

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

In the Consolidated Matter of:

HEMET UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent,

OAH CASE No. N2007090175

STUDENT,

Petitioner,

v.

HEMET UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE No. N2007100997

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on December 17, 18, 20, and 21, 2007, January 28, 29, 30, 31, and February 1, and 13, 2008, in Hemet, California.

Jack Clarke, attorney with Best, Best & Krieger, appeared on behalf of Hemet Unified School District (District). Airionna S. Whitaker and Maria Gless, attorneys with Best, Best & Krieger, also appeared on some days of hearing on behalf District. Kathy Cox, Special Education Coordinator for District, was present during most of the hearing. Caryl

Miller, Assistant Superintendent for Student Services for District, was also present during certain portions of the hearing.

Ralph O. Lewis, Jr., attorney with the Law Office of Ralph O. Lewis, appeared on behalf of Student. Mother of Student (Mother) was present during the entire hearing. Student did not appear during the hearing.

PROCEDURAL BACKGROUND

On September 7, 2007, District filed the request for due process hearing in Case No. N2007090175. On September 10, 2007, OAH gave notice setting September 29, 2007, as the date available for mediation and October 9, 2007, as the date for the due process hearing to commence. On September 17, 2007, District requested a continuance of the date for hearing. On September 20, 2007, District and Student jointly requested the mediation be continued to October 29, 2007, and the hearing date be continued to unspecified date. On September 20, 2007, OAH ordered the mediation continued to October 29, 2007, and set trial setting conference for September 27, 2007, to consider the date for continued hearing. At the trial setting conference on September 27, 2007, OAH gave notice setting December 10, 2007, as the date for the due process hearing to commence.

On October 31, 2007, Student filed the request for due process hearing in Case No. N2007100997 with a motion to consolidate Student's case with the case filed by District. On October 31, 2007, OAH gave notice in Case No. N2007100997 setting November 30, 2007, as the date available for mediation and December 17, 2007, as the date for the due process hearing to commence. District filed no opposition to the consolidation. On November 7, 2007, OAH granted Student's motion for consolidation of these two cases, vacated all dates set in Case No. N2007090175, and ordered that the case management dates set in Case No. N2007100997 would govern these consolidated proceedings.

The administrative law judge (ALJ) opened the record on December 17, 2007. The

ALJ received sworn testimony and documentary evidence during the 10 nonconsecutive hearing dates through February 13, 2008. The parties requested, and the ALJ granted, an extension of time to keep the record open until March 3, 2008, to permit the filing of written closing arguments. Upon receipt of the parties' written closing arguments on March 3, 2008, the ALJ closed the record and the matter was submitted for decision.

ISSUES

In this consolidated proceeding, District has raised the following issue for decision at the Due Process Hearing:

1. Should District be allowed to place Student in District's Autism kindergarten program at McSweeney Elementary School, with additional services and supports, as provided for in District's offer of a free appropriate public education (FAPE) without parental consent?

In this proceeding, Student has raised the following issues for decision at the Due Process Hearing:

2. Has District offered a FAPE for Student from the time Student turned three years old on July 31, 2005, including but not limited to the 2005-2006, 2006-2007, and 2007-2008 school years? Student alleges violations including:

- A. District predetermined Student's placement.
- B. The goals and objectives developed at the individualized education program (IEP) meetings were inappropriate, unmeasurable, and vague.
- C. The placement offered by District was not appropriate for Student because:
 1. District's staff was not appropriately trained in the area of Student's disability.
 2. The classroom setting was not appropriate.
 3. Student requires intensive educational treatment not offered by District.
 4. District did not allow for parental participation in the IEPs.
 5. District did not provide appropriate educational services to Student including,

but not limited to, Applied Behavioral Analysis (ABA) service, speech and language, vision therapy, and occupational therapy.

6. District failed to have the required persons at the IEP meetings.
7. District failed to offer an appropriate placement or services for Student.

3. Are Student's parents entitled to reimbursement for independent educational evaluations performed by Dr. Beth Ballinger, Dr. Melanie Lenington, and The Center for Autism and Related Disorders (CARD)?

4. Did Student's parents provide Student with an appropriate placement with the CARD Program consisting of 40 hours per week, 52 weeks per year, including supervision?

PARTIES' CONTENTIONS

District contends the IEP Team created a program which was reasonably calculated to meet Student's needs. District contends its proposed program was reasonably calculated to afford educational benefit to Student. District contends that based on information available to the IEP Team at the time of developing the IEP, the goals and objectives were appropriate and measurable, and the offer would provide a FAPE to Student. District seeks an order that District offered Student a FAPE should be resolved in favor of District.

Student contends District did not offer a FAPE in its IEP. Student contends District did not provide appropriate services to meet his unique and complex needs. Student contends District failed to meet its obligation to provide him with individualized services. Student contends that he could not receive educational benefit from District's placement. Student seeks an order that he is entitled to compensatory education of an intensive in-home ABA program for 40 hours per week for 52 weeks per year.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1 Student is a five-year-old boy who is eligible for special education and related services under the primary disability category of autism. He was first determined eligible for such services from District in January 2006, when he was three years old. At the time District's due process hearing request was filed, Student was not attending any District school. The last time Student attended a District school was in June 2007 when Student attended preschool at District's Helen Hunt Jackson program before Mother removed Student from school to begin receiving CARD services. Student would have been in the kindergarten grade if Mother had accepted District's program offer as provided in the proposed IEP dated January 23, 2007, as amended April 23, 2007, and further amended July 9, 2007. During the entire time period at issue, Student has resided with his Mother and Father (collectively Parents) in Hemet, California, within the geographical boundaries of District.

BACKGROUND

2. This case arises from the disagreement between Student and District over whether District's proposed IEP constitutes a FAPE for the 2007-2008 school year. To resolve the issue of whether District's offer constitutes a FAPE in this case, Student must show there was some procedural or substantive violation of the Individuals with Disabilities Education Act (IDEA).

3. Student began his education at District's Helen Hunt Jackson preschool program. Before entering District, he participated in Inland Regional Center's infant program until he turned three years old in the summer of 2005. Many IEP Team meetings occurred during the last two years to identify Student's educational needs and attempt to develop an IEP for him.

THE IEP MEETING ON SEPTEMBER 9, 2005

4. A school district must have an IEP in effect for each individual with exceptional needs within its jurisdiction at the beginning of each school year. In the case of an initial IEP, a meeting to develop the initial IEP shall be conducted within 30 days of a determination that the individual needs special education and related services. The IEP must also contain a specific statement of the individual's current performance levels and the short term and long-term goals, and other services to be provided, and the criteria for evaluating progress.

5. Each meeting to develop, review, or revise an IEP must be conducted by a team of individuals (the IEP Team) which must include certain specified individuals who are involved in the education of the child. Among those individuals who are required to be part of the IEP Team are at least one of the child's parents, at least one regular education teacher, if the child may be participating in the regular education environment, and at least one special education teacher. In the case of an initial IEP Team meeting, where no IEP has yet been formulated for a student, the importance of having a regular education and special education teachers present cannot be more emphasized.

6. Student turned three years old in midsummer 2005 at which time District became obligated for his educational needs. District convened an initial IEP Team meeting for Student on September 9, 2005. Mother attended this meeting.

7. Also present for this meeting was Norah Wilson, Psy.D., who was the clinical director for B.E.S.T. Services, Inc. (BEST). BEST was currently providing services to Student for District both in the classroom and at Student's home. Dr. Wilson was familiar with Student since BEST had provided services to Student before he was three years old through Inland Regional Center's infant program. At that time, BEST provided 20 hours of intensive in-home ABA services to Student per week. When Student aged out of the infant program at age three, he transferred to District's preschool program. BEST continued to

provide in-home services, but during transition their services were gradually reduced from 20 to 10 hours per week as Student's one-to-one ABA intervention gradually increased in the preschool program to 12 hours per week.

8. School psychologist Terri Foster also attended this meeting. She has never recommended a completely in-home program during her 23 years of experience. She reported on the information District received from the Inland Regional Center program. She had been trained in the use of PECS in 1996 by ABC Consultants, whom she identified was certified to provide such training by Pyramid Educational Consultants, the provider of PECS. However, she has had no further training since that time.

9. The handwritten notes on the Team Summary page noted that Mother reported to the IEP Team that Student has had what appeared to be "staring seizures" on two or three known occurrences, but that an electroencephalogram was normal.

10. This initial meeting was continued to allow District to conduct an OT assessment and a speech language assessment of Student. In the meantime, his in-home program continued as formulated under the Regional Center infant program.

THE IEP MEETING ON OCTOBER 14, 2005

11. District had continued the initial IEP Team meeting to October 14, 2005. This meeting had to be continued again because the speech language assessment was not yet completed.

THE INITIAL ASSESSMENT FOR SL THERAPY DATED OCTOBER 31, 2005, FROM PLAYWORKS

12. Under the IDEA and case law, District's proposed program must have met the following requirements in order to have constituted an appropriate educational program: (1) been designed to meet Student's unique needs, (2) been reasonably calculated to provide him with some educational benefit, (3) must comport with his IEP,

and (4) be provided in the LRE.

13. Regarding the test for substantive appropriateness under the IDEA, the first prong requires that a student's IEP must be designed to meet the unique needs of the student. And based on the "snapshot rule" discussed below, it is therefore critical to have an understanding of the needs of Student from information available to the IEP team at the time of the October 23, 2006, program offer from District.

14. Before Student attended any District school, Student attended Playworks. Playworks provides SL services, OT, developmental intervention, and social skills and parent training and primarily serves children with a diagnosis of autism. Kelli Wilms (Wilms), the Director of Playworks, assessed and reported on the speech needs of Student as provided in her October 31, 2005, Initial Assessment report. Wilms is licensed by the state of California as a speech language pathologist and has a Certificate of Clinical Competence (CCC) through the American Speech Language Hearing Association (ASHA). Playworks provides SL services, OT, developmental intervention, and social skills and parent training and primarily serves children with a diagnosis of autism.

15. Her evaluation included formal testing measures and observation of Student. On the Functional Emotional Assessment Scale (FEAS) Student scored an 8 out of a possible 66 points, placing him in the "deficient" range for social emotional development. On the MacArthur Communicative Development Inventory (MCDI), Mother reported Student's functional receptive vocabulary at about 20 words. Among other observations, he was more likely to orient to preferred routines than to his name and was inconsistent in orienting to a speaker. He did not perform routine activity upon request, and did not attend to objects mentioned during conversation. He did not respond to questions related to identification, location, or possession. He did not identify objects based on an adult's description of function or category. Wilms concluded Student's receptive language to be consistent with a developmental range of 9-12 months at the time he was over three years old.

16. Student's expressive communication was not much more developed. His Mother estimated his expressive vocabulary to be comprised of about 13 words on the MCDI. He attempted to obtain preferred items independently by reaching out for them and was not observed to use any other gestures for communication. He did not express spontaneous verbal requests. To protest unwanted items, Student would throw them, turn his head, or disengage from the interaction, although he occasionally verbalized the word "no" in protest. He had not yet learned to consistently gaze for the purpose of joint attention or social interaction. He did not express intentions related to calling, acknowledgment, comments, or requests for information. In spite of this, Student was able to maintain interactions for a few cycles of communication while engaged in activities which provided him with predictable visual or proprioceptive input. He did not combine words, but managed to approximate words while using the "I want" strip from his Picture Exchange Communication System (PECS) book. His expressive communication skills were described as scattered, with some skills at the range of 6-9 months and other skills at the upper range of 15 months. Based on her evaluation, Wilms concluded Student expressive communication to be commensurate with a functional developmental level of 12 months.

17. In the area of speech production, Student's phonetic inventory was comprised of early sounds including vowels and the consonants /m, n, d, g, h, y/ which he used for word approximations. He occasionally produced loud single syllables, repetitive vocalizations, and sounds that his Mother described as gibberish, but these sounds were rarely connected with any communicative intent. He frequently deleted initial and final consonants. Although final consonant deletion could be considered developmental for a younger child, the initial consonant deletion was not a developmental error. Other atypical errors for Student included vowel distortions, inconsistent errors, voicing errors transpositions, and groping behavior related to articulatory placement and sequencing.

Together with his limited phonetic inventory and immature syllabic configurations, such patterns would be suggestive of dyspraxia, a disorder characterized by deficits in motor planning/sequencing. However, based on Student's limited vocabulary and lack of word combinations, Wilms believed this diagnosis should be considered provisional until he was able to produce connected speech and cooperate with assessment procedures.

18. As a result of her evaluation, Wilms' report concluded that Student, in addition to his diagnosis of autism, had a severe mixed receptive-expressive language disorder.

19. From her initial evaluation in October 2005, Wilms recommended individual speech language therapy provided two to three sessions per week for an initial period of six months, followed by re-evaluation. She did not recommend any group therapy for Student due to his developmental profile at the time. She did recommend parent training and support to help promote Student's fundamental capacities, including joint attention, engagement, comprehension, expression of communicative intent and speech production.

20. Wilms specifically did not approve of a 20-minute session for Student at this time due to the nature and intensity of his needs. She also considered her recommendation of a frequency of two to three times a week to be important at this developmental stage.

21. Wilms also recommended consideration of programs to improve auditory attention and auditory processing. Though she acknowledged there is limited empirical research on these programs, there are anecdotal reports of gains in children with poor language comprehension after interventions in these areas.

THE IEP MEETING ON DECEMBER 5, 2005

22. District convened another IEP Team meeting on December 5, 2005, to review the independent speech evaluation prepared by Wilms of Playworks. There was no special education teacher present at this meeting. There was no regular education teacher present either.

23. At this meeting, Wilms reported on the speech needs of Student as provided in her October 31, 2005, Initial Assessment report. Some speech goals were drafted. Pamela Goepp (Goepp), a speech language pathologist employed by District, contributed to the formulation of some speech goals.

DISTRICT'S OCCUPATIONAL THERAPY EVALUATION FROM OCTOBER 7, 2005

24. District assessed Student for his OT needs in October 2005. Gal Harriss, a licensed occupational therapist employed by District, conducted the assessment and prepared a written evaluation of her results. She asked Mother to complete a Sensory Profile Questionnaire. She also observed Student interact with his teacher in the in-home program. He screamed and cried periodically, but could not verbalize his frustration. She noted after redirection Student would calm down, but then "just as quickly he was 'melting down' again."

25. Harriss concluded from the Sensory Profile Report for Student that he was processing sensory information in challenging ways that were affecting his interpretation of the world around him. He had the most difficulty with auditory processing, vestibular processing, and touch processing. She noted Student also had problems with Modulation of Sensory Input Affecting Emotional Responses describing his difficulty in responding appropriately to social and environmental cues. Student also had deficits in the subtests for Modulation Related to Visual Input and Movement/Body Position, as well as Oral Sensory Processing. She made note of his teacher's report of maladaptive behaviors including head banging, persistent hand to mouth activity, and pulling his own hair.

26. Her report concluded that Student was not attending a District school at the time, but if he did, she would recommend OT to establish a sensory diet for use during the school day. Such regular incorporation of specific sensory input, monitored by District's educational staff, would assist Student with regulation of his arousal system and help

increase his attention to task, accept transitions, and follow the classroom routine.

THE IEP MEETING ON JANUARY 26, 2006

27. District again reconvened the initial IEP Team meeting on January 26, 2006, to finally formulate Student's IEP. This was four and a half months after the initial meeting began in September: a full semester had passed with no IEP in place.

28. Samantha Blake (Blake), a special day class teacher employed in District's preschool program, attended this meeting. There was no regular education teacher present at this meeting.

29. Upon considering Student's speech language needs, the IEP Team agreed to follow the recommendation of Wilms in the Initial Speech Language report from Playworks. The IEP Team agreed that staff from BEST would consult with the speech therapist on strategies to implement speech goals into program.

30. When Mother requested speech sessions to be 30 minutes in length, the Team agreed to sessions from a minimum of 20 minutes, but allowed for sessions up to 30 minutes if Student could maintain attention for that long a period of time.

31. The OT discussed the OT report dated January 23, 2006. The recommendation of consultation for a sensory diet throughout the day was considered. Although Mother requested more direct services, the IEP Team reviewed and approved the goals proposed by the OT.

32. When District representatives recommended the autism preschool program, Mother inquired about mainstream opportunities. District's autism consultant did not believe Student would benefit from typically developing preschool peers and recommended structured play dates through the home program. This was consistent with Student's weak pre-linguistic foundation in fundamental capacities for relatedness and communication. The autism consultant also recommended 10 hours of in-home ABA services in addition to the preschool autism program.

33. On January 30, 2006, Mother agreed to the IEP proposed by District and provided her consent to implement it.

THE IEP MEETING ON APRIL 11, 2006

34. District again reconvened the IEP Team for a meeting on April 11, 2006, at the request of Mother. This was less than three months after the initial IEP was approved by Mother and implemented.

35. The purpose of this meeting was to review Student's progress and to discuss the need for extended school year (ESY) services. Mother expressed her concern that Student needed to be prepared to attend a typical kindergarten in another year. Based on concerns of Student's needs, the IEP Team agreed to ESY services as well as a continuation of the 10 hours of in-home services between the end of ESY and the beginning of the new 2006-2007 school year.

36. Mother did not sign the proposed IEP but took it to review with her advocate. The meeting was continued to May 30, 2006, for a further review of Student's progress before the time for ESY services would begin.

THE IEP MEETING ON MAY 30, 2006

37. District again reconvened the IEP Team for a meeting on May 30, 2006, to again review Student's progress and to discuss the need for ESY. The IEP Team agreed that Student's needs required ESY for the 20 days it was provided by District. Because of the problem with regression by Student, the IEP Team also agreed to continue Student's programming during the time after ESY ended and before the new school year began.

THE DEVELOPMENTAL ASSESSMENT REPORT CONDUCTED IN SEPTEMBER 2006 BY DR. LENINGTON

38. District agreed to fund an independent evaluation by Dr. Lenington. Dr.

Lenington is a self employed licensed clinical psychologist in West Los Angeles. Since 1994 she has been licensed by the state of California as a psychologist. She is also currently licensed as an occupational therapist. Her psychology practice concentrates on psycho-diagnostic assessments of children and young adults. She primarily sees children and young adults with autism or on the autistic spectrum as well as other developmental disabilities. She estimated about 70 percent of her practice involved children from the ages of three to seven years old. Part of her practice involves reviewing goals and objectives from IEPs to determine if they are appropriate and measurable for the individual needs of students. As part of her practice Dr. Lenington is also called upon to make recommendations as to placement for children with autistic-like behaviors. She presently conducts about 40 to 50 assessments each year, with approximately 35 of them involving children between the ages of three and seven. While most of these assessments have been conducted at the request of parents, approximately 5 to ten of the assessments have been performed at the request of school districts. She was well qualified to conduct her evaluation of Student. Dr. Lenington was very credible and her testimony was entitled to great weight.

39. Dr. Lenington first became aware of Student several months before formally evaluating him when Student's father contacted her about a possible evaluation. Student's parents had concerns about his behaviors, how they were interfering with his learning, and whether the learning program he was in was meeting his needs. Mother also wanted a current psychoeducational and psychological developmental assessment. Dr. Lenington agreed to conduct an assessment of Student to be funded by District in September 2006. Her evaluation of Student was conducted over a period of six days for a combined total of 12 hours.

40. During the course of her assessment, Student was pervasively non-compliant, exhibited frequent tantrum behavior, engaged in perseverative, stereotypic,

repetitive, self-stimulatory, and atypical behavior. Following her comprehensive assessment, Dr. Lenington prepared a comprehensive 26-page, single-spaced report of her evaluation, record review, formal testing, findings, conclusions, and recommendations. A brief summary of some of her report follows.

41. Dr. Lenington selected several standardized tests to administer to Student. On the Bayley Scales of Infant and Toddler Development, Third Edition, Student derived a raw score of 68 in the cognitive domain, with an age equivalency of two years, three months at a time when Student was four years, one month old. In the area of language, Student had raw scores of 26 in both the receptive and expressive domains, with average derived age equivalencies of one year, 10 months. In the fine motor skills domain, Student accomplished a raw score of 47 which yielded an age equivalency of two years, 10 months.

42. For further cognitive evaluation, Dr. Lenington administered selected subtests of the Wechsler Preschool and Primary Scale of Intelligence – Third Edition (WPPSI-III). Student accomplished a Verbal Intelligence Quotient (IQ) score of 53. This score was in the moderate deficit range and at the 0.1 percentile rank. Student accomplished a Performance IQ score of 72, which was in the borderline range and at the 3rd percentile rank. Student's Full Scale IQ was derived at 60 which is in the mild deficit range and at the 0.4 percentile rank. Student's Processing Speed composite was derived in the borderline range (with a standard score of 75, and percentile rank of 5) while his Global Language composite was derived in the moderate deficit range (with a standard score of 59, and percentile rank of 0.3).

43. Dr. Lenington noted the disparity of 19 points between the language and the non-language based tasks of the WPPSI-III's Verbal and Performance IQ scores was of statistical significance and important both clinically and pragmatically. She cautioned that the Full Scale IQ score of 60 was not an accurate representation of Student's overall skill at the time and that IQ scores are not considered stable at Student's young age.

44. She concluded Student had primary challenges in the domains of language including problems with articulation, formulation, and with his receptive, expressive, and pragmatic language. He had challenges with executive function including attention, planning, and sequencing. He had challenges with sensory-motor functioning including sensory integration and sensory processing. He also had difficulties with perseverative interests and behavioral challenges.

45. In addition, Dr. Lenington noted Student exhibited the failure to develop peer relationships appropriate to his developmental level. He was not able to initiate dramatic play and did not differentiate between real and make-believe. He did not cooperate in play with other children and did not understand common themes. He did not share toys or take turns with other children, and showed minimal interest in other children peers. Student lacked social or emotional reciprocity.

46. Dr. Lenington concluded that Student was not yet ready to learn in a school environment. He did not yet have the functional skills required to learn in a group environment. She noted he needed to learn the precursors to learning in the form of better attention, self-help skills, language skills, and behavioral regulation. Without these attention, self-help, language, and behavioral skills, there would be no benefit to Student to participate in a group school setting. She also noted that only after Student achieved these skills, he should not be placed with atypical peers, but in a typical preschool environment. However, such a placement was not yet recommended, due to Student's serious deficiencies in these areas.

47. In the area of language, Dr. Lenington concluded that Student lacked a communication system. She recommended the Picture Exchange Communication System (PECS) to be appropriately employed. She noted PECS was not being appropriately utilized at the time. She reported it was imperative that an experienced PECS trainer provide initial consultation, ongoing implementation and feedback, and training of those who would

implement the program with Student. Dr. Lenington gave numerous specific recommendations for implementation of PECS for communication. She noted that Frost and Bondy, the developers of PECS, are clear that the successful implementation of PECS requires an environment that promotes the use of functional communication skills and that PECS cannot be taught in an unstructured environment.

48. Dr. Lenington was clear that the intervention program and the strategies used with Student, both at school and in the home, were not an ABA program of intervention. The persons working with Student were reinforcing negative behaviors and were not interacting consistently with him.

49. Because of Student's serious deficiencies, Dr. Lenington also noted it was imperative that Student be serviced on a one to one basis by individuals experienced in the meaning and uses of applied behavior analysis and the development of discreet trial training. She was concerned that Student did not have basic compliance skills after over two years of intervention by BEST. She did not believe that the District's program was appropriate for Student. She recommended an intensive 40 hour per week ABA program to be provided 52 weeks per year.

50. Finally, Dr. Lenington's written report recommended a reassessment in no more than 18 months from the time of her September 2006 assessment to identify Student's progress and to develop a plan that reflects his ongoing needs.

51. In addition to her 12-hour clinical evaluation in September 2006, Dr. Lenington also observed Student during his in-home program provided by BEST for about an hour on January 19, 2007. During this observation, she noted Student was only engaged in preferred tasks. Even though he was engaged in preferred tasks, there was no facilitation of language by the tutor. For example, when Student was playing a preferred game, there was no discussion of the shapes involved in the game. There was no social facilitation such as turn taking. The tasks he was asked to do were tasks he had mastered

before. Dr. Lenington described there were parts of the program that resembled discreet trial training, but it was not. She did not see Student being presented with several opportunities to accomplish a task, there was no taking of data, and there were no random rotations. She did not see consistency in the program. She did not observe Student receiving minimal educational benefit with this program.

52. In addition to her clinic and in-home observations, Dr. Lenington also observed Student in his preschool SDC setting for about two and a half hours on January 25, 2007. She was concerned about the fact that Student was being reinforced for many negative and undesirable behaviors. In addition, there was no social facilitation at the playground or at snack time. Dr. Lenington even noted the chairs were too high for the students with their feet swinging in the air. This was a particular problem for the proprioceptive needs of Student with the leg motion and lack of a feeling of being grounded as he was expected to pay attention in class.

53. During the classroom observation, Dr. Lenington noted it was very noisy and disruptive. Student's PECS was not used in the classroom except for snack time to show what snack he wanted. The PECS book did not follow Student throughout the room and did not go with him to the playground. It was not being used as a communication system for Student as it was designed to be used. Dr. Lenington concluded Student was not receiving minimal educational benefit in the classroom.

54. Dr. Lenington also observed the proposed kindergarten SDC placement at the McSweeney School for between two and two and a half hours. During this observation, she concluded the placement would not be appropriate. The classroom was too unstructured for Student's needs. She noted there was very little facilitation of language in the classroom. There was very little facilitation of social interaction including both in the classroom and on the playground. Similar to the preschool SDC class, Dr. Lenington saw students being reinforced for negative behaviors. Likewise, a PECS book was pulled out

during snack time, and students were asked to use it to make requests. In short, for the areas of where Student had the greatest deficits, in the areas of language and socialization, there was little facilitation by the classroom staff.

THE IEP MEETINGS ON JANUARY 19 AND 25, 2007

55. District convened an IEP Team meeting on January 19, 2007, to review Student's IEP. A full IEP Team was present at this meeting. Samantha Blake, Student's preschool teacher, described the physical arrangement of her class, noting it was essentially two adjoining classrooms. There was one room with stations set up for instruction using the discrete trial training (DTT) methodology, and one had areas including sensory integration components, play structures, and an area for circle time. Staffing in the class was one adult to each student, comprised of Blake and instructional aides as necessary.

56. Blake described Student's difficulty with transitioning to non-preferred tasks. She noted Student can exhibit self injurious behavior including head banging when he was frustrated. Compared to the previous year, the amount of head banging had been reduced from more than 20 times per day in the past to a range of no head banging to five times on a more difficult day recently.

57. In the area of communication, Mother pointed out that District was not utilizing PECS appropriately with Student. She also noted his PECS book was not kept updated, new pictures were not being added, and the system was not being utilized correctly.

58. Blake described her formal training in PECS as a one day training provided by BEST. She added that she also received ongoing training in the classroom from BEST for how to use PECS with individual students.

59. The Team Summary notes of January 25, 2007, confirm that BEST provided training for District staff in the use of PECS for individual students. However, the notes also

state the IEP Team “clarified that BEST services are not certified PECS trainers.”

60. Also present for part of the meeting was Dr. Wilson from BEST, who attended via telephone and left the meeting early. She provided input about the ABA services provided to Student by BEST.

61. At the time of the January 19, 2007, IEP Team meeting, the amount of ABA services provided by BEST had increased to 16 hours per week: 10 hours of in-home intervention and 6 hours of intervention at VIP Tots, an agency where Student would have an opportunity to integrate with typical peers and work on social facilitation.

62. The purpose of the January 19 meeting was for an annual review of Student’s IEP and for a review of the developmental assessment report prepared by Dr. Lenington. Parent also presented new assessments from Playworks for OT and SL.

63. During this meeting there was a discussion and request by Mother for a vision assessment of student in the form of a developmental ophthalmology assessment. This was based on one of the strong recommendations in Dr. Lenington’s report for examination by a pediatric ophthalmologist. Kathy Cox, who attended the meeting as the special education coordinator for District, agreed to the vision assessment of Student, but she explained there was some confusion as to what kind of vision assessment Mother was requesting. When she was certain the request was for a developmental ophthalmology report by a pediatric ophthalmologist, District selected Loma Linda University Medical Center Pediatric Ophthalmology to conduct the assessment. On March Cox notified Mother that she was gathering the information necessary to develop the contract for such an assessment. In response, Mother notified District that she had already obtained an assessment from Beth Ballinger, a developmental optometrist.

64. School psychologist Foster also attended this meeting. She did not believe an additional psychoeducational evaluation was necessary. Rather, she believed there was enough information in Dr. Lenington’s report. She has never recommended a completely

in home program during her 23 years of experience.

65. District's OT Gail Harriss also attended this meeting. Based on the sensory needs of Student, she developed a sensory diet. The sensory diet, however, was not explained anywhere in the IEP.

66. Harriss explained she helped design a sensory diet based on her October 2005 assessment, her observations of Student and in collaboration with his teacher. Harriss did not believe further assessment was necessary. She noted the modulation issues and the sensory seeking issues that Student displayed were apparent and ongoing. Although these issues could become more manageable, and behaviors could become more under control, she was clear that these modulation and sensory issues were not something that would typically vanish in six months or even a year.

67. From her observations Harriss agreed Student had behaviors that interfered with his ability to access his education since he had a difficult time attending to task. These included head banging, hitting, scratching, yelling, and tantruming issues. There were no independent OT goals to address any of these issues, except for a general attending to task goal. It was not until the April 23, 2007 IEP Team meeting that a behavior intervention plan was proposed. While reviewing goals proposed by District members of the IEP Team, Dr. Lenington also identified many goals which were not objective or measurable.

THE IEP MEETING ON APRIL 23, 2007

68. District again reconvened an IEP Team meeting on April 23, 2007, to review the assessments recommended at the January 25, 2007 meeting. Student's initial IEP had been in place for a little over a year and Mother was concerned about the program and interventions District was providing for Student.

69. In the time since January, Mother had provided her written consent to implement portions of the proposed IEP for increased ABA services at the VIP Tots program location.

70. At this meeting, the IEP Team also reviewed a Functional Behavioral Assessment Report dated April 6, 2007. This report was conducted by Dr. Wilson and Carmela Boton of BEST. The assessor took data at the school setting on the morning of April 5, 2007, for a period of just over two hours and fifteen minutes. Data during this time period revealed instances of head tapping against surfaces, scratching, pinching, spitting and hitting. The hitting behavior was described as the behavior that occurred the most. The data showed it happened nine times during the observation period, or about four times per hour. In addition to the head tapping that was observed, teacher Blake reported that Student also banged his head with force at school, but the harder head banging was not seen during the observation on April 5, 2007.

71. Observations of Student at the VIP Tots program on the afternoon of April 6, 2007, for an hour and a half did not find any problematic behaviors. During this time, Student engaged activities including Easter egg hunting, outside play, sensory break, and snack. However, records from VIP Tots for the period from March 12 to April 6, 2007, showed instances of maladaptive behaviors including head banging, scratching, and tantrum behaviors. The tantrum behavior occurred most frequently, logged at 17 times during this three week period. The teacher from VIP Tots reported these behaviors typically occurred during circle time.

72. The report concluded that Student was engaging in challenging behaviors as a maladaptive means of communicating his needs and wants. He had learned to hit, scratch, spit, bang his head, and refuse to comply to get what he wanted or to escape from what he did not want to do. A proposed behavior intervention plan was included in the report with both proactive and reactive strategies. The report recommended that all of Student's caregivers, including his parents, babysitters, ABA home provider, teachers, paraprofessionals, and classroom aides, should receive training on the proposed plan.

CONTINUING ASSESSMENT BY BETH BALLINGER, O.D.

73. Student offered the testimony of Beth Ballinger, O.D. Dr. Ballinger has been a developmental optometrist for 29 years. She was well qualified to conduct her assessment. Dr. Ballinger first met Student on April 11, 2007, when Mother brought him to her Newport office for evaluation.

74. From her evaluation, Dr. Ballinger concluded Student had acceptable visual acuity calculated at 20/30. However, he had poor visual tracking. Student would visually disengage, and had poor focus. If given a novel target, he would not focus on the target and did not track the target well. From an educational point of view, if a student cannot sustain target, the ability to retain it becomes a problem.

75. Student and Mother visited Dr. Ballinger a second time on July 14, 2007, to get a better understanding of how Student was functioning. She also wanted to read other reports of other professionals and view any tapes available of Student. In view of the fact that her office was not a familiar place for Student, and that Mother and Student had to drive for two hours to get to her office, Dr. Ballinger requested the opportunity to view any available video recordings of Student. She recognized that for Student to be in an unfamiliar place after a two hour car ride may have affected Student's performance during the office visit. She wanted to further evaluate his performance in different environments that were more familiar to him. She also wanted to see how Student interacted with the professionals working with him including the OT, the SLP, and the ABA providers. In response to this request, Mother provided Dr. Ballinger with over four hours of video showing the CARD interventions, one video showing about an hour of the BEST interventions, and one video showing the OT interventions with Student. Due to some programming problem, Dr. Ballinger was not able to view the OT video on her computer.

76. The recording from the BEST services showed their intervention was problematic for Student because information they were giving him was in a figure-ground

demand that was very complex. As a result, it was difficult for Student to focus on what he should have been focusing on. The BEST services were provided earlier, at a time when Student was emerging in his ability to acquire information. Some of the tasks given to Student by BEST were too busy and it was challenging for him to figure out what he needed to look at and she saw a lot of visual avoidance behaviors by Student.

77. Dr. Ballinger noted the tapes of the CARD intervention during a period in late September 18-24, 2007, showed one-to-one instruction taking place. The figure-ground demands, where CARD would introduce information to Student, were much less busy. Student had a much better opportunity to visually invest himself in what they were doing. In her words, Student made huge progress. Student could visually attend better, although he would be rubbing his eyes a lot when he had a lot of visual tasks to do. She was surprised to see the kinds of gains he was making. He was talking more. He was making greater eye contact. He appeared happy. He was verbally engaging and initiating things. She did not see much off-task behavior. Even when he appeared tired, he could be brought back to the task. Dr. Ballinger reported she saw no tantruming in his behavior. Mother had reported to Ballinger that Student had been very frustrated and had demonstrated head banging and lots of tantruming in the past, but there was none of that behavior currently. She remarked that "it was like looking at a different child." She saw a little boy who was actively engaged in the process of learning. The interventions provided by CARD were reasonably calculated to provide educational benefit for Student.

78. At the time of the hearing, Dr. Ballinger had not yet prepared any evaluation report of Student. She believed that visual training of the professionals who worked Student, including the OT, the SLP and ABA specialists, would be appropriate. However, In view of the huge changes she saw in him, she said she would like to see Student again in her office for an hour to evaluate his current status. After having had these interventions for six months, she believed it would be wise to see how he is functioning currently. She

believed that evaluation would show a totally different child today.

THE IEP PROPOSED BY DISTRICT

79. For the 2007-2008 school year, District proposed to place Student in the kindergarten SDC at McSweeney. Instructional aides were proposed for Student during the entire time he was in the classroom. There is no mention in the IEP for any instructional aide assigned to Student to have any certain level of skill or experience.

80. Among other things, District's proposed IEP offered additional services to support Student. District offered 16 hours per week of one-to-one in-home ABA services. District offered OT services on a consultation basis. District also offered speech and language services to include direct individual services for 30-minute sessions, once a week and an additional 30 minutes twice a month for consultation. District would also provide adaptive physical education twice a month for 15 minute sessions, and behavior consultation twice a month for an hour.

REASONABLY CALCULATED TO PROVIDE SOME EDUCATIONAL BENEFIT

81. To be appropriate under the IDEA, a school district's proposed program must also have been reasonably calculated to provide Student with some educational benefit. As described above, however, District's proposed placement in the kindergarten SDC was not calculated to provide educational benefit to Student.

82. The SDC setting proposed by District was too unstructured for Student's needs. There was very little facilitation of language in the classroom. There was also very little facilitation of social interaction whether in the classroom or on the playground. Similar to the preschool SDC class in which Student was currently placed, the students were being reinforced for negative behaviors. The implementation of the language and PECS was not appropriate for the serious speech needs of Student. This placement was not appropriate for the areas of Student's greatest needs in language and socialization.

COMPORT WITH STUDENT'S IEP

83. This standard was designed to determine if a student's IEP was appropriately implemented by a district. Because Student did not accept the educational placement offered by District in this case, this standard not relevant in determining whether District offered Student a FAPE.

LEAST RESTRICTIVE ENVIRONMENT

84. A school district is also required to provide each special education student with a program in the least restrictive environment (LRE). This means a student should be removed from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes, with the use of supplementary aids and services, could not be achieved satisfactorily. To the maximum extent appropriate, special education students should have opportunities to interact with their general education peers.

85. District urges that its offer would be the appropriate setting as the least restrictive environment in which Student could be educated satisfactorily. That determination of the least restrictive environment requires a balancing of four factors: the academic benefits to Student of placement in District's SDC setting; the nonacademic benefits of that placement; the effects of that placement on the teacher and other students; and the cost of that placement.

Academic benefits

86. District offered placement would not provide much in the way of academic benefits for Student. The problem with the SDC setting for Student is based on his severe deficits in attention, language, self-regulation, and maladaptive behaviors. The severity of Student's educational needs tips the balance against participation in the SDC. This results in the finding that Student would not receive academic benefits in the kindergarten SDC at McSweeney.

87. The CARD program, on the other hand, provided intensive one-to-one interaction with an experienced teacher for all of Student's learning deficiencies. This was a requirement for this student to receive academic benefit.

Non-academic benefits

88. A student's opportunity to interact socially with non-disabled peers is one of the important non-academic benefits of the classroom environment at school. However, there was persuasive testimony that Student's inability to attend, communicate, and control his behavior would interfere with his ability to interact with other students. As such it is doubtful there would be any benefit to Student being schooled with nondisabled peers.

Effect on the teacher and other students

89. There was little testimony on the effect of Student's behavior on the teacher and other students. The testimony of the witnesses generally agreed that Student did not direct his maladaptive behavior at any other students. Rather, his behaviors such as hitting, spitting, and scratching were typically directed at the teacher or aide working with him. This part of the test was found to be neither a plus nor a minus in determining the least restrictive environment for Student.

90. On balance, the evidence showed that Student would not derive academic benefit from his education in the kindergarten SDC. And while many disabled students can derive benefit from being educated with nondisabled peers that did not appear to be a realistic consideration with Student's severe needs. The evidence showed, therefore, that Student cannot be educated satisfactorily in the kindergarten SDC, and that the District's offer of placement was not the least restrictive environment in which he could be educated satisfactorily.

91. In light of all the above, the weight of the evidence supports a finding that the District's offer of placement and services contained in Student's IEP would not have addressed all of Student's unique needs, and was not reasonably calculated to give him educational benefit in the LRE.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Under the Individuals with Disabilities Education Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000, et seq.)¹ FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9).)

2. "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

3. There are two parts to the legal analysis of whether a school district has complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA.² (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.)

¹ All statutory citations to the Education Code are to California law.

² As noted in the Background section, there is no claim of any procedural violation in this case.

The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. (*Id.* at p. 200.) The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Id.* at p. 208.)

4. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) Nevertheless, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley*, *supra*, 458 U.S. at p. 207.)

5. Regarding substantive appropriateness under the IDEA, the Supreme Court's *Rowley* opinion determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with

the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.)

6. Federal and state laws also require a school district to provide special education in the LRE. (20 U.S.C. § 1412(a)(5)(A); *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56364.2, subd. (a).)

7. The IDEA establishes a strong preference in favor of the placement of a special education student in the LRE. (20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at 181 n. 4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) In light of this preference, and in order to measure whether a placement is in the LRE, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four factors:

- (1) the educational benefits of placement full-time in a regular class;
- (2) the non-academic benefits of such placement;
- (3) the effect [the student] had on the teacher and children in the regular class;
- and (4) the costs of mainstreaming the [student].

8. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch.*

Dist. (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the pupil's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district offered a FAPE, even if the student's parents preferred another program.

9. The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight. . . an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

10. An annual IEP shall contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i).) An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

11. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], Petitioner Student has the burden of proof in this case.

PREDETERMINATION OF PLACEMENT

12. Predetermination of an educational placement "occurs when an educational agency has made its determination prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B. v. Las Virgenes Unified School District*, 2007 WL 1989594 (C.A. 9 (Cal.).)

INDEPENDENT EDUCATIONAL EVALUATION

13. 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).)

REIMBURSEMENT

14. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-370 [105 S.Ct. 1996]; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Student W.*)) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. In fashioning discretionary equitable relief under IDEA, all relevant factors must be considered, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the cost of the private education was unreasonable. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7 [114 S.Ct. 361]; *Alamo Heights Independent School District v. State Bd. of Education* (5th Cir. 1986) 790 F.2d 1153, 11611.)

15. Compensatory education is not a contractual remedy, but an equitable

remedy, part of the court's resources in crafting "appropriate relief." (*Student W.*, *supra*, 31 F.3d at p. 1497; see also *Burlington*, *supra*, 471 U.S. at p. 374 [equitable considerations are relevant in fashioning relief].) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union School District* (9th Cir. 2006) 464 F.3d 1025, 1033, citing *Student W.*, *supra*, 31 F.3d at p. 1496.) Factors to be considered when determining the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position and conduct of the parties. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1486-1487; see also *Student W.*, *supra*, 31 F.3d at p. 1496; *Glendale Unified School District v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

DETERMINATION OF ISSUES

ISSUE 1.

DISTRICT'S OFFER OF FAPE.

1. Pursuant to Factual Findings 1-37, 38-54, 55-72, and 73-91, and Legal Conclusions 1-13, District should not be allowed to place Student in District's Autism kindergarten program at McSweeney Elementary School, with additional services and supports, as provided for in District's offer of FAPE without parental consent.

2. The California Legislature has declared that the ability to communicate with other human beings is the most basic of human needs. While the three R's of reading, 'riting, and 'rithmetic are important for students to learn, a student cannot even begin to

learn the three R's without an effective way to communicate. The fact that Student's special education teacher, whom he relied upon to lead him in communication, was trained to use PECS by persons who were not qualified to train her fails to meet the basic need for communication.

3. The PECS communication system was not designed for students to tell what treats they want for snack. Asking for snacks was an inadequate use of a system designed to facilitate communication in all areas of a child's life, including in the classroom, on the playground, and in the home environments.

4. It is important to note that District's failure to provide a FAPE to Student was not for want of trying. District representatives attempted to utilize the programs and services they had used with other students in other situations. However, Student's serious deficits in basic skills, the basic skills that he needed to help him make sense of learning in a classroom, required more intensive intervention than District proposed to provide.

5. The evidence presented at hearing showed Student had serious deficits in the precursor skills for learning. He lacked the language and behavior skills needed for successful classroom learning. In order to access his education he needs direct one-to-one prompting to gain his attention, to maintain focus, and to help manage his maladaptive behaviors. Student would not obtain educational benefit by being in the kindergarten SDC as proposed by District.

ISSUE 2.

A. PREDETERMINATION CLAIM.

6. Pursuant to Factual Findings 1-3, 4-10, 11, 22-26, 27-37, and 55-72, and Legal Conclusions 1-12, District did not predetermine Student's placement at any point during the IEP Team meetings for Student.

7. The evidence demonstrated that many IEP Team meetings were continued

for the specific purpose of conducting additional assessments. Meetings were also continued to allow additional time to consider conflicting opinions and Mother's requests. For example, the January 19, 2007 IEP Team meeting, which took place over three hours, was continued to January 25, 2007, for further discussion. The team meeting notes of the IEP Team meetings over the years reflected frank discussion of Student's needs and possible ways to meet those needs. Moreover, the sheer number of IEP Team meetings during the past two years demonstrates that District was considering and, at the very least, trying to listen to Mother's concerns about Student's education.

B. GOALS AND OBJECTIVES.

8. Pursuant to Factual Findings 1-3, 4-10, 11, 22-26, 27-37, and 55-72, and Legal Conclusions 1-10, the goals proposed by District were not objective and measurable. Even if certain of the goals were measurable, an attempt to work on such goals would not have provided Student with educational benefit in the placement proposed by District, as discussed above.

C. INAPPROPRIATE PLACEMENT.

9. For the same reasons as discussed in the determination of Issue 1, and pursuant to Factual Findings Pursuant to Factual Findings 1-37, 38-54, 55-72, and 73-91, and Legal Conclusions 1-13, District's offer of placement was not appropriate.

10. The evidence showed that District's staff was not properly trained in the areas of Student's disability with respect to applied behavior analysis and PECS. The few days training provided by BEST were insufficient to provide the tools, strategies and knowledge of working with Student who had such intense autistic-like behaviors. This does not mean, in any way, that District staff was not adequately trained to provide services to other students with autistic-like behaviors or language deficits. This decision only considered Student's unique intensive needs that required intensive interventions.

11. The evidence showed the classroom settings, used in the preschool and proposed for the kindergarten, were also not appropriate for Student. Without the precursor skills of attention, language, self-regulation of maladaptive behaviors, and compliance, it was not credible that Student could obtain educational benefit in the group classroom. Both VIP Tots and the SDC teacher found Student to be unable to participate appropriately during circle time. Until Student had these learning skills, the one-to-one setting was the educational setting Student needed to obtain educational benefit.

12. District also failed to have the required individuals, including a regular education teacher, present at the early IEP Team meetings. However, in view of the finding of a denial of FAPE for substantive reasons, this failure did not result in any independent loss of educational benefit.

ISSUE 3.

REIMBURSEMENT FOR INDEPENDENT EDUCATIONAL EVALUATIONS.

13. Pursuant to Factual Findings 1-3, and 55-67, and Legal Conclusion 13, Parents are not entitled to reimbursement for the evaluation conducted by Dr. Ballinger. The testimony was undisputed that Mother requested a developmental ophthalmology assessment. District was in the process of creating a contract with Loma Linda Medical Center to secure such an evaluation. However, while that effort was being undertaken, Mother presented Student for assessment by a developmental optometrist.

14. Although information from Dr. Ballinger's evaluation may have been helpful in identifying Student's needs, the funding of evaluations is governed by statute. A parent can obtain independent evaluations at any time to be considered by the IEP Team. However, before a District will become obligated to fund an independent evaluation by a developmental optometrist, Student must have made a request for such an evaluation that was refused by District. Although ophthalmologists and optometrists both provide

services related to vision, there is a difference in their specialties. In this case there was no request for an evaluation by a developmental optometrist, only a developmental ophthalmologist. As a result, District has no obligation to pay for Dr. Ballinger's report. Moreover, Dr. Ballinger did not make any final findings or provide a final report for consideration of the IEP Team. At the hearing, she made clear that due to the huge progress she saw in Student's abilities in the fall of 2007, she wanted an opportunity to further evaluate Student before making any final report or recommendations.

15. Pursuant to Factual Findings 1-37, and 38-72, and Legal Conclusion 13, Parents are also not entitled to reimbursement for the evaluations conducted by Dr. Lenington and by CARD. A parent must first disagree with an evaluation already conducted by District. In this case there was no evidence that District was requested to conduct a psychological developmental assessment before parents presented Student for evaluation by Dr. Lenington. The same is true as to the CARD evaluation. In such a case, parents have the right to obtain their own independent evaluations, and those evaluations can be considered by the IEP Team, but District has no obligation to pay for such independent evaluations.

ISSUE 4.

PARENT'S PLACEMENT IN CARD PROGRAM.

16. Pursuant to Factual Findings 1-7, 8-43, 45-63, and 67-74, and Legal Conclusions 1-14, Parents' placement of Student in the CARD program beginning on June 22, 2007, was appropriate to meet Student's needs.

17. To compensate Student for the denial of FAPE, Student is entitled to be placed in the CARD program selected by the parents of Student which provides for up to 40 hours of services per week, with speech language therapy for up to three times a week for 30-minute sessions, and occupational therapy for up to three hours per week for

sensory integration. To compensate Student for the missed educational opportunity District shall be obligated to fund this educational program from the time student began services on or after June 22, 2007, until the end of the 2007-2008 school year.

18. Student's request for compensatory education for one year from the date of this decision is not appropriate. There was testimony from District's occupational therapist that Student's modulation and sensory issues were not something that would typically vanish in six months or even a year. There was also testimony from Student's psychologist that a reassessment of Student should take place in no more than 18 months from the time of her September 2006 assessment to identify Student's progress and to develop a plan that reflects his ongoing needs. In the absence of evidence as to Student's present performance levels, and whether he is ready to transition to any program other than his current placement, the end of the school year marks a clear endpoint for this compensatory education.

19. During the remaining time Student attends the CARD program until the end of the 2007-2008 school year, District is entitled to receive copies of all quarterly progress reports provided by CARD for Student. The time period that Student is entitled to compensatory education does not include ESY during the summer of 2008. It is anticipated that before the end of the 2007-2008 school year, the parties to this proceeding will arrange for whatever evaluations they deem necessary for the formulation of Student's educational programming for the 2008 ESY and for the 2008-2009 school year.

ORDER

1. District's offer to place Student in District's Autism kindergarten program at McSweeney Elementary School, with additional services and supports, as provided for in District's offer does not provide a FAPE to Student.

2. District is not authorized to place Student in District's Autism kindergarten program at McSweeney Elementary School, with additional services and supports, as

provided for in District's offer, without parental consent.

3. District has no obligation to pay for the independent evaluations of Student conducted by Melanie Lenington, Ph.D.; or conducted by CARD; or conducted by Beth Ballinger, O.D., as a developmental optometrist.

4. Student's parents are entitled to District funding of the CARD program selected by parents as Student's educational placement for the period of time from June 22, 2007, to the end of District's 2007-2008 school year, which includes up to 40 hours of services per week, with speech language therapy for up to three times a week for 30-minute sessions, and occupational therapy for up to three hours per week for sensory integration. This does not include the period of time during ESY for 2008.

5. District is entitled to receive copies of all quarterly progress reports provided by CARD for Student for the time period from June 22, 2007, to the end of the 2007-2008 school year.

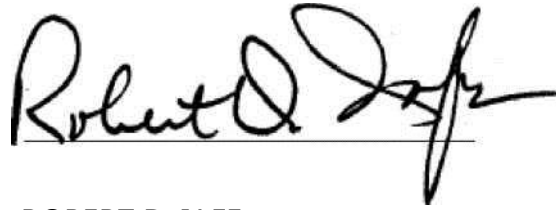
PREVAILING PARTY

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. Student prevailed on the Issue 1, 2, and 4, and District prevailed on Issue 3 as heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

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

Dated: March 24, 2008

A handwritten signature in black ink, appearing to read "Robert D. Iafe", written over a horizontal line.

ROBERT D. IAFE

Administrative Law Judge

Special Education Division

Office of Administrative Hearings