT provider, as well as a review of Student's records from Cornerstone.

28. In her assessment report, Ms. Roberts noted that Student had significant difficulty attending to structured adult-directed fine motor activities. He demonstrated fleeting attention and frequently needed to be physically redirected. In quieter environments, Student was able to complete activities independently or with minimal re-direction. In busier settings, however, Student required moderate to maximal prompting to attend and follow through with tasks.

29. Student contends that the OT assessment did not include any standardized testing of Student. Ms. Roberts noted that Student had recently been administered the Peabody Developmental Motor Scales-2 (Peabody) by Cornerstone. This standardized test includes cutting, building, lacing, grasping, and copying tasks. Review of the Peabody indicated that Student did not display any significant fine motor delays. Student's expert, Suzanne Smith-Roley,<sup>10</sup> expressed concern that the District did not conduct its own standardized testing, and indicated that she would want to see the child with her own eyes.

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<sup>10</sup> Susanne Smith-Roley is an extremely qualified occupational therapist. Ms. Smith-Roley has a B.S. in Occupational Therapy, and an M.S. in Allied Health Sciences. Ms. Smith-Roley is licensed as an Occupational Therapist through the American Occupational Therapy Association, National Board of Certification for Occupational Therapy and California Board of Occupational Therapy. She currently works with the University of Southern California as the Program Director and Instructor of the university's Comprehensive Program in Sensory Integration. Ms. Smith-Roley is highly published on subjects related to occupational therapy, and she has extensive experience with autism.

While Ms. Smith-Roley would report the Peabody results, she would not rely on them, as a child's skills can change over a short period of time. Further, the Peabody is not the only test available. Further, Ms. Smith-Roley opined that Student's scores were a red flag that he was continuing to lag in some areas. She indicated that Student showed discrepancies in eating issues, behavior and fine motor skills.

30. The District's OT report concluded that Student exhibited inefficient sensory processing, specifically, auditory and visual processing which contributed to Student's difficulties with in-seat compliance and attention to task. As a result, sensory processing was an area of unique need for Student.<sup>11</sup> Ms. Smith-Roley concurred in part, indicating that safety awareness was critical for an active child like Student. Upon completion of the assessment, the assessors identified eight generalized areas of unique needs for Student. All but sensory processing identified numerous sub-domains of need for Student. As with Dr. Majors, Ms. Smith-Rowley may have conducted a far more expansive assessment than the District provided. Her testimony, however, did not indicate that the District's assessment was procedurally flawed or inappropriate. While she placed more emphasis on Student's fine motor skills than the District did, she based her opinion on the information and protocols contained in the District's assessment. The District appropriately assessed Student in the area of OT.

#### THE APRIL 18, 2007 IEP:

31. The District held Student's initial IEP on April 18, 2007, one month before Student's third birthday. The IEP team consisted of all legally required parties, specifically, Student's parents and attorney, a District Administrator, Special Education teacher, General Education teacher, Speech and Language Pathologist, Occupational Therapist, Adaptive PE

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<sup>11</sup> The District also assessed Student's gross motor skills in an adapted physical education (APE) assessment. This assessment, however, was not challenged by Student.

teacher, School Psychologist, School Nurse, and E.S. Transition Specialist. Additionally, a representative of the Regional Center, the Director of Cornerstone Therapies, and Student's Case Manager from ASC attended the IEP meeting.

32. The IEP team determined that Student had identified unique educational needs which required intensive specialized instruction. As a result, Student could not fully benefit from a general education setting. The IEP team offered Student full-time placement in the Seahorse SDC (5.25 hours per day); group S/L services in a classroom setting (one hour per week); individual S/L services (30 minutes per week); and occupational therapy services within the classroom setting (30 minutes per week). Mainstreaming would occur five days a week for 30 minutes during recess, and an additional 30 minutes per week in circletime. Reverse mainstreaming would occur for one hour once a week. Additionally, the continuing services of ASC, Student's ABA provider, would be utilized and gradually faded through June 6, 2007, as part of Student's transition plan into the District program. The IEP also provided for an ESY as a maintenance program during the summer. Student's ESY program consisted of SDC for five hours, five days a week (July 2-31, 2007), reduced to four days a week (August 1-15, 2007); OT collaboration for one hour per month (July only); and group S/L services for one hour per week (July only). Parents did not consent to the offer contained in the IEP. Mother specifically objected to the recommended classroom placement, indicating she was concerned that Student would imitate the behaviors of the other children in the SDC.

33. Student contends that the educational program offered by the District was not designed to meet Student's unique needs nor reasonably calculated to provide Student with any educational benefit.

34. A District has met its FAPE requirements when a student receives access to an education that is "sufficient to confer some educational benefit." The standard for determining whether a district has substantively provided a FAPE involves a determination of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services were calculated to provide educational benefit to the student, and (3)



whether the services conformed to the IEP.

35. Both the District and Student's parents agree that Student is best served with an ABA based program. As defined by Jessica Postil,<sup>12</sup> the Clinical Director of ASC, the purpose of ABA is to bridge the gap between a child's functioning level to more appropriate age level skills.

36. Lori Williams, Psy. D., Coordinator of the District's Autism Program,<sup>13</sup> described the District's various autism programs. The District developed its preschool autism program in collaboration with Autism Partnership. Autism Partnership provides an ongoing staff training, as well as in-classroom consultations, to provide support to the teachers and staff and to provide problem solving regarding individual students. The District's preschool autism programs have incorporated all of the critical features of a preschool classroom for children on the autism spectrum, as defined by the National Research Counsel.<sup>14</sup>

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<sup>12</sup> Ms. Postil is the President and CFO/Clinical Director of ASC, Orange County. Ms. Postil has both a B.A. and M.A. in Psychology. She is currently a doctoral Psy.D. candidate in Clinical Psychology with emphasis in Clinical Health Psychology. She is certified by the California State Board of Education to provide Behavioral Intervention Development and Behavioral Intervention Implementation, and she is a registered Psychological Assistant with the California Board of Psychology. ASC primarily develops and provides behavioral intervention programs for autistic children.

<sup>13</sup> Dr. Williams has a Psy.D. in educational Psychology. She also has a B.A. in Psychology and an M.A. in School Psychology. Dr. Williams is currently the Coordinator of Autism Programs for the District. She is licensed as an Educational Psychologist, School Psychologist and holds a credential in Pupil Personnel Services. She has lectured at international ABA conferences on ABA and autism.

<sup>14</sup> The District's preschool program conforms to the studies of the National Research

37. At the time of Student's IEP, the District had 10 ABA preschool classrooms. Dr. Williams attended Student's IEP meeting and recommended the Seahorse SDC for Student. Seahorse is a special day class (SDC) specifically for students with autism/autistic-like behaviors. The Seahorse SDC uses ABA methodology exclusively.

38. In recommending the Seahorse SDC, the IEP team focused on Student's aggressive behavior and problems attending to task. The IEP team knew Student was bright, but determined that Student's behavior was his predominate unique need. Student's maladaptive and aggressive behaviors needed to be addressed first. The IEP team determined that it would be best to provide Student with intensive targeting of behavioral concerns. Student must learn to sit, comply and attend before he can move on to other skills. As Dr. Williams stated, "Behavior is a prerequisite to learning other skills." Once Student's

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Counsel, which considers the following areas critical in developing a preschool for children on the autism spectrum: (1) active engagement in intensive instructional programming for a minimum of a full school day, five days (at least 25 hours) a week, with full year programming varied according to the child's chronological age and developmental level; (2) repeated, planned teaching opportunities generally organized around relatively brief periods of time for the youngest (e.g., 15-20 minute intervals), including sufficient amounts of adult attention in one-to-one or very small group instruction to meet individualized goals; (3) inclusion of a family component, including parent training; (4) low student/teacher ratios (no more than two young children with autistic spectrum disorders per adult in the classroom); and (5) mechanisms for ongoing program evaluation and assessments of individual children's progress, with results translated into adjustments in programming. National Research Counsel (2001) *Educating Children with Autism*. (p. 219), Committee on Educational Interventions for Children with Autism. Catherine Lord and James P. McGee, eds. Division of Behavioral and Social Sciences and Education. Washington, D.C: National Academy Press.

behavior was stabilized, he could move on to focusing on social and emotional skills.

39. Dr. Williams emphasized that as the Seahorse SDC is a fully ABA classroom, there is no down time. Everything is a teaching event. The Seahorse SDC is highly structured and has a teacher and two aides, which provides a two-to-one ratio with students. Class time is five hours, 15 minutes a day, longer than the general education preschool. As an ABA classroom, behavior data on each student is collected daily, recorded, and summarized in order to analyze each child's progress towards their individual goals. Dr. Williams also describes the Seahorse SDC as a language rich program, with speech and language and communication skills embedded within the program.

40. While Student marginally challenged the classroom staff's competence to properly manage an ABA based program, there appears to be no disagreement that an ABA based educational program is appropriate for Student. Student is currently in an ABA program operated by ASC. Student's true objections to the IEP lie elsewhere in services and classroom placement.

41. Student contends that the District failed to develop appropriate goals in the area of speech and language. The District's identification of Student's unique needs in the area of speech and language corresponded to those of Cornerstone. The IEP noted that "Student presents with unique needs in the areas of expressive pronouns and verbs, and pragmatic communication, specifically requesting, commenting, and use of joint referencing with appropriate eye contact/gaze with adults and peers. Cornerstone Therapies also reported unique needs for comprehension of negation in multi-word utterances, and answering questions appropriately in group settings with peers." The IEP team created S/L goals for Student which are similar to those recommended by Cornerstone. The IEP team crafted goals for comprehension (negation); expressive language (-ing verb tense); expressive language (is/are verbs); expressive language (pronouns); pragmatics (commenting); pragmatics (requesting); and WH questions. Ms. Bryan indicated that, in spirit, Cornerstone's recommendations were contained in five of Student's seven S/L goals. Other

recommendations made by Cornerstone were considered incidental to teaching and not needed as a structured goal. In a review of the goals, Student's expert, Barbara Moore, indicated that the goals were appropriate for Student's areas of need. The S/L goals were designed to address Student's unique needs.

42. Student contends that the District failed to develop appropriate OT goals. Student's assessments indicated that Student had areas of need in adaptive behavior, sensory-motor processing and self-regulation. As stated by Ms. Martin-LaCroix, regulating stimulation in OT allows Student to develop skills to focus and cope.

43. Student's IEP contained 22 goals. Of those goals, six were specifically behavior goals, and an additional seven goals contained OT sensory and behavioral components intertwined therein. As example, Student's goals included a Functional Academic/Readiness goal of "attending to story," which, by definition, included a behavioral component addressing self-regulation, and attention. Student's goal of "appropriate toy use" also is an appropriate OT goal for sensory processing, even though the IEP classifies it as a Social/Emotional goal. Further, as indicated by Dr. Williams, sensory processing objectives were embedded in the teaching methodology used in the District's structured autism classes.

44. Multi-discipline approaches to goals are not uncommon. Ms. Smith-Roley indicated that multiple disciplines often address the same goal. She continued, however, that each professional handles the same goal differently. An occupational therapist would not approach a goal from an academic or educational perspective. While Ms. Smith-Roley admitted she is unaware of the specific training requirements for a structured autism teacher, she reiterated that an occupational therapist is not a trained teacher, and a teacher is not an occupational therapist. Of those goals which address sensory issues, only three involved the participation of an occupational therapist. It is Ms. Smith-Roley's opinion that, given Student's significant sensory needs, an occupational therapist should be working on many of the goals identified as the teacher's responsibility, including group participation, following two-step directions, and self-care.

45. All of the witnesses expressed significant concerns regarding Student's self-regulation abilities, primarily in the area of personal safety. As explained by Ms. Smith-Roley, self-regulation directly impacts on Student's behavior, ability to attend, and ability to cooperate and participate in group activities. She further stated that safety awareness is a critical concern for an active child such as Student. In reviewing the IEP team's goals for Student, Ms. Smith-Roley expressed a concern that the area of self-regulation was insufficiently addressed. In order to tackle maladaptive behaviors, Student needed a specific goal to directly address self-regulation. Without it, she believes it would be difficult for Student to make much progress. Ms. Smith-Roley, however, did not provide any insight as to what such goal would include. The OT goals contained in the IEP were appropriate to address Student's unique needs.

46. Student contends the IEP failed to offer appropriate supports and DIS services in speech and language. The District offered two, 30 minute sessions of group S/L per week and 30 minutes per week of individual S/L services. The District also offered two, 30 minute group sessions per week for four weeks of ESY as maintenance services. Student contends that he requires S/L services a minimum of two hours per week.

47. Ms. Moore agreed that group S/L sessions twice a week for Student would be appropriate. She indicated, however, that Student needed to be matched with similar peers in a small group of no more than three or four children. She expressed concern if Student were to be paired with lower functioning students. Ms. Moore opined that Student needs more than 30 minutes per week of individual services, and further indicated that there is a good chance that Student would regress if direct services were reduced from two hours to 30 minutes a week. Additionally, she indicated that S/L services should be a pull-out activity, as classroom services would be too distracting to Student. In reviewing Ms. Moore's Evaluation Report, it is noted that her recommendations are based upon services in a family centered program rather than services in an educational setting, with language skills embedded as part of the teaching strategy.

48. Ms. Welch, on the other hand, acknowledged that in making a speech and language recommendation, one must look at the student's entire program. Language does not only happen in the classroom. If Student has a truly language enriched classroom, then he may need less pull out services. Still, it is her belief that Student requires two hours of S/L services, and he needs the influence of verbal peers.

49. In justifying the 30 minutes per week difference in recommendations for individual services, Ms. Bryan, asserted that the District's S/L services are intended to supplement the entire educational program offered to Student. The autism SDC is a language enriched program with language goals being addressed in other classroom activities as well. Further, although Ms. Moore would have included social/behavioral issues in her recommendations, S/L services do not typically include behavior goals. Several of Student's other 22 goals directly addressed behavior, while others addressed it indirectly. Taken as part of the whole program for Student, the 30 minute direct S/L session may be appropriate for Student after transition into the District autism program. Ms. Moore's concern that Student would regress if individual S/L services were immediately reduced to 30 minutes is troubling. The IEP provides no transition from the two hours of direct services provided by Cornerstone to the mere 30 minutes allotted to individual services to be provided by the District. This concern is compounded when considering that the IEP provided no individual S/L services to Student during the summer. The IEP did not provide student with sufficient individual S/L services for the school year, provide Student with an adequate transition to substantially less individual S/L services, and offered no individual S/L during the ESY. Therefore, the District has not provided Student with an appropriate offer of individual S/L services in the April 2007 IEP. Student is entitled to one hour of individual S/L services during the school year in addition to the one hour of group S/L services offered in the April 2007 IEP. Additionally, Student is entitled to reimbursement for the individual S/L services obtained for him during the 2007 ESY.

50. Student contends the District failed to offer Student adequate OT services.

The IEP team offered OT services for 30 minutes, once a week, in order to address goals in group participation, attending to tasks, in-seat participation, and safety awareness. OT services for the ESY consisted of 60 minutes of collaboration for the entire ESY.

51. Ms. Smith-Roley believes this offer is inadequate to allow Student to make progress. While Ms. Smith-Roley believes the offer of one-on-one OT services is appropriate, she does not believe that all OT services can be provided in the classroom setting, as Student's activity would most likely be disruptive in the classroom. Further, Ms. Smith-Roley strenuously opined that not all of Student's OT goals could be addressed in 30 minutes a week.<sup>15</sup> Ms. Martin-LaCroix disagreed, and indicated that most of Student's OT could be done in the classroom, and the classroom itself had lots of equipment and toys to assist with sensory issues. Further, the teaching strategies in a structured autism classroom have sensory components, and the special education teacher has OT training and is well-versed in sensory diets.

52. Ms. Smith-Roley concluded that Student required intense OT services for one school year. While 10 hours per week of OT would be ideal, in order to make gains, Student would need OT at least three hours per week. While Ms. Smith-Roley is a highly qualified and informative professional, her opinions on Student's IEP are tempered by her professional limitations in addressing OT from an academic or educational perspective. Additionally, in commenting on the District's program, Ms. Smith-Roley did not know the training qualifications of the special education teachers or whether ABA teaching strategies addressed sensory processing or sensory integration.

53. Nonetheless, the District has emphasized that the primary considerations for placing Student in the Seahorse SDC related to controlling Student's behavior in order to provide an appropriate educational program. As stated by Dr. Williams, Student needed

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<sup>15</sup> As Mother indicated, it takes Student 10 minutes to get his shoes off.

intensive targeting of behavioral concerns. As she further stated, "you must get a child to sit, comply and attend before you can move onto other skills." The District's initial concerns for Student revolve around safety, self-regulation, and attention. All of these areas are directly related to sensory processing, perceptual awareness, and sensory integration. All are properly addressed in OT, by a licensed occupational therapist. While the ABA methodology provided in the classroom is significant, the District has not successfully refuted the multiple testimonies that most of Student's maladaptive behaviors stem from his sensory difficulties. Student's behaviors cannot be adequately addressed until his underlying sensory processing deficits are addressed. Further, while the OT goals may be appropriate, the allotment of a mere 30 minutes per week to work on those goals is insufficient to meet Student's extensive needs in this area. Likewise, the absence of any direct OT services during the ESY fails to meet Student's OT needs. While Ms. Smith-Roley's recommendation of three hours of OT services per week is designed more to maximize Student's potentials, Cornerstone's provision of one hour of OT services per week is appropriate. Further, given the emphasis both the District and Ms. Smith-Roley have placed on sensory processing and behavior, the provision of no direct OT services during ESY is inappropriate. At this initial stage of Student's education, where behavior is paramount, Student required a minimum of 30 minutes a week during ESY for maintenance of those skills learned during the school year.

54. Student contends that the IEP failed to provide "related services" in the form of a home component of ABA services or, at minimum, a parent training component to facilitate generalization of new skills obtained via the classroom ABA program.

55. The District offered a transition in ABA services from Student's home program with ASC. The IEP team intended that Student's ASC aide would gradually fade out services through June 2007. Once Student began attending the Seahorse SDC, the ASC aide would accompany him as a shadow aide for three hours per day for the first week; two hours per day for the second week; and two hours per day for the third week. As of June 7, 2007, the ASC aide would terminate, and all ABA services would be provided by the Seahorse SDC teacher



and staff. Additionally, the ESY program for Student consisted of 20 hours per week of SDC for the six weeks of ESY. No additional ABA services were offered during the ESY or the remaining school break.

56. Dr. Williams explained that while a one-to-one program at home is the most natural setting for children until age three, it is also the most restrictive. By age three, the preschool environment is preferred as it is school based. Dr. Williams conceded that a home based program often continues after age three, however, in those cases the child needs a more restrictive setting in which to work on more basic skills before moving into the school setting. Student did not require such restrictions, and Dr. Williams believes it most important to address Student's unique needs in the school setting. The IEP team did not offer an ABA home component as the team believed Student's needs could all be addressed in the classroom. Ms. Postil disagreed, and considers a home component critical for a three year old in order to assist with generalizing education skills at home and home skills at school.<sup>16</sup> At the time of the IEP, Student was comfortable and familiar with his home setting and just beginning to integrate into the school setting. Further, most of Student's IEP goals could be done in both or cross environments. Ms. Postil offered that Student's prognosis was excellent with an ABA program; however, she did not believe he would make gains without a home component and parent training. As indicated in *Rowley*, methodology is generally left up to the district's discretion. Ms. Postil's opinion is based upon her experience with ASC, which provides an ABA program primarily conducted in a home setting. The District's Seahorse SDC is also an ABA program, but is administered in an educational setting with a different focus and teaching strategies. Neither program is incorrect. They focus on differently based goals,

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<sup>16</sup> Ms. Postil also indicated that ASC in-home services were terminated when Student reached three years of age as the Regional Center determined that Student no longer qualified for in-home ABA services.

i.e., education vs. behavior, and utilize different ABA strategies to work towards those goals. As such, the argument is one of methodology.

57. It is unrefuted that a successful ABA program requires parental involvement. Dr. Williams indicated that parental observations and input is critical to verify observations which represent patterns in daily functioning. Ms. Underwood emphasized that parent involvement is critical to a successful ABA program in order to provide Student with consistency.

58. While the District's proposal to transition the ASC aide out of the classroom and rely on its own ABA program, may be appropriate, the District has made no arguments to discredit Student's experts regarding the necessity of continuing ABA services during the summer months, or a parent component to maintain consistency in other environments. Both parties reference Lovaas-based ABA methodology. Both parties indicated that the existing research suggests that ABA intervention is most effective when provided at least 20 hours per week, 12 months per year. Ms. Underwood opined that an ABA program should run 40 to 52 weeks a year, with no more than a one week break at a time. A break in services in excess of a few weeks for a child of three years of age, likely will result in significant regression. As a result, a district offers ESY services to maintain a student's progress level. In Student's case, the break time from the end of the ESY until the beginning of the new school year represented a period of an additional month without ABA. As emphasized by Dr. Williams, the focus for Student's Seahorse program is "Behavior first, the learning will follow." In order for the learning to follow, Student must make progress toward behavior goals and maintain that progress. For a three year old, recently terminated from a home program, maintenance of acquired skills is imperative. A month long break in ABA services makes Student's regression probable, thereby defeating Student's anticipated gains in behavior during the prior school term. The District did not provide a sufficient ABA maintenance program for the break in school services for the summer of 2007. Student is entitled to reimbursement for the ABA services obtained for him from ASC during the summer of 2007.

59. Modification of Student's maladaptive behaviors does not stop at the end of the

school day, and, at minimum, the involvement of the parents is necessary to maintain consistency outside of the school setting. Student's IEP did not identify a means for parental consultation or training necessary to promote consistency and advance Student's progress in the Seahorse ABA program. Dr. Williams indicated that the District offers a parent training program to all parents of children with autism, but that the parent program does not appear in the IEP. While Student correctly contends the IEP contains no parental component, he does not provide authority which requires that District services provided to parents be contained in the IEP, as the parents are not subject to the IEP. Therefore, including parental programs in the IEP, while highly desirable, is not mandatory.

60. A child with a disability must be, to the maximum extent appropriate, educated with children who are not disabled and in the least restrictive environment. Student contends that his placement in the Seahorse SDC does not constitute the least restrictive environment, and he should be placed in general education with a one-to-one aide.

61. Dr. Williams explained that the District has a continuum of placements ranging from general education to blended classrooms, to non-categorical classroom (non-autism) to special day classes (SDC). At the time of Student's IEP, the District had ten ABA preschool classrooms. The IEP team recommended the Seahorse SDC for Student. Seahorse is a special day class specifically for students with autism/autistic-like behaviors. The Seahorse SDC is the most restrictive school placement for children with autism. There are five Seahorse SDC classrooms. The IEP team also offered mainstream time with typical peers during each day for 30 minutes during gross motor/recess, 30 minutes each week during circle time, and an additional 60 minutes a week of reverse mainstreaming. Additionally, the IEP team scheduled a meeting in September 2007, to review Student's behavior progress and placement.

62. The District invited mother to observe the various placement options. Mother visited a Seahorse SDC and was highly offended by what she observed. As she recalled, she could barely remain in the classroom. In testimony, Mother vividly described her revulsion for the Seahorse SDC. The Seahorse SDC was a very restrictive environment. The children all had

behavioral problems and were lower functioning than Student. Mother expressed great concern for the lack of typical peers, as Student learns by imitating peers in positive interactions. Student's current providers had recommended a general education placement for Student. Student was making progress in his current, typical peer preschool.<sup>17</sup> Mother concluded that she was not willing to take a chance that Student would regress in the District's placement.<sup>18</sup> As a result, she did not agree with the IEP team recommendation of placement in the Seahorse SDC.

63. When determining which placement is the LRE, a district must consider: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the cost of mainstreaming the child.<sup>19</sup> These components shall be addressed at length.

64. Determination of LRE requires an analysis of the educational benefits available to Student in a general education classroom, supplemented with appropriate aides and services, as compared to the educational benefits of an SDC.

65. Ms. Smith-Roley provided the clearest picture of Student. She describes Student as a bright kid who needs lots of supports. He has good imitation skills, and needs good

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<sup>17</sup> It is noted from Ms. Underwood's testimony that Student's typical peer preschool class has only 9-11 children.

<sup>18</sup> It should be noted that Student's parents previously had difficulty in obtaining increased ABA services for Student from Regional Center, and that after a nine month battle to increase Student's ABA to 25 hours, Student improved dramatically. Such hard earned advances are not easily set aside by parents.

<sup>19</sup> In this matter, the cost of educating Student was not argued in the context of LRE.

modeling. While she supports the desire to ultimately remove Student's aide and have Student act independently, she finds that Student can disorganize rapidly without structure. Ms Smith-Roley observed tantruming during her assessment. She reported that Student is unable to modulate his activity levels; has irregular processing in educational areas; has serious safety issues related to sensory and special awareness problems; has difficulty with self-regulation; and requires adult structure and assistance to engage others.

66. Dr. Majors recommended that Student be placed in a general education preschool with a one-on-one aide. Student scored close to age appropriate in many areas and needed exposure to typical peers to imitate typical behaviors. She noted that Student is a big imitator. As a result, he needs significant contact with mainstream children. Dr. Majors opined that placement in an SDC could be harmful to Student if he regressed or imitated lesser peers. Dr. Williams countered by stating that any potential inappropriate mimicking of lower functioning classmates would be dealt with by the special education teacher. Dr. Majors also indicated that Student needed a small class, as a larger class would over stimulate him. Further, Dr. Majors could not comment on the educational components of placement, as she is not trained as an educator. She would not comment on whether Student needed a trained special education teacher, whether the IEP goals could be implemented, or how ABA services could be delivered in a general education setting.

67. In March 2007, Cornerstone had recommended that Student attend a typical preschool. Ms Welch explained that Mother wanted a typical preschool program, and she agreed that Student deserved a chance in a typical setting. Ms. Welch, however, was uncertain as to whether Student would be successful among typical peers. On April 4, 2007, Student began attending a regular preschool with the assistance of a shadow aide. Mother indicated that Student successfully imitated through positive interactions with the typical peers at preschool, and did not exhibit maladaptive behaviors. It is noted, however, that Student's preschool teacher did not attend the IEP or testify at hearing. Student presented no evidence regarding Student's learning abilities or interaction with peers at school. Further, while

Student attended the regular preschool, he also continued with his ABA program at home. It is therefore unknown as to whether Student was obtaining educational benefit from the preschool, the home ABA program, or both.

68. At the time of the IEP, Ms. Underwood agreed, that due to his behaviors, Student still needed a one-on-one aide. Without an aide, Student's behavior would impede his education in a general education setting. Further, Ms. Underwood expressed concerns about the size of a general education class, as Student was overwhelmed in larger groups. She indicated that Student had difficulties in large groups, even with an aide. Ms. Underwood, however, believes there has been a marked reduction in Student's maladaptive behaviors, and she worried that placement in an SDC would be a step backwards for Student.

69. While not addressing the educational elements of Student's placement, Ms. Moore also indicated she believed Student could be educated in a general education setting with an aide. Additionally, she felt it important, at least in group S/L, that Student be matched with similarly skilled peers. She further indicated, however, that even in a SDC, she wanted S/L services in a pull-out setting with no more than three to four children in group, as the classroom setting or more children would be too distracting for Student. During her assessment of Student, Ms. Moore indicated that Student tantrumed, wandered, and pulled toys from the shelves. She concluded that Student needed considerable help with focusing and redirection.

70. The IEP team determined that a general education setting would be inappropriate for Student. All parties concur that an ABA based program best served Student at that time. The general education preschool is not an ABA based program nor does it contain any special knowledge of autism. The IEP team determined, and all experts agree, that Student needs a small classroom. The general education setting is too large for Student. While all of Student's experts believe Student could function in a general education setting with the assistance of an aide, none of the experts could testify as to the educational aspects of a general education placement. Most importantly, the general education classroom does

not utilize an ABA based program. The general education teacher would not be the source of teaching for Student. This concern is echoed by Student's own ABA provider. While Ms. Underwood recommended a general education setting for Student, she also warned that if Student's aide was not fully trained in ABA, Student would not access his education in a general education setting. Dr. Williams further emphasized this dilemma. In general education, the teacher is not trained in special education or ABA methodologies. As a result, the aide would need to continually prompt Student. In essence, it would be the aide who breaks down the instruction for Student, thereby providing the teaching, rather than the teacher. In the SDC, on the other hand, it is the special education teacher who breaks down the instruction, and modifies it as necessary to meet a student's needs. The aide assists with implementation. While Student may have bodily attended a general education classroom with the assistance of an aide, the general education classroom would not provide the means for Student to access the educational program. The IEP team correctly determined that as of the date of the IEP, Student would not have received educational benefit in the general education classroom.

71. Determination of the LRE also requires consideration of the non-academic benefits of mainstream placement. Both Mother and Dr. Majors emphasized Student's superior imitation skills, and expressed deep concern for Student's regression in the presence of lesser developed peers. By all accounts, Student is a bright child who would benefit from interaction with typical peers. Student would receive non-academic benefit from placement in a general education classroom.

72. Determination of the LRE must consider the negative effects Student's presence may have on the teacher and students in the general education classroom. The IEP team determined that Student was aggressive, had other behavior problems, and difficulty attending, all of which indicated placement in a general education classroom was inappropriate. Although Mother steadfastly insists that Student's behavior is no more aggressive than that of a typical three year old, the record is replete with observations, from

all witnesses including Mother, to the contrary. Ms. Underwood agreed with Dr. Majors that many of Student's behaviors were the same as would be expected from any three year old, however, she added that the intensity and duration of Student's behaviors were more severe than those of typical peers. Although she told the District assessors that Student was having a bad day during the home visit, her testimony did not invalidate Ms. LePak or Ms. Sostoric's observations or the behavior patterns derived from their observations. Ms. Moore also observed tantruming, wandering and difficulty attending. Mother herself reported tantrums, hitting, and biting incidents which the experts concluded were behavior manifestations of Student. Further, Mother informed the IEP team of her concern for Student's safety due to spatial and self-awareness problems.

73. As further example, Student's own ABA provider, Ms. Underwood, acknowledge Student's aggressive behavior in describing his improvements. She indicated that much of Student's behavior problems stemmed from his frustrations with communication. It was her opinion that Student's behavior goals should focus on using words to convey thoughts in order to terminate maladaptive behavior. In other words, she would teach Student to use words rather than engage in aggressive behavior. While Ms. Underwood's methodology may differ from that of the District, she nevertheless focused on modifying aggressive behavior. Even with an aide, it is likely a general education teacher would be required to spend substantial time addressing Student's maladaptive behaviors, and those behaviors would be disruptive to the other students in class. Further, the unanimous concern regarding Student's safety issues requires a more restrictive environment for Student than the general education classroom.

74. The IEP team determined that Student required an initial placement in a more structured classroom. The Seahorse SDC is a highly structured and behavior oriented program. According to Dr. Williams, the focus of the Seahorse SDC is not cognitive, it is more behavior and readiness skills oriented. In a less structured program, Student would not adequately benefit from his education. Further, given that this was an initial placement in an



educational setting, the District must be provided some flexibility to further observe Student's adaptation to school, and to get him kindergarten ready. Once enrolled in the class, Student's behavior and mimicking would be observed and reported. The IEP team recognized this need, and included a September 2007 meeting to discuss Student's potential advancement from the Seahorse SDC, or at the other end, a need for a behavior intervention plan. The District's offer of the Seahorse SDC represents an appropriate placement in the least restrictive environment.

#### PEER REVIEWED RESEARCH

75. Student asserts that the District failed to implement a program which is scientifically based and supported by peer-reviewed research. As a result, Student contends the District's program denied him a FAPE. An IEP must contain a statement of the special education and related services, based on peer-reviewed research, to the extent practical, to be provided to the child.

76. As indicated in Factual Finding 36, the District's preschool program conforms to the studies of the NRC. The District's Seahorse SDC is an ABA based program. In *Educating Children With Autism*, the NRC discussed comprehensive programs for autism. The report noted that, while the "differing conceptual frameworks influence the intervention models in substantial ways, there is also considerable overlap between and across the various models," and that "gaps in practice appear to be narrowing." The Council further stated: "There is no outcome study published in a peer-reviewed journal that supports comparative statements of the superiority of one model or approach over another."

77. ABA is an intensive behavioral intervention which employs behavior modification treatment. The component parts of early intervention through the use of ABA techniques include the intensity of up to a 40-hour week, primarily involving one-on-one repetitive drills, or DTT, by a therapist trained in this methodology, and detailed daily data collection to monitor skill acquisition. ABA's scientific basis dates back to the work of Dr. Ivar

Lovaas at the University of California, Los Angeles, in the 1960s and 1970s, as described in *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*. Since then, Dr. Lovaas' work has been examined by many peer-reviewed studies, some of which have confirmed Dr. Lovaas' results.

78. The scientific research regarding the various methodologies to teach autistic children is still emerging and inconclusive at best. The Individuals with Disabilities Education Improvement Act (IDEIA) does not mandate a particular methodology if the educational agency can establish that its chosen methodology is based on peer-reviewed research to the extent practical and that the methodology will allow the pupil to make adequate educational progress. The District's program of ABA has been subjected to peer-reviewed research. The components of the program are established and widely accepted methods of treatment. Student's prior programs, since the inception of his intervention services, have consistently contained elements of ABA. Therefore, the District's Seahorse SDC autism program is based on peer-reviewed research to the extent practicable.

#### IEEs:

79. Student contends he is entitled to reimbursement for his independent psychoeducational assessment prepared by Dr. Christine Majors, speech and language assessment prepared by Barbara Moore, and occupational therapy assessment prepared by Susanne Smith-Roley.

80. When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense.

81. In its request for due process hearing, the District has requested a determination that its assessment is appropriate. As described in Factual Findings 7 through 36, the District's assessments are appropriate. The District is not required to provide Student's IEEs at public expense.

## REIMBURSEMENTS:

82. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is appropriate in light of the purposes of the IDEA. Student is requesting reimbursement for his parent's expenditures for private preschool at both Child Development, Inc. and A Child's Place Learning Center; Cornerstone Therapies for S/L and OT services; and Autism Spectrum Consultants for ABA services. All reimbursement requests are for the period of May 16, 2007, through September 26, 2007.

83. Student submitted invoices for services as well as confirmation of payment of each invoice. Note has been taken that the services provided by Cornerstone Therapies have been billed to Parent's medical insurance. Parents have testified that they have not received any reimbursement to those invoices submitted into evidence, nor do they anticipate any reimbursement to be forthcoming.

84. Each of the providers is a non-public agency and contracts with local educational agencies. The services obtained by Parents are similar to those of the District. Mother testified that the private preschool, coupled with the services from Cornerstone and ASC met Student's unique needs, and provided him with educational benefit. The District did not dispute that portion of Mother's testimony.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49, [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. District has the burden of persuasion on issue one. Student has the burden of persuasion on all other issues.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California

law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. Special education is defined as specially designed instruction provided at no cost to parents, calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.)

3. In *Board of Education of Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L. Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs.” *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Court concluded that the standard for determining whether a local educational agency's provision of services substantively provided a FAPE involves a determination of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services were calculated to provide educational benefit to the student, and (3) whether the services conformed to the IEP. (*Id.* at p.176; *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) Although the IDEA does not require that a student be provided with the best available education or services or that the services maximize each child's potential, the “basic floor of opportunity” of specialized instruction and related services must be individually designed to provide some educational benefit to the child. De minimus benefit or trivial advancement, however, is insufficient to satisfy the *Rowley* standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119 at 130.)

4. Under California law, "special education" is also defined as specially designed instruction, provided at no cost to parents, that meets the unique needs of the child. (Ed. Code, § 56031.) "Related services" include transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) Such services include transportation and other supportive services as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(a)(17); *Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.)

5. Before any action is taken with respect to an initial placement of an individual with exceptional needs in special education, the school district must assess the student in all areas of suspected disability. (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.532(f)(2006); Ed. Code, § 56320.) The student must be assessed in all areas related to the suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (34 C.F.R. §300.532(g)(2006); Ed. Code, § 56320, subd. (f).) The assessments shall be conducted by trained and knowledgeable personnel.. .except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).)

6. In conducting the assessment, the District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or

for determining an appropriate educational program for the student. (34 C.F.R. § 300.304(b)(2).)

7. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(II), (III); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2) & (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. §300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds.(a)(4)(A) & (B).)

8. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141 (*Adams*); *Pitchford v. Salem-Keizer School District*, (D. Ore. 2001) 155 F. Supp.2d 1213, 1230-32); *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.)

9. To the maximum extent appropriate, a child with a disability must be educated with children who are not disabled and in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2).) When determining which placement is the LRE, consideration is given to any potential harmful effect on the child or on the quality of

services he or she needs. (34 C.F.R. § 300.116(d).) Further, the district must consider: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the cost of mainstreaming the child. (*Sacramento City School District v. Rachel H.*, (1994 9th Cir.) 14 F.3d 1398, 1404.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability of the child is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (*Id.*) California incorporates these requirements in Education Code sections 56031 and 56342.

10. An IEP is assessed in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) "An IEP is a snapshot, not a retrospective." (*Ibid.*, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid*)

11. A parent is entitled to obtain an Independent Educational Evaluation (IEE) of a child. (20 U.S.C § 1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district. (34 C.F.R. § 300.502(b)(1); Ed Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense. (34 C.F.R. § 300.502(c)(1); Ed. Code, § 56329, subd. (c).)

12. The 2004 Amendments to the IDEA express a policy that a special education program include the use of scientifically based instructional practices, to the maximum extent possible. (20 U.S.C. § 1400(c)(5)(e).) The Amendments also require IEPs to contain a statement of the special education and related services and supplementary aides and services, based on peer-reviewed research, to the extent practical, to be provided to the child. (20 U.S.C.

§1414(d)(1)(a)(i)(IV).)

13. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374, [105 S.Ct. 1996]; 20 U.S.C. § 1415.) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See, e.g., *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.*) The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.* (6th Cir. 1986) 790 F.2d 1153, 1161.) However, the parents' placement still must meet certain basic requirement of the IDEA, such as the requirement that the placement address the child's needs and provide him educational benefit. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361].)

14. Federal law provides that a local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility. (20 U.S.C. § 1412(a)(10)(C)(i).)

#### DETERMINATION OF ISSUES

Did the District properly assess Student in all areas of suspected disability? Yes.

15. Before any action is taken with respect to an initial placement of a student with exceptional needs, a school district must assess the student in all areas of suspected disability. As stated in Legal Conclusion 5, the student must be assessed in all areas related to his



suspected disability, including, if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. Pursuant to Factual Findings 13 and 14, based upon information provided by Student's then existing service providers and Student's parents, the District suspected a myriad of impairments relating to Student's diagnosis as a child with autism. Ms. Lepak crafted an extensive assessment plan for Student covering all suspected areas of disability.

16. Pursuant to Legal Conclusion 5, the assessments must be administered by qualified and knowledgeable personnel. Based upon Factual Findings 7 through 10, the District selected qualified personnel to administer Student's assessments. Further, pursuant to Factual Finding 7, Ms. LePak is a licensed school psychologist.

17. As stated in Legal Conclusion 6, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent. No single measure or assessment may be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. Pursuant to Factual Findings 16 through 36, the District utilized multiple assessment tools to assess Student's psychoeducational, speech and language, and occupational therapy needs. In addition, the District obtained parental input and reviewed reports and observations from Student's then current service providers. Although Student's witnesses indicated they might have tested Student differently or more extensively in some areas, the findings in their comparative assessments did not differ greatly than those of the District. The District properly assessed Student in all areas of suspected disability.

Did the District fail to develop appropriate goals and objectives in all areas of identified need? No.

18. While Student marginally challenged the District's ABA programs, there is no dispute that Student is best served in an ABA based educational program. Student's sustainable concerns center on issues involving speech and language and occupational therapy. Based upon Legal Conclusion 3, the standard for determining whether the District's services substantively provide Student a FAPE involves a determination of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services were calculated to provide educational benefit to the student, and (3) whether the services conformed to the IEP.

19. Based upon Factual Finding 47, the District crafted 22 goals for Student covering multiple areas of need. Based upon Factual Finding 45, the IEP contained five S/L goals which were similar to those proposed by Cornerstone Therapies, Student's then current speech provider. Further, Student's expert, Barbara Moore, reviewed the District's S/L goals and found them appropriate.

20. Based upon Factual Finding 47, Student's IEP contained six goals specifically addressing behavior, and an additional seven goals which contained OT sensory and behavioral components intertwined therein. Further, many sensory processing objectives are embedded in the teaching methodology used in the Seahorse SDC. Suzanne Smith-Roley is a highly credible occupational therapist, and she provided significant definition to Student's OT and sensory needs. With no educational background, however, she could offer little information on whether OT goals could be incorporated into an autism classroom, and she provided no suggestions for different OT goals for Student. Based upon Factual Findings 45 through 49, the District provided Student with 22 goals which were designed to address his unique needs and were calculated to provide him with educational benefit.

Did the district fail to offer appropriate supports and DIS services? Yes.

21. As indicated in Legal Conclusion 3, in order to provide Student with a FAPE the District must provide services which are reasonably calculated to assist Student accomplish his IEP goals. Student's S/L goals contained in the IEP are appropriate. Mother and Dr. Majors have emphasized that, due to Student's mimicking abilities, he should not be placed in groupings with lesser developed peers. Although Ms. Moore finds the District's offer of one hour of group speech appropriate in Factual Finding 51, she also concurs that group sessions should take place with similar functioning peers. The argument, however, is one of teaching methodology. As determined in *Rowley*, the courts must be careful to avoid imposing their view of preferable educational methodology upon the States. How Student is grouped for services is a decision for the District, as is the method in which Student will receive those services. The offer of group S/L services for one hour per week was appropriate.

22. Pursuant to Factual Finding 50, the District offered Student 30 minutes of individual S/L services per week. Based upon Factual Findings 51 and 52, Student's experts believe this to be insufficient direct service for Student, and each recommended a minimum of one hour per week of individual sessions. Ms. Moore's concerns, raised in Factual Finding 53, are justified and convincing. Initially reducing Student's individual S/L service from two hours to 30 minutes is extreme. This is compounded with no offer of direct S/L services during ESY or the entire summer break. Such termination and reduction of individual services begs for regression, and, as such, was inappropriate for Student at the time. Student is entitled to one hour of individual S/L services per week during the school year. Student is also entitled to reimbursement for S/L services provided by Cornerstone Therapies for the period of May 16, 2007, through September 26, 2007.

23. Pursuant to Factual Finding 54, the District offered 30 minutes per week of OT services during the school year in order to address Student's behavior related goals. The issue goes beyond the methodology argument of whether the District can provide services within

the classroom framework. The record supports the District's observations and conclusions regarding Student's significant maladaptive behaviors. Based upon Factual Findings 35, and 47 through 49, 13 of Student's 22 goals, were behavior/sensory related. Of those goals, only three involved the participation of an occupational therapist. While the teaching program of the Seahorse SDC may intertwine elements of OT throughout the day, it does not take the place of OT services. Based upon Factual Finding 55, it is unlikely that Student's extensive needs could be met in a mere 30 minutes per week. Further, as stated by Ms. Smith-Roley in Factual Finding 48, although a special education teacher may have training in OT, the teacher is not an occupational therapist, and an occupational therapist is not a teacher. The District's offer of 30 minutes of OT services, and no OT services during ESY does not comport to the Student's needs as defined in his IEP. Student is entitled to one hour per week of OT services to be provided by an occupational therapist during the school year. Student is also entitled to reimbursement for OT services provided by Cornerstone Therapies for the period of May 16, 2007, through September 26, 2007.

24. Student's definition of "behavioral intervention" as contained in his closing brief differs from that of the District. As a result, their conflicting arguments do not address the same evidence. Student's contention that the District failed to provide appropriate behavior intervention equates to whether the District failed to provide appropriate DIS services in the form of a home ABA program and parent consultation. Based upon Factual Finding 59, the District offered a transition in ABA programs from Student's home program with ASC to the District ABA program contained in the Seahorse SDC. The IEP called for a gradual reduction to fade out of the ASC aide. As of June 7, 2007, all ABA services would be provided by the Seahorse SDC teacher and staff. Summer break ABA services would be provided for reduced hours during ESY through August 15, 2007. Based upon Factual Finding 60, Dr. Williams indicated that it was most important to address Student's unique needs in a school setting. Ms. Postil, from ASC disagreed. Further, the ASC program provided ABA services in a different manner than the ABA provided in the Seahorse SDC. Based upon Legal Conclusion 8, as long

as a school district provides an appropriate education, methodology is left up to the district's discretion. The determination of how an ABA program will be conducted or what specific components shall entail, is a decision of methodology. The District was not required to include a home component in the IEP.

25. Further, based upon Factual Finding 63, while a parent component would be useful, a parent is not subject to the IEP, and Student has provided no authority which requires the IEP team to include provisions for mandatory parental involvement in a student's services. The District is not required to include a parental component in its IEP.

26. Based on Factual Finding 62, the existing research on ABA intervention indicates it is most effective when provided at least 20 hours per week, 12 months per year, with no more than a one week break at a time; A break in services in excess of a few weeks for a child of three years of age will likely result in significant regression. The ESY program reduced Students ABA to 20 hours per week for the month of July 2007, with an additional reduction to 16 hours per week for two weeks in August. No services were scheduled thereafter until the new school year commenced in September 2007. Reduced services and a month long break from August 15, 2007, until the return to school, represents a significant break in services, which will likely result in Student's regression. Further, based upon peer-reviewed research, as required in Legal Conclusion 12, the ESY does not conform to the recognized recommendations for successful ABA services. The District failed to provide sufficient ABA services during the summer 2007. Student is entitled to reimbursement for ABA services obtained from ASC from July 2, 2007, through September 10, 2007.

Did the district fail to offer placement in the LRE? No.

27. A child with a disability must be must be, to the maximum extent appropriate, educated with children who are not disabled and in the least restrictive environment (LRE). Pursuant to Legal Conclusion 9, when determining which placement is the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she

needs. Further, the district must consider: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the cost of mainstreaming the child.

28. Based upon Factual Finding 66, the Seahorse SDC represents the District's most restrictive classroom placement for children with autism. Clearly, Mother strenuously objected to the Seahorse SDC, and equally as strenuously supported Student's placement in a general education setting with a one-on-one aide. By all accounts Student is an intelligent child, with strong mimicking skills. Based upon Factual Finding 68, Dr. Majors noted that Student scored close to age appropriate in many areas and needed significant contact with typical peers to imitate typical behaviors. Each of Student's experts concluded that, in their areas of expertise, Student might succeed in a general education setting with an aide. Each also added, as did Dr. Majors in Factual Finding 68, that Student needed a small class, as a larger class would over-stimulate him. Further, both Ms. Moore, and Ms. Smith-Roley stated that Student still required pull out services in order to benefit from his DIS services, as he would be distracted and distracting if remaining in the classroom. Ms. Underwood in Factual Finding 71 indicated that Student had difficulties in larger groups, even with an aide.

29. Both Dr. Majors and Ms. Underwood expressed a concern that Student may regress if placed in an SDC. None of Student's experts, however, are qualified in educational areas, and none were willing to provide opinions as to Student's educational needs or as to the teaching strategies of the SDC. Their concerns regarding Student's placement is limited to their own fields, and does not take into account the total educational program or the abilities of the District's staff to do their jobs, that is, to teach. Based upon Factual Finding 70, Student's mimicking potentials could be addressed by the special education teacher. As Dr. Williams further indicated, the general education teacher does not have special education teaching experience. The general education program would not be broken down into smaller components as it is in an ABA based classroom, which, in turn, would require the aide to

teach Student, rather than the teacher. This result directly impacts the quality of education provided to Student. While Mother envisions Student's total emersion with typical peers, the reality is that Student would be alone among typical peers, obtaining his education independently from an aide, being unable to participate in the general education forum. From an educational perspective, in April 2007, the general education classroom, with a one-on-one aide, was inappropriate for Student.

30. While Mother's desired placement in general education was inappropriate in April 2007, it is not determinative of whether the Seahorse SDC represented the LRE for Student. Again, the elements of Legal Conclusion 9 must be considered.

31. Based upon the observations of all witnesses, Student exhibited aggressive and maladaptive behaviors. In Factual Finding 23, Kathy Sostaric observed that Student could not yet meet his observable physical needs in socially appropriate ways. He displayed no impulse control; had difficulty focusing and paying attention; and became aggressive when he did not get his own way. In Factual Finding 49, as part of her OT recommendations, Ms. Smith-Roley expressed concern over Student's lack of self-regulation, and specifically noted that safety awareness was a critical concern for an active child such as Student. In Factual Finding 72, Ms. Moore had observed Student tantrum and wander during her assessment, and concluded he needed considerable help with focus and redirection. All of these observations support the IEP team's determination that Student initially required a highly structured, behavior oriented program as described in Factual Findings 75 through 77. As emphasized by Dr. Williams, one must tackle Student's behavior first, in order to ready him to learn. The Seahorse SDC is behavior and readiness skill oriented. Once those skills have been attained, Student would be ready to move on to less restrictive environments with even more typical peer interaction, if not fully mainstreamed. Based upon Factual Finding 77, the IEP team recognized that Student's behaviors would need to be reviewed early, and included a provision for a September 2007 IEP review. The IEP team's determination that Student required the highly structured behavior program of the Seahorse SDC was appropriate based upon the

information and observations of Student available to the District as of April 2007.

Did the District fail to implement peer reviewed research? No.

32. Based upon Factual Finding 79 and 80, the scientific research regarding the various methodologies to teach autistic children is still emerging and inconclusive at best. Based upon Legal Conclusion 16, the IDEA does not mandate a particular methodology if the educational agency can establish that its chosen methodology is based on peer-reviewed research to the extent practical and that the methodology will allow the pupil to make adequate educational progress. The District's ABA program has been subjected to peer-reviewed research. The components of the program are established and widely accepted methods of treatment. Student's prior programs, since the inception of his intervention services, have consistently contained elements of ABA. Therefore, the District's Seahorse SDC autism program is based on peer-reviewed research to the extent practicable.

Is Student entitled to reimbursement for his IEEs? No.

33. Pursuant to Legal Conclusion 11, when a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense. Pursuant to Factual Findings 7 through 36, the District has shown that Student has been appropriately assessed in all areas of suspected disability. The District is not required to reimburse Student for his IEEs.

Is Student entitled to reimbursement for privately obtained ABA, Speech/Language and OT services? Yes.

34. Pursuant to Legal Conclusion 13, when a district denies a child with a disability a FAPE, the child is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Based upon Determination of Issues 27, 28, and 31, the District in the April 2007 IEP, offered inadequate DIS services in S/L, OT, and supplemental ABA services. Student's parents have submitted the billing for Student's services, which are confusing at best due to insurance



references and two children receiving similar services. Student's Father adequately testified as to the paper trail of payments. The District, however, poses legitimate concern that many of the requests for reimbursement have been redirected for payment by Parent's medical insurance. The record, however, reflects no insurance payments have been received by either the parents or the service providers as of the date of hearing. Thusly, Student is entitled to reimbursement for S/L and OT services from Cornerstone Therapies, for the period of May 16, 2007, through September 26, 2007, and ASC services for the period of July 2, 2007, through August 31, 2007.

Is Student entitled to compensatory education? No.

35. As stated in Legal Conclusion 13, compensatory education is a form of equitable relief which is awarded to help overcome lost educational opportunity. The purpose is to ensure that the student is appropriately educated within the meaning of the IDEA. No evidence has been presented to suggest that Student has regressed or otherwise failed to make progress. Student's educational progress has been provided by his parents for which they are receiving financial reimbursement. With no loss of educational opportunity, Student is not entitled to further compensatory education.

## ORDER

1. The District properly assessed Student in all areas of suspected disability pursuant to Education Code section 56320. Therefore, Student's request for reimbursement for his Independent Expert Evaluations is denied.

2. The District did not fail to develop appropriate goals and objectives in all identified areas of need.

3. The District did not fail to offer Student placement in the least restrictive environment. Therefore, Student's requests for reimbursement for non-public preschool and ABA services during the regular school year are denied.

4. The District did not fail to implement peer reviewed research.

5. The District did fail to offer appropriate supports in the areas of speech and language, occupational therapy and summer ABA services, which constitutes a denial of FAPE.

Therefore the District is ordered to supplement Student's April 18, 2007 IEP as follows:

a. An additional 30 minutes per week of individual S/L services during the school year shall be added to Student's IEP, for a total of one hour of individual S/L per week.

b. An additional 30 minutes per week of OT services during the school year shall be added to Student's IEP, for a total of one hour of OT services per week. Student's OT services shall be provided by a licensed occupational therapist.

6. Student is entitled to reimbursement as follows:

a. Speech and Language services from Cornerstone Therapies for the period of May 16, 2007, through September 26, 2007, in the amount of \$3,900;

b. Occupational Therapy services from Cornerstone Therapies for the period of May 16, 2007, through September 26, 2007, in the amount of \$1,400; and

c. ABA services from Autism Spectrum Consultants for the period of July 2, 2007, through September 10, 2007, in the amount of \$8,941.

7. Student's request for further compensatory education is denied.

## PREVAILING PARTY

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

1. The District prevailed on issues 1, 2, 3, 5, 6, and 7.

2. Student prevailed on issues 4 and 8.

## 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 18, 2008



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JUDITH L. PASEWARK

Administrative Law Judge

Special Education Division

Office of Administrative Hearings