

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2008110543

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009020717

PARENTS ON BEHALF OF STUDENT,

v.

CLOVIS UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009040524

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in Clovis, California, on August 11, 12, 13, 18, 19, 20, 27, and 28, 2009.

Student's Mother represented Student. Student's Father was present for most of the hearing. Student was not present at the hearing.

Daniel A. Osher, Attorney at Law, represented the Clovis Unified School District (District). Janet van Gelder, the former director of the District's Special Education Local

Planning Area (SELPA), represented the District and was present throughout the hearing.

On February 11, 2009, the District filed a first amended request for due process hearing (complaint) in Case No. 2008110543.

On February 23, 2009, the District filed another complaint in Case No. 2009020717. On March 9, 2009, that matter was continued. On March 10, 2009, OAH consolidated Case No. 2008110543 with Case No. 2009020717 and ruled that the timeline of the latter matter would govern the consolidated cases.

On April 14, 2009, Student filed his complaint in Case No. 2009040524, and a motion to consolidate his complaint with Cases No. 2008110543 and 2009020717.

On April 15, 2009, OAH consolidated the three matters and continued the consolidated due process hearing until August 10, 2009. On May 15, 2009, Student filed a first amended Complaint in Case No. 2009040524, and the continuance remained in effect. On August 3, 2009, OAH continued the matters to August 11, 2009.

At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to September 21, 2009, for the submission of closing briefs by mail. On September 22, 2009, OAH received the District's closing brief, and on September 24, 2009, OAH received Student's closing brief. On that day the briefs were filed, the record was closed, and the matter was submitted.

## ISSUES

### A. DISTRICT'S ISSUES (CASE NOS. 2008110543 AND 2009020717):

1. Did the District's August 25, 2008 initial administrative placement offer at the beginning of the school year (SY) 2008-2009 (the Interim Placement) offer Student a free, appropriate public education (FAPE)?
2. Did the District's September 24, 2008 IEP and the November 12, 2008 amendment IEP offer Student a FAPE for the SY 2008-2009?

3. Did the District's January 16 and 26, 2009 triennial IEP offer Student a FAPE for the SY 2008-2009?

4. Are the following assessments valid and appropriate, so that the District is not liable for the cost of the independent educational evaluation (IEE) obtained by Parents?

- a. Psychological assessment by Brooke Bell
- b. Educational assessment by Wendie Huerta
- c. Speech and language assessment by Lindy Adolph
- d. Assistive technology assessment by Amanda Fisher
- e. Occupational therapy assessment by Noelle Miller
- f. Health background study by Gayle Guenther<sup>1</sup>

5. Is the District entitled to a ruling that all of the above IEPs offered Student a FAPE, and may it implement the January 16 and 26, 2009 triennial IEP in its entirety without parental consent?

**B. STUDENT'S ISSUES (CASE No. 2009040524)**

1. Did the District fail to provide Student an appropriate interim placement on August 25, 2008, in the least restrictive environment?

2. Did the District implement in their entirety the District's interim placement offer of August 25, 2008, and the IEP offers of September 24 and November 12, 2008, in the absence of parental consent?

3. Did the District fail to allow Parents to meaningfully participate as members of the IEP team throughout the 2008-2009 school year by refusing to provide Parents the

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<sup>1</sup> At hearing, Parents withdrew their opposition to the Occupational Therapy assessment by Noelle Miller and the Health Background study by Gayle Guenther, and withdrew any request for reimbursement for IEEs with respect to them.

information they needed to make informed decisions, thus depriving them of the ability and right to give their informed consent?

4. Did the District pre-determine the outcome of Student's IEPs throughout the 2008-2009 school year, before IEP team meetings were held and in the absence of Parents?

5. Did the District adequately address Student's present levels of performance during the development of his IEPs on September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009?

6. Did the District develop appropriate and adequate goals and objectives for Student in its IEP offers of September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009?

7. Did the District fail to offer or provide Student an appropriate placement in the least restrictive environment during the SY 2008-2009?

8. Did the accommodations, modifications, supports and supplementary aids and services offered by the District at the September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009 IEP meetings meet Student's unique needs?

9. Did the District implement the sections of the SY 2008-2009 IEPs to which Parents did consent?

10. Did the District violate the Individuals with Disabilities in Education Act (IDEA) by refusing to discuss and disclose what, if any, scientifically based methods of instruction would be utilized in its September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009 IEP offers?

11. Did the progress monitoring in Student's IEPs of September 24 and November 12, 2008, and January 16, and 26, and February 17, 2009, meet Student's unique needs?

12. Did the District unilaterally determine that extended school year (ESY)

services in 2009 were not necessary for Student?

13. Did the District fail throughout SY 2008-2009 to provide adequate supports and services emphasizing special education and related services designed to meet Student's unique needs and prepare him for employment and independent living?

14. Did the District fail to include a required assistive technology (AT) team member in the IEP meetings of September 24 and November 12, 2008, and fail to provide necessary AT equipment during SY 2008-2009?

15. Did the District fail to provide prior written notice when it declined to state what scientifically based, peer-reviewed, research-based intervention program and methodology would be utilized in Student's IEPs during the 2008-2009 and 2009-2010 school years?

16. Did the District alter Student's assessments and records to hide the fact that Student was not making the educational progress reported in his IEPs and educational records during the 2008-2009 school year?

17. Did Student suffer regression during SY 2008-2009 due to the inadequacy of the IEP offers made to him during that school year?

18. Did the District fail to execute in a timely manner the September 24, 2008 assessment plan signed by Parents on September 26, 2008?<sup>2</sup>

19. Did the District fail during SY 2008-2009 to assess Student in all areas of suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities?

20. Did the District offer Student a FAPE during SYs 2008-2009 and 2009-2010?

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<sup>2</sup> The issues are those set forth in the Order Following Prehearing Conference. Student's issue No. 18 was withdrawn at hearing and is not addressed here. The numbering of issues in the Order Following Prehearing Conference is preserved for clarity.

## PROCEDURAL MATTERS

At the close of hearing, the parties moved for leave to file closing briefs. The motion was granted, and the parties were allowed to serve simultaneous 35-page briefs by mail on or before September 21, 2009.

On September 22, 2009, Student served by mail a 42-page brief. The District then moved to strike the brief as untimely filed and in violation of the page limitation. However, the District does not argue that it has been prejudiced by the brief delay in receiving Student's closing brief. Student asserts that in the days leading up to the briefing deadline, extraordinary personal circumstances affecting Parents interfered with the completion of his brief. For those reasons, the motion to strike all or part of Student's closing brief is denied.

However, Student's closing brief is replete with factual representations that were not made at the hearing, and arguments based on documents not admitted into evidence. The District has moved to strike numerous portions of Student's closing brief on the ground that they set forth evidence not introduced at hearing. Evidence not introduced at the hearing may not be considered. The motion to strike is granted, and the portions of Student's closing brief identified in the District's motion to strike are stricken from the record.

Student's closing brief, Student's revised issue statement filed on September 8, 2009, and Student's unauthorized reply brief filed October 12, 2009, all contain numerous factual representations based on materials not admitted into evidence, arguments not made in Student's first amended complaint or set forth in the Order Following Prehearing Conference, and additional arguments concerning matters already briefed. Those factual representations and arguments are not considered here.

The District has also moved to strike several specific portions of Student's opposition to the District's first motion to strike because the opposition asserts matters arising after the hearing and not part of the hearing record. The District's motion to strike portions of Student's opposition is granted, and the portions of Student's opposition to the first motion to strike that are identified in the District's second motion to strike are stricken from the record.

Student's opposition to the District's motion to strike requests that the record and the hearing be re-opened for the receipt of evidence Student possessed but neglected to offer at hearing, and for the receipt of evidence of alleged events occurring after the hearing. No good cause is shown for prolonging these matters further by re-opening the record or the hearing. Events occurring after the hearing have no bearing on the validity of IEP offers made in September and November 2008 and January 2009. Student's motion to re-open the record and the hearing is denied.

#### BACKGROUND AND JURISDICTION

1. Student is a 10-year-old male who resides with Parents within the geographical boundaries of the District. He was first ruled eligible for special education and related services in April 2007 by the Fresno Unified School District (FUSD), where the family then lived, because of a specific learning disability and a speech and language impairment. He was placed in a second grade general education class with services and supports.

2. On May 6, 2008, near the end of Student's third grade year, FUSD held an annual IEP meeting and produced an IEP (the Fresno IEP) that placed Student in a fourth grade general education with services and supports, provided for numerous accommodations and modifications, and included extensive tutoring in reading by the Cullinan Education Center (Cullinan), a private organization.

3. In July 2008 the family moved from Fresno to Clovis, California, within the boundaries of the District. On August 25, 2008, the District created for Student an Interim Placement intended to last until the parties could have an IEP meeting within 30 days. The Interim Placement adopted the Fresno IEP in most respects, but did not include private reading tutoring by Cullinan. Parents agreed to the placement and services in the Interim Placement, though they objected to the elimination of tutoring by Cullinan. For the rest of the school year the parties failed to agree on an IEP, and the Interim Placement remained in effect.

#### VALIDITY OF ASSESSMENTS

4. Assessments upon which a special education determination is based must comply with numerous legal requirements.<sup>3</sup> They must, for example, be conducted in all areas related to any suspected disability the student may have. They must occur at least every three years, or more frequently if circumstances require it, or if a parent or teacher requests it. They must not be based on a single procedure or criterion; must be used for purposes for which they are valid and reliable; must be properly administered by trained personnel; must accurately reflect the pupil's aptitude, achievement level and other relevant factors; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is not feasible. These and additional requirements identified in the Legal Conclusions of this decision are referred to herein as "the statutory criteria."

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<sup>3</sup> Federal statutes and regulations generally use the term "evaluation." California statutes and regulations generally use the term "assessment." This decision conforms to California usage.



5. As part of its triennial review of Student's eligibility and needs for special education, the District mailed a proposed Assessment Plan to Parents on September 9, 2008. After attempting to attach numerous conditions to the plan, Parents signed it unconditionally on November 6, 2008.<sup>4</sup> The District conducted its triennial assessments during December 2008 and January 2009 in preparation for the triennial IEP meeting on January 16, 2009. Parents timely notified the District that they disagreed with the assessments and would seek reimbursement for Independent Educational Evaluations (IEEs).

6. In order to avoid paying for an independent educational evaluation (IEE), a district must establish at a due process hearing that the assessment disputed by a parent is appropriate. The District requested a due process hearing to establish that the following assessments are appropriate, so that it need not pay for Parents' IEEs:

- a. A Psychoeducational Assessment by Brooke Bell
- b. An Educational Assessment by Wendie Huerta
- c. A Speech and Language Assessment by Melinda Adolph
- d. An Assistive Technology Assessment by Amanda Fisher

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<sup>4</sup> The parties agree that the timing and content of Parents' responses to the Assessment Plan in this matter were identical to the facts in a matter involving Student's older brother. (Clovis Unified School Dist. v. Student (2009) Cal.Offc.Admin.Hrngs. Case No. 2008110569; see also, Clovis Unified School Dist. v. Student (2009) Cal.Offc.Admin.Hrngs. Case No. 2009020721.) In that matter Parents argued that their conditional acceptances of the Assessment Plan constituted consent to it, but Judge Lepkowsky ruled that Parents did not effectively consent until they consented unconditionally on November 6, 2009. (Clovis Unified School Dist., *supra*, pp. 16-17.) At hearing, Parents accepted that ruling and withdrew their identical contention in this matter.

## The Psychoeducational Assessment

7. The District's multidisciplinary team for Student's triennial assessments was headed by school psychologist Brooke Bell, and included Student's special education teacher Wendie Huerta, speech and language therapist Lindy Adolph, assistive technology specialist Amanda Fisher, occupational therapist Noelle Miller, and nurse Gayle Guenther. Ms. Bell conducted a psychoeducational assessment, coordinated the other assessments, and collected the assessments for presentation to Student's IEP team.

8. By law, only a credentialed school psychologist may conduct a psychoeducational assessment for a district. Ms. Bell is a nationally certified school psychologist employed by the District. She has been a school psychologist for six years. She has a master's degree in Science and Psychology, with an advanced specialization in school psychology, from California State University at Fresno. She also has a pupil personnel services credential and a certificate as a behavioral intervention case manager. She was trained in best practices for assessments in her Master's program, and has assessed well over 100 students. She is well qualified to perform a psychoeducational assessment. She was a calm and careful witness who was familiar with the records underlying her assessment and whose testimony was entirely consistent with those records. Her testimony was not damaged on cross-examination. She was a credible and persuasive witness.

9. Ms. Bell conducted her assessment of Student on December 18, 2008, and January 6 and 13, 2009. She conducted a review of all available school and medical records, interviewed Student, Parents, and Student's teachers and providers, and observed Student in class and on the playground. Her observations allowed her to see Student's instructional environment; to determine his learning habits, style preferences, and level of acquisition of necessary skills; and to check his teachers' reported observations against her own.

10. Ms. Bell also administered a number of test instruments. To measure Student's cognitive abilities, she administered the Wechsler Intelligence Scale for Children (4th ed.)(WISC-IV), and the Universal Nonverbal Intelligence Test (UNIT). To assess Student's phonological processing, she used the Comprehensive Test of Phonological Processing (CTOPP). To understand his reading needs, she administered the Gray Oral Reading Test (4th ed.)(GORT-4). For adaptive behavior, she used the Vineland Adaptive Behavior Scales (2d ed.)(Vineland-II)(Teacher and Parent/Caregiver Rating Forms), and to measure his social and emotional condition she administered the Behavior Assessment System for Children (2d ed.)(BASC-2)(Parent and Teacher Rating Scales).

11. After reporting and discussing the results of each test instrument, Ms. Bell summarized her conclusions. She found that Student demonstrated appropriate behavior and was respectful and cooperative. His peer interactions were somewhat limited but were improving. His scores showed a significant discrepancy between his verbal comprehension skills, which fell into the first percentile of his peers, and his perceptual reasoning skills, which fell into the 70th percentile. In reading, Student's phonological awareness and phonological memory were average and above average, respectively, but his fluency rate was low. To ensure an accurate picture of Student's cognitive abilities, Ms. Bell then administered the UNIT, a nonverbal measure which showed his nonverbal intelligence to be much higher than his verbal intelligence scores would suggest.

12. Based on her colleagues' assessments as well as her own, Ms. Bell recommended that Student remain eligible for special education. She found that Student's significant expressive language deficits resulted in oral expression, written language, reading comprehension, and math reasoning that were not commensurate with his nonverbal cognitive ability. She suggested 22 environmental and instructional modifications for the IEP team's consideration.

13. The District's attorney, in a series of questions, asked Ms. Bell whether she had complied with each of the statutory criteria for assessments in assessing Student, and in each case she testified credibly that she had done so. For example, she testified that her tests were conducted so as not to be racially, sexually, or culturally discriminatory; that the tests were conducted in Student's native language; that the tests she selected were used for purposes for which they are valid and reliable; and that they were administered in accordance with the instructions provided by the producers of the tests. In that fashion Ms. Bell answered affirmatively to each question inquiring whether each of the statutory criteria had been met. Independent evaluation of her report and testimony confirm that she complied with all the statutory criteria, including those governing the content of her report.

14. Student contends that Ms. Bell's psychoeducational assessment was inappropriate because she failed to conduct certain subtests of the WISC-4, that she failed adequately to explore Student's processing difficulties, and that she should not have administered the UNIT. These contentions rest exclusively on the report and testimony of Dr. Michael Perrotti, the only expert witness to assert that Ms. Bell's assessment was inappropriate.

15. Dr. Perrotti is a clinical and forensic psychologist whose credentials, honors, publications, and experience are extensive. He has a private practice in clinical psychology and marriage, child, and family counseling, and has extensive experience in a wide variety of fields. His resume states that his areas of expertise include family law, criminal law, personal injury, evaluation of sexual deviance, neuropsychology, law enforcement, assessment and treatment of juvenile offenders, crisis intervention, employee assistance plan services, independent medical examinations, and consultation for the Social Security Administration.

16. Dr. Perrotti was employed by Parents shortly before the hearing. He reviewed a selection of records Parents gave him, interviewed and assessed Student on seven occasions ending in July 2009, and delivered his completed his report on August 4, 2009. His assessments generally covered the same areas as Ms. Bell's, though from a clinical rather than an educational perspective.

17. The validity of an IEP is measured by what was objectively reasonable at the time the IEP was written and in light of a "snapshot" of the information available to the IEP team when its decisions were made. Subsequent events cannot be used to undermine the judgment of an IEP team. Under this snapshot rule, because all the IEPs at issue here were completed months before Dr. Perrotti's opinions were available, Dr. Perrotti's views can have no bearing on the judgments made earlier by the IEP team. However, his report and testimony may be considered in determining the appropriateness of an assessment.

18. Dr. Perrotti's report discusses Ms. Bell's psychoeducational assessment at length, sometimes critically and sometimes in support of Dr. Perrotti's own views. The only serious criticism of the psychoeducational assessment made in his report is that Ms. Bell's educational recommendations "do not appear to address [Student's] deficits." The rest of his written comments under the subheading "Review of School Psychologist's Evaluation" merely restate various items in the records Dr. Perrotti reviewed. At hearing, however, Dr. Perrotti criticized Ms. Bell's assessment on a number of grounds not mentioned in his report. For several reasons, Dr. Perrotti's criticisms are not entitled to substantial weight.

19. Dr. Perrotti's expertise in education is extremely limited. His extensive resume does not mention education as a field in which he has significant experience or expertise. None of his licenses, honors, certifications, articles, publications, or symposium presentations pertains to education. He has no teaching credential or training in special education. He has never worked as a teacher, and has never visited a special education classroom. His educational experience is limited to consulting with attorneys concerning

educational programs for children involved with the juvenile court. His generalized attack on the educational usefulness of Ms. Bell's educational recommendations must be discounted because of his lack of experience and expertise in the field.

20. Dr. Perrotti saw Student only in his office. He made no attempt to view Student in any educational setting, or to view the educational setting in which Student was likely to be placed. He had no contact with any of Student's teachers or service providers, or with anyone else at the District. Dr. Bell, and another expert for Student, Susan Neuffer, both testified that it was extremely important in assessing a student for educational purposes to see the student in an educational setting, since the purpose of the assessment is to determine what the student needs in that setting. Dr. Perrotti's failure to obtain any information from any educator who taught or served Student, coupled with his failure to observe Student in an educational setting, rendered his opinions far less credible than they might otherwise have been.

21. Dr. Perrotti depended almost entirely on Parents to provide him the documents and information on which he based his opinions. He did obtain answers to a behavior questionnaire from Student's fourth grade general education teacher, but otherwise he relied entirely for his impressions of Student's behaviors and needs in the classroom on representations by Parents and review of the documents they selected for his use.

22. Parents gave to Dr. Perrotti an unbalanced selection of documents that provided an unduly negative impression of Student's skills and accomplishments. For example, Dr. Perrotti's report notes with concern a November 4, 2008 daily progress report from Student's general education teacher, Gregory Knod, saying that Student was shutting down in class. However, over the next few days Mr. Knod sent home additional daily reports which stated on four of those days that Student had a "great day" and on another that he had a "good day." When shown these documents on cross-examination, Dr. Perrotti

stated he had never seen them before, and agreed that the documents given him were incomplete.

23. Dr. Perrotti's examination of the documents he did receive was cursory. For example, at hearing he volunteered the criticism of Ms. Bell's report that no achievement testing had been done. However, RSP teacher Wendie Huerta conducted an academic assessment which reflected her administration of the Woodcock-Johnson Tests of Achievement (3d ed.)(WJ-III). Dr. Perrotti conceded on cross-examination that the WJ-III was a valid achievement test. When shown Ms. Huerta's assessment, Dr. Perrotti testified that he had never seen it before. Yet it is listed in his report as one of the documents he examined. It is also described and summarized in Ms. Bell's psychoeducational assessment, which Dr. Perrotti purported to study carefully enough to declare invalid. Later on cross-examination, he reversed his testimony and stated he had seen the document before.

24. Dr. Perrotti seemed unaware that Ms. Bell had led a multidisciplinary assessment team whose assessments all relied on information from the other team members.<sup>5</sup> For example, Ms. Bell relied on Ms. Huerta's achievement test results in forming her own opinions. Most of Dr. Perrotti's criticisms of Ms. Bell's report were based on his erroneous belief that she had insufficient information on a subject and should have gone further and tested more. For example, he attacked Ms. Bell's report for failure to probe further into Student's processing delays, not knowing that Ms. Bell had ample information about those delays from other sources. And he insisted that Ms. Bell violated the publisher's instructions for the administration of the WISC-4 by failing to administer certain

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<sup>5</sup> Student does not criticize the interdisciplinary method. Susan Neuffer, Student's expert SLP, testified on the basis of considerable educational experience that an interdisciplinary assessment was the best way to determine a student's special education eligibility and needs.

subtests the publisher labeled optional. He stated that the publisher required these subtests because, without them nothing would be known about, for example, Student's arithmetic or picture completion skills. He stated that in the absence of those subtests he "did not see" any data to support Ms. Bell's interpretations, and that her assessment was invalid because there were "so many unanswered questions."<sup>6</sup> He was unaware that Ms. Bell had ample information about those matters from other members of the interdisciplinary team as well as from Student's records.

25. Dr. Perrotti faulted Ms. Bell's report for using the UNIT because it allegedly exaggerated Student's cognitive ability. Dr. Perrotti would have relied solely on the WISC-IV. He seemed unaware that Ms. Bell was required by law to use more than one measure to determine Student's cognitive ability. Ms. Bell did not report the UNIT results alone; she reported the results of both the WISC-4 and the UNIT, thereby giving a balanced and integrated picture of Student's verbal and nonverbal cognitive abilities. Reliance solely on the WISC-4 would have understated those abilities.

26. For all these reasons, Dr. Perrotti's criticisms of Ms. Bell's psychoeducational assessment were wholly unpersuasive and are not entitled to any weight. No other evidence corroborated them. The preponderance of the evidence therefore showed that Ms. Bell complied with all the statutory criteria required of a psychoeducational

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<sup>6</sup> After hearing of Dr. Perrotti's criticism of her alleged failure to administer required subtests of the WISC-4 (which was not mentioned in his report), Ms. Bell studied the test instructions and the next day testified confidently and credibly that the subtests were optional and she had not been required to give them. Student also disputes Ms. Bell's decision not to fill out certain blanks on the test results form, but Ms. Bell credibly testified that filling them out was optional and, in Student's case, unnecessary. Neither Dr. Perrotti nor any other witness disputed that testimony.



assessment. In particular, she did not use a single measure to determine Student's intelligence quotient or eligibility for services. She was trained and knowledgeable in the test instruments she selected, which were valid for her purposes, and she used them in accord with the instructions of the publishers. Her report included everything the law requires. Ms. Bell's psychoeducational assessment was valid and reliable. The District met its burden of proving that the psychoeducational assessment was appropriate.

### The Speech and Language Assessment

27. Melinda Adolph conducted a speech and language (SL) assessment of Student on four occasions during November and December 2008. Ms. Adolph is a speech language pathologist (SLP) who has worked for the District for about 30 years, first as a teacher, then as an SLP. She has a bachelor's degree in communicative disorders and a master's degree in speech pathology. She has both state and a national SLP licenses. Ms. Adolph also has a K-12 general education credential and a special education credential to teach communicatively handicapped children. Her duties as an SLP include providing SL intervention services to children from preschool through 12th grade, consulting with teachers, parents and outside agencies, participating on IEP teams, assessing and observing students, and providing therapy and intervention. She has conducted hundreds of SL assessments in her career. She was a balanced and patient witness, and her testimony was credible in all respects.

28. Ms. Adolph's assessment of Student included observations of him in the classroom and during testing, consultation with Student's teachers and other District IEP team members, review of Student's records, review of parent responses to rating scales given to them by Ms. Bell, and the administration of standardized test instruments. Ms. Adolph also conducted informal observations of Student's oral-motor skills and spontaneous language.

29. Ms. Adolph administered to Student the Clinical Evaluation of Language

Fundamentals (4th ed.)(CELF-4), a comprehensive, norm-referenced assessment measure used to assess a student's general ability to understand and use verbal language.

Student's scores on the CELF-4 reflected that he was in the borderline range for core language skills, in the 8th percentile in relation to his peers. His receptive language was average but his expressive language was very low, as was his understanding of the spoken paragraph. His language memory was also in the borderline range, in the 7th percentile.

30. Ms. Adolph also administered to Student the Comprehensive Assessment of Spoken Language (CASL), which is a norm-referenced oral language assessment battery of individually administered core and supplementary tests. Ms. Adolph administered the following subtests of the CASL: antonyms (in which Student scored in the 55th percentile); paragraph comprehension (in which Student scored in the 0.4th percentile); syntax construction (in which Student scored in the 4th percentile); non-literal language (in which Student scored in the 6th percentile); and pragmatic judgment (in which Student scored in the 4th percentile). These scores indicated that his skills related to antonyms were in the average range, but well below average in syntax construction, nonliteral language, and pragmatic judgment, and very low in paragraph comprehension.

31. Ms. Adolph concluded in her report that Student continued to qualify for individual SL therapy. His receptive language was an area of strength, especially with visual stimuli, but his expressive language deficits negatively affect his educational performance and his ability to progress in the educational setting. She recommended that he receive one-to-one SL therapy, but left the frequency and duration of that therapy to the IEP team.

32. In answer to the same series of questions that had been asked of Ms. Bell and Ms. Huerta, Ms. Adolph was asked whether she had complied with each of the statutory criteria for assessments in assessing Student. In each case she testified credibly that she had done so. Independent evaluation of her report and testimony confirm that

she complied with all the statutory criteria, including those governing the content of her report.

33. In preparation for a triennial IEP meeting on January 16, 2009, Parents obtained the services of Susan Neuffer, a well-qualified SLP with substantial experience in educational matters. Late in November, 2008, Ms. Neuffer conducted an SL assessment similar to Ms. Adolph's. Many of the scores obtained by Student on the tests she administered were quite similar to the scores Ms. Adolph reported. A few were considerably lower. Ms. Neuffer testified as an expert for Student, but declined every invitation in direct examination to say that Ms. Adolph's SL assessment was invalid for any reason.

34. One contention raised by Student in examining Ms. Neuffer concerned "practice effect," the unrepresentative elevation of scores that sometimes occurs when the same test is administered by two assessors close together in time, and the test subject does better on the second test by virtue of having recently taken it before. Ms. Neuffer administered the CELF-4 to Student in late November. Ms. Adolph administered the same test in early December, well before another administration would have been advisable under the instructions of the test publisher. However, when Ms. Adolph chose to administer the CELF-4 shortly after Ms. Neuffer administered it, she did not know of Ms. Neuffer's testing because Parents had not told her of it. No employee of the District knew that Ms. Neuffer had earlier administered the CELF-4 to Student until the January 16, 2009 IEP meeting, when Parents presented Ms. Neuffer's report. It was no fault of Ms. Adolph's that she chose to use the same test instrument that Ms. Neuffer had just used.

35. Moreover, Ms. Neuffer's report was dated December 8, 2008, and did not set forth the earlier date on which she had actually administered the CELF-4 to Student. Ms. Adolph had administered the CELF-4 on December 4, 2008, so on the face of Ms. Neuffer's report, it appeared that Ms. Adolph's test had been administered first. For that reason, the

IEP team on January 16, 2009, declined to disregard Ms. Adolph's CELF-4 results.

36. Any practice effect that might have undermined the usefulness of Ms. Adolph's CELF-4 results was not the result of her professional judgment; it was the result of Parents' decision not to inform her that Student had recently taken the same test. Notably, on direct examination, Ms. Neuffer declined an invitation to testify that any practice effect or discrepancy between scores on the two assessments rendered Ms. Adolph's assessment invalid. No witness so testified.

37. Ms. Adolph's CELF-4 results were generally consistent with Ms. Neuffer's except on the CELF-4's concept and direction subtest, for which Ms. Neuffer reported a score in the 2d percentile and Ms. Adolph a score in the 50th percentile. However, neither this discrepancy nor the fact that the IEP team used Ms. Adolph's results had any practical consequence. Ms. Neuffer's scores on other measures were quite similar to Ms. Adolph's. Ms. Adolph's recommendations were based on a great deal of information in addition to her CELF-4 results. And both SLPs came to essentially the same educational programming recommendation: that Student receive intensive one-to-one SL therapy. Ms. Neuffer recommended that Student receive at least 30 minutes of SL therapy twice a week, and an unstated amount of consultation. The January IEP offer proposed that Student receive 240 minutes of SL a month (or 60 minutes a week), and 30 minutes a month of consultation.

38. In his closing brief Student argues that Ms. Adolph's assessment is invalid because it depended in part on Ms. Bell's allegedly invalid psychoeducational assessment. Since, as shown above, Ms. Bell's assessment was valid and reliable, the premise of Student's argument is incorrect.

39. The preponderance of the evidence showed that Ms. Adolph complied with all the statutory criteria required of an SL assessment. Her report included everything the law requires. Ms. Adolph's assessment was valid and reliable, and the District met its burden of proving that the assessment was appropriate.

#### The Educational Assessment

40. Wendie Huerta conducted an educational assessment of Student.<sup>7</sup> Ms. Huerta has been an RSP teacher for one year at Fort Washington Elementary school and has worked for the District for six years. She has a bachelor's degree and a master's degree in education, a multisubject teaching credential, and a special education teaching credential. As a Resource Specialist Program (RSP) teacher, her job duties include providing special education instruction in group and one-on-one settings to special needs children, collaborating with general education teachers, working with her students' parents, attending IEP meetings, developing strategies for special needs children, and conducting assessments through observations, interviews, and standardized and informal testing. Ms. Huerta was a frank and straightforward witness who gave detailed and credible explanations of her testing processes and the educational services she provided to Student, and equally credible answers to questions asked on cross-examination. Documentary evidence corroborated her testimony. She was in all respects a credible and persuasive witness.

41. Ms. Huerta's educational assessment of Student consisted of a review of his educational records, observations of Student in his classroom and during the testing process, an interview with Student's general education teacher, and standardized and informal testing. In order to assess Student's academic achievement, Ms. Huerta

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<sup>7</sup> Ms. Huerta is now Wendie Huerta Martinez, but during SY 2008-2009 was known as Ms. Huerta.

administered the Woodcock-Johnson III (WJ-III) Tests of Achievement to Student, which is a standardized test based on norms for children of varying grade levels. For Student, Ms. Huerta used the norms of students in the fourth month of the fourth grade, which was Student's grade level when he was assessed. The assessment consisted of various subtests that measured Student's oral language, written language, listening comprehension, and math skills, as well as his academic skills, fluency, and knowledge. She found that Student's total achievement was in the 38th percentile. That score was a composite of scores in the 21st percentile in broad reading, the 72d percentile in broad math, and the 48th percentile in broad written language.

42. Ms. Huerta also administered to Student the Developmental Reading Assessment (DRA), a non-standardized test that measures accuracy, fluency, and comprehension. She chose the measure because it allowed her to look at several specific areas of reading ability. She found that Student's reading decoding was not a concern, and that his reading accuracy was at his fourth grade instructional level. However, she also learned that his oral reading rate, at 42 words per minute, was well below the instructional level of 70 to 99 words per minute, and she concluded he needed RSP support in that area.

43. Ms. Huerta reported that Student's scores on the two instruments showed him to be in the high average range in math calculation skills; the average range in basic reading skills, math reasoning, basic writing skills and written expression; the low average in oral expression, reading and listening comprehension, and fluency; and the very low range in academic knowledge. Based on these findings, and after consulting Student's general education teacher, Ms. Huerta recommended that Student receive one-to-one and small group RSP support in reading comprehension, fluency, and written language delivered outside of class.

44. Ms. Huerta was also asked a series of questions to determine whether she had complied with each of the statutory criteria in assessing Student, and in each case she

testified credibly that she had done so. For example, she testified, and the evidence showed, that she was qualified to administer all the tests involved in her assessment, and that the standardized tests she administered to Student were validated for the purposes for which she used them. She testified that the WJ-III and the DRA are not racially, culturally or sexually discriminatory, and that the tests were administered in accordance with the publisher's instructions. In that fashion Ms. Huerta answered affirmatively to each question inquiring whether each of the statutory criteria had been met. Independent evaluation of her report and testimony confirm that she complied with all the statutory criteria, including those governing the content of her report.

45. In his closing brief, Student presents an extensive exposition of test scores that he has accumulated since the first grade. Those scores vary considerably, and many of them are lower than comparable scores obtained by the District in general, and by Ms. Huerta in particular. Student argues that these scores are so different from Ms. Huerta's results that her results must be faulty. For numerous reasons, Student's argument is not persuasive.

46. Student's test results vary because his attention to, and cooperation with, adults vary widely from day to day. As Mr. Knod reported, on one day Student would simply shut down, and on the next he would have a "great day." Student is hard to test, and his assessors over the years have reported substantially different degrees of cooperation and attention during testing. Ms. Adolph, for example, had an ongoing relationship with Student before her speech and language assessment, and reported that, with two exceptions, Student was cooperative and compliant during the assessment, and that their rapport was good. Ms. Huerta reported that Student was mostly cooperative during her educational assessment, though he had good and bad days. On the bad ones she would reschedule testing. Ms. Bell did not know Student before her psychoeducational assessment, and at their first meeting he was unresponsive. But Ms. Bell had been told by

Ms. Adolph that Student liked to play Shrek Checkers, so she struck a deal with Student in which, after every three subtests, they would play a game of his choice for a few minutes. Student immediately warmed to the project, and the two played checkers between groups of subtests. As a result, Ms. Bell was able to report that Student was attentive and helpful during testing.

47. Ms. Neufer, on the other hand, had seen Student with his Parents at a few public events, but did not otherwise know him. She had some difficulty in testing him in her office. She reported that Student sometimes put his head down on the desk, appeared lethargic, and closed his eyes. He frequently asked whether he was finished. It took her four sessions to test him. Dr. Perrotti had never met Student before his assessment began. He reported that, during assessment sessions in his office, Student was fatigued, shy, inattentive, and distracted. He noted a "marked disturbance and impairment of function during the testing process." Dr. Perrotti had to conduct seven sessions with Student before he obtained scores he could report.

48. It is evident from these events that Student's variable reactions to testing can produce quite different scores. Ms. Neufer testified that some, and possibly all, of the differences between the scores on her SL report and the scores on Ms. Adolph's SL report could be attributed to these variations. The fact that Student's scores on District examinations are generally higher than the scores of other assessors does not mean that the District's scores are incorrect.

49. Part of Student's argument concerning his test scores rests upon a misinterpretation of Ms. Huerta's results. Student points out that early in the fall, Ms. Huerta administered the Developmental Reading Assessment (DRA) at the "28" level, but in her later assessment used the "40" level. The numbers refer to the level, by grade and month, of the materials used. Student misunderstands Ms. Huerta's testimony. She did not find him reading at a DRA 28 level in September; she merely chose that level to get a



preliminary sense of his skills. Her findings reported a testing level, not an achievement result.

50. Another part of Student's argument assumes that two private tests in 2009 are definitive and impeach Ms. Huerta's results. The evidence showed, however, that those two tests were unreliable. In April 2009 Parents obtained a reading assessment from Sasha Johnson of the Cullinan Center. She concluded that he had experienced minimal if any growth in his reading over the last year, and that in his reading he displayed anxiety she did not observe in him a year ago.

51. Most of the tests relied upon by Ms. Johnson measured Student's progress, under the Orton-Gillingham reading method, against the same internal tests conducted in spring 2008. The results generally showed that Student had progressed little, if at all, from spring 2008, and in some areas had regressed, although in some he had improved. However, the applicability of Cullinan's internal testing to the public schools was not clear. The tests are not norm-referenced or standardized in any way. There was no evidence that the grade levels in Cullinan's internal testing correlated with grade levels in the public schools.

52. The one standardized test given by Ms. Johnson in April 2009 was the Test of Written Language (4th ed.)(TOWL-4). Ms. Johnson could not remember being trained in the administration of the TOWL-4. At one point Student could not finish a series of test questions; he was unable to answer several of them in the time allotted. Ms. Johnson nonetheless gave him credit for answering the questions and decided he had completed the test. On cross-examination she was asked whether it made any sense to grade a standardized test in that fashion, and whether the test publisher's instructions for grading the test allowed giving credit for unanswered questions. She was unable to explain or justify her grading. Ms. Bell testified persuasively that it is inappropriate to grade a

standardized test in that way, and there was no contrary evidence. Ms. Johnson's apparent scoring error was sufficiently substantial that it rendered all of her testing results suspect.

53. In July 2009, Parents employed John Nikaido to teach reading to their children during the summer. Mr. Nikaido testified that he administered a reading fluency test to Student, using materials published by Houghton-Mifflin that he decided were at a fourth grade level. Student was only able to read at 53 words per minute.

54. Mr. Nikaido lacks the credentials to produce credible test results. His only qualification for giving the test is that he has been a public school teacher for 11 years, 9 of them as a substitute. When asked to identify his teaching credential, he could only reply that it is the credential Governor Schwarzenegger gives out. Mr. Nikaido administered the test while Student was in a group of students that may have included Student's older brother. There was no evidence that Mr. Nikaido's test results were reliable.

55. Thus the 2009 reading testing by Ms. Johnson and Mr. Nikaido do not demonstrate any flaws in Ms. Huerta's results in her educational assessment.

56. The preponderance of the evidence showed that Ms. Huerta complied with all the statutory criteria required of an educational assessment. Her report included everything the law requires. Ms. Huerta's educational assessment was valid and reliable, and the District met its burden of proving that the assessment was appropriate.

#### The Assistive Technology Assessment

57. Assistive Technology (AT) specialist Amanda Fisher conducted an assessment of Student as part of the District's multidisciplinary assessment. Ms. Fisher has a both a bachelor's degree and a master's degree in speech language pathology. She is also a credentialed AT specialist. Her duties include helping students access the curriculum through AT, and consulting with teachers to determine a student's needs and how to address those needs in the classroom. She has completed at least 20 AT assessments and engaged in a substantial amount of consultation with teachers in this District and others.

58. Ms. Fisher's assessment of Student included observations of Student during her individual work with him, observations of him in his classroom, and interviews with Student's teacher. As part of her AT assessment, Student was directed to create three spontaneous sentences to generate a topic. He completed the task in a timely manner and his writing was legible, although there was some variance in the size of his handwritten letters. Student was also given a portable word processor, on which he was able to complete four sentences in 10 minutes. Ms. Fisher created a simple graphic organizer for his use with the word processor, which Student was able to use to generate ideas. Student was able to use text prediction software with ease. Ms. Fisher testified without contradiction that she used those measures of Student's ability because there are no standardized tests that usefully measure those skills or needs.

59. Based on Student's performance in Ms. Fisher's individual exercises, her observations of him in class, and her consultation with Student's teachers, Ms. Fisher reported that Student has difficulty with writing lengthy assignments, with comprehension of complex ideas, and with the organization of his thoughts for written expression. To assist him in accessing the curriculum, she therefore recommended that he be given access to a word processing program with text prediction software for lengthy writing assignments; graphic organizers to help him organize his thoughts for written expression; and audio books to help with reading comprehension.

60. While Ms. Fisher did not address her compliance with the statutory criteria for assessments in her testimony, independent evaluation of her report and testimony confirm that she complied with all the statutory criteria, including those governing the content of her report.

61. It was not possible to determine from Student's cross-examination of Ms. Fisher why he might believe her assessment is inappropriate. In his closing brief, Student

abandons any attempt to dispute the validity of Ms. Fisher's AT assessment, asking only that the ALJ authorize a second assessment by the Diagnostic Center in Fremont.

62. The preponderance of the evidence showed that Ms. Fisher complied with all the statutory criteria required of an AT assessment. Her report included everything the law requires. Ms. Fisher's assessment was valid and reliable, and the District met its burden of proving that the assessment was appropriate.

#### Failure to Assess in All Areas of Suspected Disability

63. A district must assess a disabled child in all areas related to a suspected disability. Student contends that the District failed to assess him for autism.

64. In November 2008, Mother mentioned to Ms. Bell that she was concerned about Student's limited peer interaction. Yet Parents did not request an assessment for autism, although they knew they had that right. Although Parents wrote many conditions and requests on the assessment plan between September 2008 and November 6, 2008, none of them mentioned a need to assess for autism. In conducting her psychoeducational assessment, Ms. Bell, who is familiar with the characteristics of autism and autistic-like behaviors, reviewed Student's file to see whether an assessment for autistic-like behaviors was warranted. She testified that there was nothing in Student's records to suggest it was an area of concern. Autism was not mentioned in the records, and no assessment for autism had been conducted. The records contained numerous indications that were inconsistent with autism. For example, Student's peer interactions were limited by his expressive language impairment; he sometimes found it hard to reply to peers who addressed him. Otherwise, however, the records confirmed Ms. Bell's own observations that Student socialized easily with peers, engages with them, displays empathy, displays perspective-taking skills, and interacts in other ways inconsistent with autism. Ms. Bell also determined that Student's expressive difficulties kept him from full participation in class, but he was interested and engaged in a way an autistic student would not be. Ms. Huerta,

who is also familiar with the characteristics of autism and autistic-like behaviors, testified that she also believed Student's behaviors, such as his maintenance of direct eye contact, were inconsistent with autism. So Ms. Bell decided it was unnecessary to assess for autism. Student's SLP Ms. Neuffer suggested testing for autism, but the District did not have Ms. Neuffer's report until January 16, 2009. Although Dr. Perrotti opined in August 2009 that autism testing ought to be done, he conceded in his report that Student did not have all the symptoms of autism.

65. On January 13, 2009, as Ms. Bell was interviewing Mother for her assessment, Mother stated she was concerned that Student might have autism. Ms. Bell interpreted that statement as a request for an assessment. She still did not believe that an autism assessment was necessary, but decided to offer one anyway because of Mother's concern. At the January 16, 2009, triennial IEP meeting, the District offered to assess Student for autism. Mother declined to approve the assessment and withdrew her request, stating in writing that she would rather have a medical diagnosis first. Parents have not approved an autism assessment since. The only reason the District did not assess Student for autistic-like behaviors is that Parents refused to allow it. The District therefore did not fail to assess Student in all areas related to a suspected disability.

## SUBSTANTIVE ISSUES

### The Interim Placement

66. California law allows a school district to create an interim placement for a special education student who transfers into the district, from one SELPA to another, between school years. The interim placement is not an IEP and does not require parental consent. It is intended only as a temporary program to be implemented before the first IEP meeting, which must be held within 30 days. The District's obligations during that time are to consult with parents about the placement and to provide the student a FAPE.

67. Parents moved to Clovis in July 2008, but did not inform the District of the presence of their children until August 19, 2008, four business days before the beginning of classes for SY 2008-2009. On that day they delivered to the District a letter introducing themselves and Student. Parents requested that the District adopt Student's IEP from FUSD, and gave the District permission to contact FUSD, but only for the purpose of obtaining the IEP. Neither the IEPs nor any other documents were enclosed with the letter.

68. The District scheduled a meeting with Parents about Student's interim placement for August 25, 2008, the first day of school. Program Specialist Lisa Hansen, who was in charge of the interim placement, obtained a copy of Student's Fresno IEP, spoke with FUSD's Special Education Director, and consulted with District colleagues Wendie Huerta, who would become Student's case manager, and Lindy Adolph, who would provide speech and language services to Student. Ms. Hansen and Ms. Huerta then drafted an Interim Placement for Student.

69. At the interim placement meeting on August 25, 2008, Parents met with Ms. Hansen and Ms. Huerta, who explained and discussed the Interim Placement with them. Parents do not contend they were not consulted. The Interim Placement put Student in a fourth grade general education class. It provided for small group support in reading, written language and math (RSP support) for 225 minutes a week (45 minutes a day), and for speech and language support for 30 minutes a week. It did not state the location in which support would be provided. It did not provide for private tutoring in reading, which under the Fresno IEP had been provided for two hours each day after school by the Cullinan Center.

70. Parents argue that the Interim Placement document failed to give them adequate notice of its terms because it did not mention any goals, any accommodations (except for state testing), or whether the special education support would be delivered in the general education class (the "push-in" method) or outside the classroom (the "pull-

out" method). The document failed to describe those matters, and as notice of the terms of the placement, it was seriously deficient. However, since an interim placement document is not an IEP, it is not held the formal standards of an IEP. California law does not appear to provide any standards for the form or completeness of such a document, or for its adequacy as notice of its terms.

71. Parents now state that they did not understand the Interim Placement because they did not know what accommodations would be used, what goals would be followed, or whether the RSP and speech and language support would be delivered by the push-in or pull-out method. They maintain these matters were not discussed at the August 25, 2008 interim placement meeting. At hearing, Ms. Hansen and Ms. Huerta disagreed, testifying that all these matters were discussed. Ms. Hansen was particularly emphatic in testifying that she went through all those matters with a checklist.

72. The weight of evidence showed that goals, accommodations, and push-in RSP support for Student were all discussed at the August 25, 2008 meeting. Parents' claim of confusion is not credible, because a letter they wrote to the District two days later, on August 27, 2008, demonstrates that they well understood the details of the Interim Placement. In that letter Parents disapproved of the District's decision not to include the Cullinan Center's private tutoring in the Interim Placement. Then they wrote the following:

We do agree and accept that [Student] receive an Interim Placement with Clovis Unified with the special education services designated on his present IEP 5/6/08 as written on pages 1-23 including but not limited to Specialized Academic - Classroom Based Instruction/Push in 225 minutes /weekly [and] Speech/Language 30 minutes weekly.

The District correctly construed this language as agreement to the terms of the Interim

Placement. The language "agree and accept" necessarily implies that the agreed-to terms had been offered by the District. By agreeing to and accepting "Classroom Based Instruction/Push in," Parents showed that they knew that RSP support would be delivered inside the general education classroom.

73. Parents' August 27, 2008 letter also stated: "We agree with continuing the 5/6/08 goals and objectives from his previous school district, Fresno Unified as written on pages 1-23 of his 5/6/08 IEP." That language shows that Parents knew the Interim Placement included Fresno's goals and objectives, and that they agreed with continuing those goals and objectives. Parents' August 27, 2008 letter did not specifically mention the accommodations in the Fresno IEP, but in the letter Parents twice agreed to the implementation of pages 1 through 23 of the Fresno IEP, which contain all those accommodations. Pages 1-23 of the Fresno IEP comprise the entire document.<sup>8</sup>

74. Even if Parents had not understood the Interim Placement, they promptly acquired actual knowledge of its significant terms. In the remaining four days of the first week of school, Parents visited Student's classroom four times, and visited it frequently after that week. Through their observations Parents became aware of the details of the program actually provided to Student. They observed the conditions of his education in the fourth grade general education class, and saw some of the accommodations and modifications being implemented, and services being provided. They did not find it necessary to inquire about any accommodations, modifications, or services they might not have seen implemented. Nor did they inquire about Student's goals or whether his RSP

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<sup>8</sup> Parents' August 27, 2009 letter also purported to accept "[o]ther special education/related services one on one (private program) 600 minutes weekly," a reference to the Cullinan Center services which had been eliminated. Since that was not part of the Interim Placement, Parent's purported approval was ineffective.



support was push-in or pull-out. To the extent that the Interim Placement was designed to provide full notice of its terms, it failed, but that failure had no practical consequence.

75. Parents also allege that the District employees were confused about which accommodations, goals, and objectives were part of the Interim Placement. However, the evidence showed that the District employees charged with implementing the terms of the Interim Agreement understood the program they implemented. Ms. Hansen established that it was the standard practice of the District, in implementing an interim placement, to adopt the goals, the accommodations, and the modifications set forth in the student's last agreed-upon IEP from the previous district. Accordingly, she told Ms. Huerta and Ms. Adolph to implement the Fresno goals, and reviewed the Fresno accommodations with Ms. Huerta. Ms. Adolph testified that, to her knowledge, District staff knew what program they were to implement.

76. All the District educators who implemented the Interim Placement testified that they knew they were to implement the agreed-upon provisions of the Fresno IEP. Gregory Knod was Student's general education fourth grade teacher. He has a multi-subject credential for teaching kindergarten through 12th grade. He has been employed for eight years by the District but has been teaching for 19 years. He has taught between 80 and 100 disabled students over those years, including students with the same disabilities as Student's. He was a calm, composed, careful witness who was very familiar with Student and his classroom needs. Cross-examination of Mr. Knod did not reveal any weaknesses or inconsistencies in his testimony. His testimony was credible in all respects.

77. Mr. Knod testified that at the outset of the school year he was given the goals and accommodations from the Fresno IEP and was told to implement them. He clearly understood that to be his duty. He reviewed the Fresno accommodations with Ms. Huerta, Student's case manager, at the beginning of the year.

78. Ms. Huerta confirmed that Ms. Hansen had told her to implement the Fresno accommodations on August 25, 2008. She testified that she, Mr. Knod, Ms. Adolph, and Student's instructional assistant (IA) all implemented those accommodations as soon as Student began school. She also testified that the District was not confused about whether Student's services were push-in or pull-out. Ms. Huerta confirmed that she understood she was to deliver and supervise RSP services inside the classroom, and Ms. Hansen confirmed that she understood she was to deliver SL services in the classroom, as had been done under the Fresno IEP.

79. Notwithstanding the incompleteness of the written Interim Placement, neither District staff nor Parents were confused or uninformed about the details of the placement.

#### FAPE during the first 30 days

80. During the first 30 days of Student's placement in the District, the District implemented the goals of the Fresno IEP. With one exception mentioned below, it implemented the Fresno accommodations and modifications. The District also provided Student an IA for RSP support in the classroom, as Fresno had done.

#### READING SUPPORT

81. Under the Fresno IEP, Student had been receiving two hours a day of private reading tutoring by the Cullinan Center in addition to RSP support. In a contention that is addressed to the entire SY 2008-2009, Student argues that the District should have

continued that instruction, and that the reading program that the District implemented instead was inadequate.

82. Virtually the only information the District had by August 25, 2008, was from the Fresno IEP. That IEP reported that Student had significant delays in reading fluency and reading comprehension, but the delays it described were not extreme. The IEP reported that Student's reading had significantly improved during his third grade year. Under "Reading Level" the IEP stated that testing in May 2008 placed Student's "instructional level between 3rd and 4th Grade."<sup>9</sup>

83. Ms. Hansen and Ms. Huerta noticed that the Cullinan program was included in the Fresno IEP, but the IEP did not state why Student needed outside reading tutoring, nothing in the IEP explained it, and FUSD's Special Education Director had been unable to explain it. Moreover, the IEP contained three goals for Student, supplied by Cullinan, to be pursued in the Cullinan reading program. They were the goals of Student's brother, not Student. Two of the goals mentioned the brother by name, and one referred to a sixth grade reading standard. Student's brother is two grades ahead of Student and has a different disability. The use of his goals in Student's Cullinan program appears to have been unintentional, but it gave the District no reason to have confidence in the Cullinan program. Believing that the District could adequately serve Student's needs in its own

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<sup>9</sup> In his closing brief, Student argues that the District failed to comply with a "matrix" published by the California Department of Education (CDE) requiring certain intensive programs for students more than two years below grade level in reading. The matrix was not introduced in evidence, and there was no showing that it was binding on the District. In any event, since the Fresno IEP placed Student at grade level in reading, the matrix could have no application here.

programs, Ms. Hansen and Ms. Huerta omitted the Cullinan program from the Interim Placement.

84. The presence of the Cullinan program in the Fresno IEP does not by itself establish that the District had to continue that program in order to provide Student a FAPE. The evidence showed that districts differ in their abilities to provide services in-house. The required inquiry is whether the District's reading program actually was adequate in providing Student a FAPE.

85. The Interim Agreement provided for small group support for Student in reading, written language and math (RSP support) for 225 minutes a week, or 45 minutes a day. The parties understood that this would be delivered in class by Ms. Huerta or by the IA she supervised. Ms. Huerta testified that she implemented that RSP support in two ways. First, she instructed Student directly, approximately 20 to 30 minutes at a time, which was what his attention span would allow. Primarily she used the program Read Naturally, which she chose because it is used predominantly for reading fluency and reading comprehension, and because it allowed her to have intense one-to-one interaction with Student. After the individual instruction, she would then model the use of the program for the IA and instruct her in how to continue the lesson. During the fall of 2008, Ms. Huerta was in class delivering services to Student and working with the IA and Mr. Knod about once a week.

86. Second, Ms. Huerta testified, she supervised the aide every day. The aide would report to Ms. Huerta after class on Student's progress and problems that day, reporting on what worked and what did not. Ms. Huerta and the aide would then discuss various curriculum tools, strategies and approaches. Ms. Huerta also facilitated communication between the IA and the general education teacher. The IA, under that supervision, delivered RSP services every day. Mr. Knod testified that he also gave Student as much individual assistance as he could, consistent with his duties to his other students.

87. Ms. Huerta testified credibly that her supervision of the aide was adequate and sufficient. No witness disagreed. She also testified that she and the aide together delivered about one hour a day of RSP services, which was more than the 45 minutes the Interim Placement required. In addition to assisting Student with reading and with writing (which involves reading), Student's RSP support targeted Student's specific difficulty with math, which was that he struggled with word problems. Thus virtually all of Student's RSP support involved reading. Ms. Huerta, Ms. Hansen, Ms. Adolph and Mr. Knod all credibly testified that they believed the Interim Placement, including its reading program, provided Student a FAPE.

88. Only one of Student's three expert witnesses directly addressed the sufficiency of the District's reading program. Sasha Johnson is the on-site Director of the Cullinan Education Center. She received a regular education teaching credential from California State University at Fresno. She has three and one half years of teaching experience, first as a student teacher in the public schools, and then exclusively at the Cullinan Center. Ms. Johnson testified that she was trained in the Orton-Gillingham and LindamoodBell reading instruction methods, and that Cullinan had been using both of those with Student. In her opinion those methods are "best" for Student, and a placement at the Cullinan Center would be the "best possible" placement for him.

89. On cross-examination Ms. Johnson admitted that she is not familiar with methodologies for teaching reading other than the ones she uses. She conceded that she could not say whether other methodologies would or would not be effective with Student, and she did not know what methodologies the District had used or would use.

90. Ms. Johnson did not establish that the District's reading program for Student was inappropriate or inadequate. She was not asked to render an opinion on the District's reading program for Student, and did not do so. Whether Cullinan's methods would be best for Student is irrelevant, since a district is not required to provide the best available

program in order to provide a FAPE to a student.

91. Ms. Neufer, Student's expert SLP, was not asked to render an opinion on the adequacy of the District's reading program, and did not do so. Nor did Dr. Perrotti directly address the adequacy of that program, or testify that it was in any way inappropriate or insufficient. None of Student's experts supported his contention that his reading program was inadequate.

92. In criticizing the reading program in the Interim Placement, Student returns to the plethora of low and variable test scores he has accumulated over the years. Although Student's closing brief does not clearly draw a conclusion about the reading program from these scores, it emerged from Parents' testimony at hearing that they believe these scores speak for themselves, and make it self-evident that the District's reading program was inadequate and that private tutoring was necessary for the provision of a FAPE. That conclusion was not supported by the evidence and is unjustified.

93. As shown above, Student's variable test scores are in large part a function of the difficulty of testing him and of his differing moods and levels of cooperation.

94. More fundamentally, the evidence did not show any direct correlation between Student's low and variable test scores and his educational programming. District staff were aware of many of those scores, and nonetheless testified that Student's program was adequate. Ms. Neufer and Dr. Perrotti were also aware of those scores, having reported some of them. However, neither drew the educational programming conclusions from those scores that Student does. Ms. Neufer recommended the same amount of individual pull-out SL therapy for Student as the District offered in its January 16, 2009 IEP. Dr. Perrotti also recommended basically what the District offered: placement in general education for most of the day, with RSP support. Even Student's experts did not believe that his test scores meant he should have a reading program significantly different from the District's.

## IMPLEMENTATION OF RSP SUPPORT

95. In another contention that is addressed to the entire SY 2008-2009, Student contends that the District did not actually implement the RSP portion of the Interim Agreement because all Student's direct RSP support was provided by Student's IA and none by Ms. Huerta. The evidence showed otherwise.

96. Ms. Huerta testified, as set forth above, that she delivered direct services to Student about once a week from the beginning of school. After Student's triennial assessments, she perceived he needed more support and began to serve him in class every day. Ms. Bell confirmed that Ms. Huerta worked directly with Student in class; she saw that "with my own eyes." Mr. Knod also confirmed that Ms. Huerta worked directly with Student in class.

97. Student claims that there is no "physical" evidence of Ms. Huerta's direct services to Student. In light of the testimony of three credible witnesses, there was no need for such evidence.

98. Student's claim that Ms. Huerta did not work directly with him in class is based on a misinterpretation of three communications. On September 18, 2008, Ms. Huerta forwarded to Ms. Adolph an email from Ms. Hansen that sought to collect information for the upcoming IEP meeting. Ms. Adolph returned the email to Ms. Huerta with answers. One of the questions was: "Who is actually going into the room with [Student]? How much time?" Ms. Adolph answered: "Debbie Rowley [the IA] goes 45 mins a day ... on help in Language Arts ... ." Student argues that this response, by negative implication, constitutes a statement by Ms. Adolph that Ms. Huerta did not go into the classroom to work with Student. However, Ms. Adolph rejected that interpretation. Moreover, it is obvious Ms. Adolph did not intend her response as a complete list of the adults who went into the classroom with Student, or she would have included herself and Mr. Knod as well as Ms. Huerta. Ms. Adolph was merely telling Ms. Huerta something she

might not fully know. It would have been pointless and presumptuous for Ms. Adolph to tell Ms. Huerta how often Ms. Huerta went into the classroom.

99. Student makes the identical misinterpretation of a statement by Ms. Huerta at the November 12, 2008 IEP meeting to the effect that the aide went into the classroom with Student 45 to 60 minutes a day, and a statement by Ms. Adolph in her assessment that Student received special education support from the IA for 60 minutes each day. Neither of these statements was intended to exclude support from other adults in the classroom. The evidence showed that Ms. Huerta, Ms. Adolph, and Mr. Knod routinely provided direct support to Student in the classroom.

100. There was no credible evidence to support Student's claim that he did not receive direct services from Ms. Huerta. Student's request that OAH take judicial notice that the testimony of the District witnesses was fabricated is utterly groundless and is denied. The evidence showed that Ms. Huerta worked directly in class with Student throughout the school year, as the Interim Placement contemplated.

101. The preponderance of the evidence showed that the RSP reading support Student received under the Interim Agreement was adequate and appropriate, and comprised part of the provision of a FAPE to Student.<sup>10</sup>

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<sup>10</sup> In his closing brief, Student argues that the RSP support the District furnished violated various state rules concerning the minimum instructional minutes in Language Arts a student must receive. That issue was not alleged in Student's first amended complaint, was not set forth in the Order Following Prehearing Conference, and was not addressed at hearing. It is therefore not considered here.



## ACCOMMODATIONS AND MODIFICATIONS

102. Student's Fresno IEP provided for extensive accommodations and modifications to assist him in accessing the curriculum. He was, for example, to be given visual enhancements such as graphic organizers, pictures, and color-coding; frequent checks for understanding; additional time to complete assignments; preferential seating; and the "chunking" of assignments into smaller segments for easier understanding. With one exception, the District made these accommodations and modifications part of the Interim Placement and implemented them.

103. The District chose not to follow the Fresno IEP in providing Alphasmart with Co-Writer. Alphasmart is the brand name of a keyboarding device that functions like a digital typewriter. Co-Writer is text completion software that predicts and completes a desired word from the entry of the first few letters. Ms. Fisher, the District's AT specialist, advised Ms. Hansen and Ms. Huerta that she saw nothing in the Fresno IEP to explain why Student needed these devices, and that the use of Co-Writer was inconsistent with one of the Fresno goals, which sought to improve Student's handwritten letter formation. If the computer wrote letters for Student, she reasoned, he would practice less in forming them. Ms. Fisher testified that the District prefers to avoid using brand names of equipment and software in IEPs in order to maintain flexibility if it decides to change brands.

104. The District provided Student access to a computer and a keyboard. There was no evidence that these were inadequate substitutes for the Alphasmart device. Ms. Fisher testified that Student did not need Alphasmart or Co-Writer to receive a FAPE. Mr. Knod testified that Student rarely needed or used a computer anyway, except for long assignments. No one testified that Alphasmart or Co-Writer was necessary or even useful for Student. No AT specialist testified for Student. The evidence showed that Alphasmart and Co-Writer were unnecessary in facilitating Student's access to the curriculum. Student

does not argue that he needed any other accommodation or modification that the District did not provide.<sup>11</sup>

#### SPEECH AND LANGUAGE SUPPORT

105. Ms. Adolph discharged her duty under the Interim Agreement to provide 30 minutes of SL therapy to Student once a week in the classroom. She testified that her services were sufficient for his SL needs, and Student does not argue otherwise.

#### PROVISION OF FAPE

106. Based on what it knew at the time, the District's Interim Placement, as implemented, met Student's unique needs and was reasonably calculated to allow him to derive some educational benefit. Contemporaneous teacher reports show that Student did make some progress during this period. The District therefore provided Student a FAPE in the first thirty days of SY 2008-2009.

#### The September IEP Offer

107. Student's IEP team met for the first time on September 24, 2008. The IEP it fashioned proposed to continue the same accommodations and modifications and speech and language support that had been provided under the Interim Agreement. However, it proposed a new set of goals, and it would have increased Student's RSP support inside the classroom from 45 minutes to an hour.

#### PRESENT LEVELS OF PERFORMANCE

108. An annual IEP must contain a statement of the student's present levels of

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<sup>11</sup> Student argues that the accommodations and modifications were not accompanied by statements of the duration, frequency, or location of their proposed use. There is no requirement that accommodations and modifications be so described.

academic achievement and functional performance. The present levels of performance (PLOPs) establish a baseline for measuring the child's progress throughout the year. Knowledge of a student's progress from his PLOPs in one year toward his annual goals is essential for drafting appropriate goals for the next year. Unless a student's progress toward annual goals is accurately measured, new PLOPs cannot accurately be derived and new goals cannot adequately be written.

109. Most of the PLOPs, or baselines, in the Fresno IEP were too vague to be useful. For example, Student's reading fluency goal stated as a baseline that Student "[w]ill be able to read with grade-appropriate fluency." The baseline in his reading comprehension goal was that Student "[w]ill be able to identify structural patterns found in informational text." Elsewhere in the IEP were comments that he could decode "unfamiliar" words, answer "comprehension questions," and identify "parts of speech." These baselines gave no idea of the levels of reading fluency or reading comprehension from which Student could be expected to proceed, and were not useful in the drafting of the September 2008 IEP offer.

110. Instead of relying on the Fresno PLOPs, District staff determined to gather information on their own. Ms. Huerta conducted several informal assessments of Student's reading skills in September. For his own informal assessments, Mr. Knod repeatedly pulled Student aside to hear him read. Ms. Adolph gave Student an informal SL assessment of her own design. Student's three teachers then compared their assessments and their in-class observations, and used that information, and some prior assessment information, to write new PLOPs for the goals in the September IEP.

111. The resulting PLOPs in the September IEP goals were precise, and far superior to the PLOPs from Fresno. This was the baseline on one of Student's new reading goals:

After a DRA level 28 assessment [Student] was able to provide a retelling of what actions occurred in the story with prompting words of "In the beginning," "Next," "Then," "After that," and "In the end." When checking for literal comprehension, interpretation, or reflection, [Student] was unable to provide accurate information that related to the story. [Student's] interpretation did not match the main idea of the story ....

The PLOPs in the other proposed goals were similarly precise and useful as starting points for measuring Student's progress. The PLOPs were as accurate as the District could make them given the limited information it had. There was no evidence they were inaccurate.

112. In his closing brief, Student nearly abandons his contention that the PLOPs in the September IEP were inadequate. He argues only that the PLOPs were inaccurate because there were no valid or reliable assessments. The evidence does not support that claim. There was no evidence that the informal assessments done by Ms. Huerta, Mr. Knod, and Ms. Adolph in September were inaccurate. There were a few Fresno assessments available to the District by the September meeting, and there was no evidence they were inaccurate. The District had been unable to conduct formal assessments because Student had only been in its school for 30 days, and because Parents had refused to sign an assessment plan mailed to them on November 9, 2008. The District created the September PLOPs on the best information it had in light of these limitations. Those PLOPs were accurate, adequate, and appropriate.

## GOALS AND OBJECTIVES

113. An IEP must contain a statement of measurable annual goals designed to meet all of the student's needs that result from his disability, in order to enable him to be involved in, and make progress in, the general curriculum. Annual goals are statements that describe what the student can reasonably be expected to accomplish in the coming year.

114. In the September 2008 IEP, the District proposed goals in the areas of answering questions, reading fluency, reading comprehension, and writing. Each of the goals was measurable. For example, the reading fluency goal was:

By 9/24/09, when given a fourth grade narrative and expository passage, [Student] will read text aloud [at] 150 words per minute with appropriate fluency, accuracy, pacing, intonation, and expression with 85% accuracy in 3 consecutive trials as measured by observation and student work samples.

The other goals were equally clear and measurable.

115. At hearing, Ms. Huerta described each goal in detail and explained how each would be implemented. Ms. Huerta, Ms. Adolph, Mr. Knod, and Ms. Hansen all credibly testified that the goals offered in September 2008 provided for Student's needs and were appropriate.

116. Student argues that there were not enough goals, because there was no goal for each of the academic areas in which he was struggling. However, it is not the purpose of goals to set standards in academic areas. Rather, as Ms. Huerta and Ms. Adolph testified, goals are designed to allow students to acquire skills that can be then used to access the curriculum in all academic areas. A goal that improves reading comprehension,

for example, assists a student in every subject. The need Student's goal had to address was for support in reading comprehension, not support in every academic subject. Ms. Huerta explained that if goals were created to measure a student's performance against state standards in each subject, hundreds of goals would be required. There are between 20 and 30 standards for reading alone. The District's goals addressed the skills Student needed to access the entire curriculum.

117. Student argues that the September IEP should have contained goals to increase his vocabulary. However, District witnesses testified persuasively that there was no need for a separate vocabulary goal, since most of the goals offered had vocabulary training embedded in them. For example, a goal that develops reading comprehension necessarily expands vocabulary, as does a goal that improves writing. RSP services also build vocabulary. The District did not want to adopt specific vocabulary goals, as FUSD had done, because that would limit Student to a particular list of words. The District wanted the flexibility to go beyond any list of words if Student was able to proceed. There was no evidence that Student needed a separate vocabulary goal.

118. Student argues that the District should have adopted reading goals presented at the IEP meeting by the Cullinan Center. Ms. Huerta persuasively testified, however, that the District IEP team members declined to use the Cullinan goals because they were lists of skills to be mastered rather than measurable goals, and because they were tied to two methodologies (Visualizing and Verbalizing and Orton-Gillingham) that the District was unlikely to use. There was no evidence that the Cullinan reading goals were appropriate or necessary to provide Student a FAPE.

119. Student contends that the District's September and later IEP goals did not provide appropriate monitoring of Student's progress because monitoring by teachers is too "subjective." However, federal and state law require only that a student's IEP contain a description of how the student's progress toward meeting the annual goals will be

measured, and a statement of when periodic reports on the student's progress toward meeting his annual goals will be provided. Nothing prohibits the use of teacher observation as one of the methods selected.

120. Student's IEP indicates that his progress in the curriculum would be monitored in a variety of ways. First, the IEP indicates that Student would participate in the California Statewide Assessment (STAR) testing. Student's IEP goals state that each goal would be measured through teacher-charted observation and Student work samples. Moreover, Student's IEP indicates that Parents would be informed of Student's progress through quarterly progress reports. The IEP thus sets forth several methods by which the District would report on Student's progress. The evidence therefore does not support Student's contention that the progress monitoring in the September offer would not meet his unique needs.<sup>12</sup>

121. The preponderance of evidence showed that the goals the District offered in September 2008 were measurable and appropriate, and addressed all of Student's unique needs.

#### Accommodations and Modifications

122. The accommodations and modifications included in Student's September 2008 IEP offer were generally the same as those in the Interim Placement. They were slightly reworded, but Student does not argue that the rewording had any significance.

123. By the time of the September 2008 IEP meeting, Ms. Fisher, the District's AT

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<sup>12</sup> The District sent Parents progress reports throughout the school year. Contrary to Student's contention, the progress reports that were admitted into evidence show that progress was being measured against the Fresno goals, not the goals proposed in the September 2008 IEP offer. One progress report was not admitted into evidence and is not considered here.

specialist, had obtained an AT assessment done in November 2007 by an AT specialist at FUSD. Ms. Fisher testified persuasively that the Fresno AT assessment was unhelpful in determining Student's AT needs, and was not reported in a manner consistent with professional standards. The document is slightly over one page long, is mostly boilerplate, and contains no explanation why Student needed the six items recommended. The report recommends Alphasmart with Co-Writer for no apparent reason. The other five recommendations were included in the District's September offer. The Fresno AT report was brief and unexplained, and did not give the District any reason to follow its recommendations.

124. On one page of the September 2008 IEP offer, a question on the form asks whether the student needs AT devices. The "no" box is checked. However, various visual enhancements and access to a keyboard and computer are listed on another page under the heading "Aide, Services, Program Accommodations/Modifications, and /or Supports." There was no evidence that the placement of AT under that heading in the IEP offer made any difference to Student or Parents.

125. Student asserts that the District failed to consider his home environment in its decisions about his AT needs, but there was no evidence he needed any AT in that environment to assist him in accessing his curriculum.

126. Student argues that everyone in his general education class received some of the AT provided for him in his IEP offer. For example, Student was allowed graphic organizers as an accommodation. Mr. Knod chose as a teaching technique to use graphic organizers with all his fourth grade students. It is not clear why Student objects to that practice. As long as Student got the AT he needed, the fact that others also got it is irrelevant.

#### OFFER OF FAPE

127. For all the reasons above, the District's September 2008 IEP offer would have



met Student's unique needs, and was reasonably calculated, based on what the District knew at the time, to allow Student to derive some educational benefit. The District therefore offered Student a FAPE in its offer of September 24, 2008.

128. Parents did not consent to the September offer, primarily because it did not replicate the Fresno IEP. That meant Student remained in the Interim Placement.

#### The November IEP Offer

129. A continuation or addendum meeting of the September IEP meeting was held on November 12, 2008, because both Parents and the District began to notice, during October and early November 2008, that Student was having substantial difficulties in keeping up with his general education fourth grade class. Parents reported that Student was frequently "shutting down" at home, and taking longer to complete his homework. Father testified that at some point during the fall, Student told him he could not keep up with the class. District members of the IEP team reported that Student was having trouble focusing and was shutting down increasingly in class, when work seemed too difficult for him. Mr. Knod explained that fourth grade marked a major transition for a student because he suddenly was in a class with 37 students instead of 20 as in third grade, and because the fourth grade curriculum became increasingly rigorous in the fall. He also stated that Student was not focusing, because he was easily distracted by the noise made by 36 other students. Mr. Knod, Ms. Huerta, and Ms. Adolph all reported that Student had begun to seem frustrated and overwhelmed by the curriculum.

130. These concerns led the IEP team in November 2008 to modify the September 2008 offer by increasing Student's RSP support to from 60 to 90 minutes a day, and to propose that 60 minutes of that support be delivered by the pull-out model, in which Student would receive small group instruction in the resource room. Mr. Knod felt particularly strongly that Student could not focus on learning skills among 36 other students, and needed the relative peace and quiet of the resource room to master the

skills that would allow him to keep up with the curriculum.

131. The PLOPs, goals, accommodations, and modifications in the November offer were the same as those in the September offer, and were appropriate for the same reasons.

#### LEAST RESTRICTIVE ENVIRONMENT (LRE)

132. Federal and state law require that a special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. Student argues that the District's November offer violated the congressional preference for placement of a student in the LRE because it would have pulled him out of the mainstream class for one hour a day for RSP support.

133. The evidence showed that Student could no longer be educated satisfactorily while remaining exclusively in the general education setting. As the District members of the IEP team credibly testified, Student was not adequately learning skills in the midst of 36 other students. He needed a quiet environment in which to learn the skills that would enable him to progress in the general education environment, otherwise he would increasingly lose focus, shut down, and fall behind the class.

134. Student misconceives the impact of one hour of pull-out RSP services on his mainstreaming experience. Student was already receiving one hour of RSP services in class, delivered either by his aide, by Ms. Huerta, or by both. During that time he was required to focus not on his classmates or the subject being addressed in class, but on his one-to-one or small group instruction. Most of the time Ms. Huerta and his aide found it necessary to move Student to a table in the back of the room for RSP support so he could concentrate. During that time he did not observe, model, or mix with his typically developing peers

anyway. Moving his RSP support outside of the classroom for one hour a day therefore had no significant impact on his opportunities for mainstreaming. Leaving him in the general educational class for RSP support would have had minimal academic or non-academic benefit; in fact it was counterproductive. On the other hand, the delivery of RSP support in an environment where he could concentrate on it would have assisted him significantly in the acquisition of the skills necessary to keep up with the general education curriculum.

135. Student does not deny that he was increasingly losing focus and shutting down in class, or that he was increasingly frustrated and overwhelmed by the curriculum. Instead, he argues that the November offer failed to place him in the LRE because the District had not exhausted every possible method of educating him exclusively in the general education classroom. He argues that the District failed to provide him necessary AT and a full-time credentialed teacher for his RSP support, and that the District should have done those things before proposing to provide pull-out RSP support. However, as shown above, Student had all the AT he needed. And as discussed immediately below, Student's demand for RSP support exclusively from a special education teacher was without support in the evidence or in law. Moreover, there is no requirement that a district exhaust every educational alternative before proposing pull-out services.

#### DISPUTED STAFFING OF RSP SERVICES

136. For the entire academic year, Parents sought to change the staffing of Student's RSP services. Instead of having those services delivered by Ms. Huerta and by an IA under Ms. Huerta's supervision, Parents sought to have RSP services delivered exclusively by Ms. Huerta. The District declined, preferring its usual staffing arrangement.

137. Student does not argue, and the evidence does not show, that there was anything inadequate in the training or performance of his IA. Student avoids any criticism of his IA, but suggests in his closing brief that her only appropriate role was to help Mr.

Knod. The evidence showed that the IA performed satisfactorily and as required by the Interim Placement. Parents' desire that only a credentialed special education teacher deliver RSP services to their son was their preference, but it is not a legal requirement. The statutes governing RSP services specifically authorize the delivery of those services under the supervision of an RSP teacher, and the employment of an IA in the delivery of those services.

138. Mother testified that on one occasion in November she visited Student's classroom and saw in his eyes that he was "humiliated" by the presence of the IA because it singled him out as a recipient of special education. Mr. Knod, who saw Student every school day, testified convincingly that Student was not humiliated by the presence of the IA. In any event, Parents' concern about humiliation could not have been strong, because they proposed as a solution that Ms. Huerta sit next to Student rather than the IA. That would have singled him out at least as much.

139. The November offer did not deny Student a FAPE because it contemplated the delivery of RSP services by both Ms. Huerta and by the IA under Ms. Huerta's supervision.

#### ALLEGED PARTIAL CONSENT AND FAILURE TO IMPLEMENT

140. In California, parents may consent to a portion of an IEP offer, and the District must implement that portion. Student argues that Parents consented to the portion of the November offer proposing pull-out RSP services, and that the District then failed to implement that portion of the IEP.

141. Parents' claim that they consented to pull-out services is based on the following passage from a letter they sent to the District on November 19, 2008:

We are rejecting the 9/24/08 IEP as an appropriate offer for [Student]. We respectfully request that RSP Teacher Wendie

Huerta or a qualified credentialed RSP teacher deliver specialized academic instruction one-on-one instruction/small group to [Student] instead of an instructional aide until all assessment evaluations are completed.

142. This statement in Parent's November 19, 2008 letter did not constitute consent to the pull-out portion of the November offer. The language used says nothing about pull-out or push-in services. As Parents knew, Ms. Huerta and the IA delivered one-to-one and small group RSP services in the general education classroom, so authorizing such services did not necessarily identify their location. Yet Parents failed to mention the location in which they desired these services to be delivered.

143. Both Parents are teachers. Mother is employed by FUSD, has taught general education students for 14 years, and has had many special education students in her classes. She has considerable experience with AT, has obtained a certificate in autism, and has taught classes on autism. Father teaches business administration in a junior college and has previously taught in the public schools. Parents have a great deal of experience negotiating the terms of IEPs for their two special needs children. Parents are fluent in the language of special education. In November 2008 they knew exactly how to authorize pull-out services, and how to approve of a portion of an IEP, if they chose to do so. They did not use the language they knew would accomplish those purposes.

144. When the District did not interpret the November 19, 2008 letter as acceptance of part of the November offer, Parents did nothing to clarify that they wished to authorize pull-out services. Instead, they repeated their desire to have RSP services delivered exclusively by Ms. Huerta. The passage of the November 19, 2008 letter on which Parents rely was directed not to whether RSP services would be pull-out or push-in, but instead to the qualifications of the person delivering those services. Parents did not accept

any portion of the November IEP offer, so there was nothing for the District to implement.

#### OFFER OF FAPE

145. For all the reasons above, the District's November 2008 IEP offer would have met Student's unique needs, and was reasonably calculated to allow him to derive some educational benefit. The District therefore offered Student a FAPE in its offer of November 12, 2008.

146. Parents did not consent to the November offer, so Student remained in the Interim Placement.

#### The January 2009 Offer

147. During November and December 2008, and early January 2009, Student's triennial assessments were conducted. They produced significant amounts of new information that was used by District staff in drafting an offer for the January 16, 2009 triennial IEP meeting. The January offer proposed to continue placing Student in his general education fourth grade class for most of the day, with 30 minutes a day of in-class RSP support and 60 minutes a day of pull-out RSP support in a small group. The January proposal contained several additional goals. It increased SL services, offering 60 minutes a week of pull-out SL support and 30 minutes a month of SL consultation with teachers. It also offered additional AT in the form of word processing and text prediction software. In all, the January IEP proposed to remove Student from the general education class for 17% of the school day. The IEP was to be in effect for one year, to January 16, 2010, when an annual IEP meeting would be held.

#### PLOPs, GOALS, AND OBJECTIVES

148. Based on the triennial assessment results, and on teacher and parent reports, the January offer proposed goals for the answering of questions, writing

sentences, organizing expressive ideas, writing organization and focus, math reasoning, social pragmatics, and topic maintenance in social interaction. It also proposed three goals for reading comprehension and analysis. One focused on distinguishing cause and effect; one on identifying the main events of a plot; and one on reading fluency, which sought to raise Student's oral reading rate to 120 words per minute. The goals were measurable in the same ways that the proposed goals in the September offer had been measurable.

149. The PLOPs for the proposed goals in the January offer consisted of combinations of assessment results and teacher reports and were lengthy and specific. They were supplemented by several pages of performance reports culled from the assessments.

150. In their testimony, Ms. Bell and Ms. Huerta examined each proposed goal, explained its purpose, and described how it would be implemented. Ms. Bell, Ms. Huerta, Mr. Knod, and Ms. Adolph all credibly testified that the PLOPs were accurate based on available information, and the goals were measurable and appropriate.

151. Student argues he should have had a receptive language goal. However, Ms. Adolph established that receptive language is an area of relative strength for Student, and that he would necessarily be required to work on receptive language when working on his expressive language goals. The two cannot be separated; the teacher must make sure that Student understands (receives) the material about which he expresses himself. Thus all of Student's expressive language goals involved work on receptive language.

152. Student again argues that he should have had vocabulary goals. However, as explained above, several of the other goals, such as reading comprehension and reading fluency, were designed in part to build vocabulary. And Parents and the District negotiated a goal at the IEP meeting for writing organization and focus in which vocabulary development was embedded, by requiring, among other things, use of "a list of target-vocabulary words."

153. Ms. Neufer, Student's SL expert, was asked her opinion of each of the goals in the January offer. She approved of several of them. She testified she might have written some of them differently; for example, she might have included separate goals for the pre-teaching of vocabulary, and for receptive language. But she testified that these were matters only of her personal preference, and that the final decisions were best left to Student's IEP team. She declined to state that any of the goals was inappropriate.

154. Neither Ms. Johnson nor Dr. Perrotti expressed any views on the January goals. As a result, none of Student's experts testified that the January goals were flawed.

155. The evidence showed that the PLOPs, goals, and objectives in the January offer were accurate, measurable, and appropriate.

#### ACCOMMODATIONS AND MODIFICATIONS

156. The accommodations and modifications in the January offer included all of the accommodations and modifications in the September offer. These were adequate and appropriate for the reasons addressed above.

157. In addition, to address Student's writing and vocabulary difficulties, the January offer also proposed that Student have the use of word processing software and text prediction software. Since Student no longer had a letter formation goal, text prediction software was no longer in conflict with one of his goals. Student does not criticize the addition of these devices. Instead, he argues that the District's inclusion of them in the January offer proves they should have been included in the September and November offers as well. However, a decision that certain devices may be helpful is not the same as a decision that a student could not receive a FAPE without them. By January the District had a great deal more information about Student's writing needs. Since the AT report from Fresno was not useful, and since Parents had delayed authorizing assessments for two months, the District had insufficient information to support the addition of these devices in its earlier offers. By January it had reason to know the devices would be useful,



at least for lengthy writing assignments. No AT specialist appeared for Student, and no one testified that the absence of the devices from the earlier offers denied Student a FAPE.

158. Dr. Perrotti, in his August 2009 report, made numerous suggestions of accommodations and modifications that would be helpful to Student. Since his report was written months after the last IEP meeting at issue here, the snapshot rule forbids its consideration in determining the wisdom of those IEPs. In any event, the evidence showed that all of Dr. Perrotti's recommendations were either in the January offer or could be accomplished within its terms.

#### PULL-OUT SERVICES AND THE LRE

159. By January the District knew that Student was struggling even more than he had been in October and November as the result of his placement exclusively in the general education classroom. His homework was taking him still longer to complete, and he was unable to complete many of the in-class assignments. Mr. Knod reported that Student was frequently inattentive during both instruction and independent work time, and would engage in such behaviors as shutting his eyes, putting his head on his desk, picking at his fingernails, giggling at inappropriate moments, or looking toward the ceiling. On one assessment form Mr. Knod had stated that Student "always" had difficulty paying attention, following spoken directions, and remembering what people say. The District IEP team members were more convinced than in November that Student needed a quiet place to concentrate on learning skills outside the classroom. They proposed to provide 30 minutes a day of RSP support in class, and also to pull him out of class for RSP support for an hour every day. They also proposed to double Student's weekly one-on-one pull-out SL therapy.

160. The pull-out services in the January offer did not violate the law's preference for placement in the LRE. The evidence showed that Student needed quiet time away from his 36 classmates to learn skills, and without that time he was falling further behind his

classmates. By January it was even clearer than it had been in November that Student could no longer be satisfactorily educated exclusively in a general education classroom.

#### OFFER OF FAPE

161. For all the reasons above, the District's January offer would have met Student's unique needs, and was reasonably calculated to allow him to derive some educational benefit. The District therefore offered Student a FAPE in its offer of January 2009.

162. Parents did not consent to the January offer, which meant that Student remained in the Interim Placement.

#### EXTENDED SCHOOL YEAR

163. At its January meeting, the IEP team decided that Student was not eligible for extended school year (ESY) services in the summer of 2009. Student claims that decision denied him a FAPE.

164. A district must provide ESY services to a student in special education if an ESY program is required to provide the student a FAPE. However, the standards for determining whether a student is entitled to an ESY placement in order to receive a FAPE are different from those applied to the regular school year. The purpose of special education during the ESY is to prevent serious regression over the summer months. The mere possibility of regression does not entitle a student to an ESY placement, because all students may regress to some extent during lengthy breaks from school. A more specific showing is necessary to establish ESY eligibility.

165. In California, a student is eligible for ESY only if his IEP team finds that interruption of the student's educational programming may cause regression. The team must also find that the likely regression, when coupled with the student's limited recoupment capacity, would render it impossible or unlikely that, without a summer

program, the student would attain the level of self-sufficiency and independence that would otherwise be expected in view of his disability. This regression and recoupment analysis must be done by the IEP team. If the analysis results in a decision that the student must have an ESY program to receive a FAPE, that decision must be recorded in the student's IEP.

166. Student made no attempt at hearing to demonstrate that he was eligible for ESY services. He did not engage in any analysis of his likelihood of regression or recoupment. There was no evidence concerning the likelihood, or likely severity, of Student's regression during the summer, or the difficulty he might have in recovering from it. There was no evidence that the absence of an ESY program might have caused Student to regress to the extent that, when coupled with limited recoupment capacity, his regression would have rendered it impossible or unlikely that he would have attained the level of self-sufficiency and independence that would otherwise be expected in view of his disabling condition. In short, Student made no showing that he was eligible for an ESY placement.

167. Ms. Huerta established that there was no history in Student's records of regression in the summer. Ms. Hansen testified that, in her opinion, Student was not at risk for the kind of regression in summer that would make him eligible for ESY. She pointed out that by the time Student began school in Clovis in August 2008, he had recouped any regression he may have suffered during the summer. She also noted that FUSD had not ruled Student eligible for ESY. There was no contradictory evidence.

168. The preponderance of evidence showed that Student was not eligible for ESY.

#### REGRESSION DURING SY 2008-2009

169. Student contends he regressed during the school year, particularly in the spring. Even if true, under the snapshot rule any evidence of regression in the spring has

no bearing on IEPs written in January 2009 and before. Student seems to argue, however, that his regression in reading in the spring was so dramatic that it not only shows that the District's earlier testing was wrong; it also shows that the District must have deliberately altered records to hide his lack of progress. No substantial evidence supported either claim.

170. The evidence of Student's alleged regression in the spring is unpersuasive. It rests on the 2009 testing done by Sasha Johnson and John Nikaido, which, as shown above, did not prove reliable results. Relying on those tests, Student argues not only that he regressed in the spring of 2009, but also that those test results are so definitive they somehow prove that the District's testing months earlier was unreliable, and that the results of those tests were deliberately altered to hide his lack of progress. Those conclusions are unsupportable. Due to the variability of Student's test results, the April and July 2009 tests, even if accurate, demonstrate only what he could or would do on a particular day. They prove nothing about the District's tests. The contention that the results of the April and July 2009 tests necessarily indicate that the District altered Student's test scores to hide his lack of progress is utterly without support in the record and is frivolous.

171. The District does not argue that Student made adequate progress during SY 2008-2009. It argues that, beginning at least as early as November 2008, it was apparent that Student was in an inadequate placement, and Parents' refusal to agree to any IEP offers that would have improved his educational program left him in that placement and led to any regression he may have suffered. Student argues that the District's offers are somehow responsible for his alleged regression, but he does not explain how an offer that is not accepted can have such an educational result. On this record, any regression Student may have suffered in the spring of 2009 resulted from Parents' decisions to decline three offers of FAPE made by the District, thereby leaving Student in the Interim Placement. The District cannot be blamed for the consequences of those decisions.

## PROCEDURAL ISSUES

### Denial of Meaningful Participation / Predetermination of IEP Offers

172. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. Parents have meaningfully participated in the development of an IEP when they are informed of their child's problems, attend the IEP meeting, express their disagreement with the IEP team's conclusions, and request revisions in the IEP. A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way

173 A district must fairly and honestly consider the views of parents expressed in an IEP meeting. School officials may not arrive at an IEP meeting with a "take it or leave it" attitude, having already decided on the program to be offered. A district does not predetermine an IEP simply by meeting to review and discuss a child's assessment and programming in advance of an IEP meeting, but a district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process.

174. Parents argue that throughout the relevant time at issue here – from their first contact with the District on August 19, 2008, to the last session of the triennial IEP meeting on February 17, 2009 -- the District denied them their right to meaningful participation in the IEP process by refusing to give them information they needed to make an informed decision about the District's IEP offers.

175. The number and nature of communications between Parents and the District during the time at issue establish that Parents' participation in the IEP process was thorough. At a minimum, the record contains or refers to several hundred communications between the parties. Parents were allowed to visit Student's classroom freely, and did so many times. They spoke frequently with Mr. Knod, Ms. Huerta, and Ms. Adolph. In August,

Parents attended Back to School Night and observed instruction in Ms. Huerta's RSP room. Throughout the fall, Mother and Ms. Huerta spoke after school at least twice a week when Mother picked her children up from school. On those occasions Ms. Huerta would tell Mother her observations of Student's interactions, progress, and behavior that day.

176. At the IEP meeting on September 24, 2008, Parents brought with them two representatives of the Cullinan Center, who explained their program and answered questions. Mother presented a slide show, and gave significant new information about Student to the team. She played an audio recording of Student reading, read sections of the Education Code, and asked and answered numerous questions. All witnesses agree that the discussion was extensive and detailed.

177. The District brought to the meeting a draft IEP on a computer. Ms. Hansen, who facilitated the meeting, explained to Parents at the outset that the document was only a draft, and modifications could be made to it at the meeting. Ms. Huerta modified the draft during the meeting both on the computer and by hand. As a result of discussions at the September meeting, the District team members agreed to several changes in the draft IEP. At Parents' request, the team added to the PLOPs some of Student's scores from state testing in the spring, and added several excerpts from the Fresno IEP. The Cullinan representatives provided information on Student's reading abilities that was used in revising the PLOPs. After Mother explained her expertise in AT, the team added a provision under which Mother and Mr. Knod would collaborate in developing graphic and written instructions for use with Student in class. At Parent's request, the team added provisions for reading texts to Student and using books on tape to the offered accommodations.

178. The most significant change that resulted from the discussion at the September IEP meeting was the decision to propose the delivery of RSP services by the push-in method. Before the meeting, District team members had tentatively decided to propose pull-out services, but Parents were adamant at the meeting that they wanted

push-in RSP services only.<sup>13</sup> Believing that Student could benefit either way, and having in mind the LRE preference, District team members acceded to Parents' request.

179. The District's changes to the IEP proposal during the meeting in response to comments and requests by Parents and the Cullinan representatives show that the IEP was not decided upon before the meeting. The District representatives arrived at the meeting with a document they knew to be only a draft, and modified it in several ways in response to comments by Parents and their representatives. The September offer was not predetermined.

180. After the September IEP meeting, Parents sent lengthy written comments to be attached to the IEP offer. Their communications with Mr. Knod, Ms. Huerta, and Ms. Adolph continued. Negotiations occurred concerning the District's proposed assessment plan. Parents continued to visit Student's classroom. Mother met, at her request, with the SELPA director and a District area superintendent to air her grievances with the District.

181. The November 12, 2008 IEP meeting was not a separate meeting but an extension of the September meeting called to discuss the increasing concerns of Parents and Student's teachers that he was struggling and shutting down in class. The District proposed to modify the September IEP offer by increasing RSP services and delivering most of them by pulling Student out of class. The parties' positions during the meeting did not change, but the audio recording of the meeting shows that District team members sincerely considered Parents' views. The recording shows that a range of programming options was discussed. There was a thorough exchange of opinions and a two-way flow of

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<sup>13</sup> In answer to the question "[W]hat services does the team feel are needed for FAPE ..." in the email circulated among Ms. Hansen, Ms. Huerta, and Ms. Adolph on September 18, 2009, one of the correspondents wrote "Pull-out for ELA [English Language Arts] (90 min.) ... ."

information. The recording shows that the District members of the team did not arrive with a decision already made; they were simply unpersuaded by Parents' arguments that push-in services were still appropriate. The November modifications were not decided in advance of the meeting, and the November offer was not predetermined.

182. After the November meeting, and because of mounting concerns about Student's difficulties in class, Mr. Knod and Mother fashioned a system by which Mr. Knod sent home a written report about Student at the end of every school day. It contained a section for parental response, and Mother sometimes responded to the report in writing and sent it back. This exchange lasted for four to six weeks. During that period, Parents continued to visit the classroom. The parties communicated about the triennial assessments that were underway, which included interviews of parents and the completion of parent questionnaires.

183. The triennial IEP meeting on January 16, 2009 lasted from shortly after 3:00 p.m. until after 8:30 p.m. District team members presented the results of their assessments. Parents presented a report on Student's reading abilities prepared by Lindamood-Bell Learning Processes. They also presented Ms. Neuffer's speech and language assessment. The team recessed in order to read Ms. Neuffer's report, then returned and engaged in a comparison of that report with Ms. Adolph's. Each of the proposed goals was discussed. In response to Parents' concerns about Student's vocabulary acquisition, the parties discussed adding a new goal. The team agreed to Parent's request to allow Student to take the California Standards Tests (CST) with accommodations instead of the California Modified Assessment (CMA) for English Language Arts and Writing. Mother gave a PowerPoint presentation on the subject of data collection in Applied Behavior Analysis (ABA). The meeting notes report detailed discussions of several other subjects as well. The extent and nature of the discussions at the January meeting, and the District's flexibility in amending its draft IEP, demonstrate that District team members arrived with an open mind



and did not decide on the offer in advance. The January offer was not predetermined.

184. At the end of the meeting on January 16, 2009, a two-hour continuation of the meeting was scheduled for January 26, 2009, at which the District presented the final version of its offer, including the new goal the District included to address Parents' concerns about vocabulary building. At Mother's request, the District scheduled and held a final session of the triennial meeting on February 17, 2009, for the purpose of hearing Parents' comments on the proposal.

185. The communications described above show that Parents' participation in the IEP process was both meaningful and thorough.

186. On closer examination, Parents' claim that they were denied meaningful participation conceals three different claims. The first is that the District did not agree with Parents' positions to the extent they desired. Student's closing brief states that the disagreement lies "in what [Parents'] participation resulted in" and that Parents felt excluded because, after their presentations, "some parts" of the IEP offers remained the same. However, the District is not required to adopt Parents' suggestions if it does not believe they are necessary to provide Student a FAPE. The District is required to consider Parents' views, not to agree with them.

187. The second underlying claim is that the District refused to identify the methodologies it would use in providing RSP support. Father testified candidly that he asked District staff to identify the scientific and research-based methodologies to be used in RSP support, and that he felt excluded from meaningful participation because they would not. Ms. Huerta told Parents she would principally use the program Read Naturally, but otherwise she preferred to remain flexible, and preferred not to put methodologies in an IEP where Parents could approve or disapprove them. The law gives a district that discretion, as long as it delivers a FAPE to a student. There is no requirement that a district identify all the methodologies it intends to use, or name those methodologies in an IEP,

and the District did not deny Parents meaningful participation by declining to do so.

188. The third underlying claim is characterized by Parents as not knowing “what the pull-out services would look like.” The evidence showed that Parents wanted to know when, and during what subject, Student would be pulled out of class during the school day for RSP instruction, because they did not want him to miss core instruction. However, the District wanted to remain flexible about the timing of pull-out services. Ms. Bell explained that the time could vary, because the school could be having an assembly, or the class might be taking a test, at a time that had been fixed in an IEP. Ms. Huerta testified it was her practice to time a pull-out session in a student’s best interest, and that she would consult with the general education teacher to identify a time during which material was being presented in class that the student could later make up. There is no requirement that a district commit itself to the time of day, or subject during which, a student is pulled out of class for small group instruction, and the District did not deny Parents meaningful participation by declining to commit itself to those specifics.

189. The evidence showed that the District did not deny Parents meaningful participation in the IEP process.

#### Prior Written Notice

190. Prior written notice to parents is required any time a district refuses to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE to the child. Student contends that the District committed a procedural violation when it failed to give prior written notice of the specific scientifically based, peer-reviewed, research-based intervention programs and methodologies that would be utilized in Student’s IEPs. The District did timely provide a written explanation of its reasons for declining to specify the methodologies it might use.

191. A district is not required to give prior written notice of its choice of methodologies. The United States Department of Education, in exercising its interpretive

powers under the IDEA, has specifically stated in its comments to its special education regulations that it declines to require public agencies to provide prior written notice when an IEP team does not provide identification or documentation of research-based methodologies to be used. Therefore, the failure of the District to provide prior written notice of the methodologies it intended to use did not violate Parents' rights under the IDEA.

#### Failure to have AT expert at IEP meetings

192. An IEP team must include at least one parent, a representative of the local educational agency, an individual who can interpret the instructional implications of the assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the parent, and when appropriate, the student. Parents argue that the District violated the IDEA when it failed to have present at the September 24 and November 12, 2008 IEP meetings someone who could explain the instructional implications of an FUSD AT assessment conducted in November 2007. No AT specialist attended those meeting.

193. Even if a district had to ensure the presence at an IEP team meeting of someone who could explain another district's assessment, in this case there was nothing to explain. As set forth above, the Fresno AT assessment was very brief and not presented according to professional standards. It made recommendations without explanation of any kind, and was not useful in drafting Student's IEPs. Moreover, Mother is a self-professed expert in AT because of her autism training and experience, and needs no assistance in understanding AT. Parents do not identify anything in the Fresno AT assessment, or anything concerning AT, that they did not understand. As Parents knew, they could have invited an AT specialist to the meetings, but they did not.

194. When Parents finally consented to an AT assessment, Ms. Fisher, the District's AT specialist, conducted one and appeared at the January 16, 2009 triennial IEP

meeting to explain it. The District did not commit a procedural violation by failing to have an AT specialist at the September and November 2008 meetings. Even if it had, the failure had no practical consequence.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The petitioner has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].) The District has the burden of proving its claims 1 through 5 in Case Nos. 2008110543 and 2009020717. Student has the burden of proving his claims 1-20 in Case No. 2009040524.

### LIMITATIONS ON ISSUES AND EVIDENCE

2. A party who requests a due process hearing may not raise issues at the hearing that were not raised in his request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) An ALJ may not consider evidence not introduced at hearing. (*A.B. v. San Francisco Unified School Dist.* (N.D.Cal. 2008) 2008 WL 4773417, p. 13 [nonpub. opn.]; *Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108-109.)

### ASSESSMENTS

3. In evaluating a child for special education eligibility, a district must assess the child in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A reassessment may be performed if warranted by the child's educational or related services needs, or if requested by a parent or teacher. (34 C.F.R. § 300.303(a)(2006); Ed. Code, § 56381, subd. (a)(1).) No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational

programming. (Ed. Code, § 56320, subds. (c), (e).)

4. An assessment must be conducted “by persons competent to perform the assessment, as determined by the local educational agency.” (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student’s suspected disability. (Ed. Code, § 56320, subd. (g).) An assessment must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3).) Only a school psychologist may administer tests of intellectual or emotional functioning. (*Ibid.*)

5. Assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student’s native language or mode of communication unless it is clearly not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; and used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(1).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure and not the pupil’s impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) The determination of what tests are required is made based on information known at the time. (See, *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1158.)

6. The assessor must prepare a written report that includes; 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student’s academic and

social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (Ed. Code, § 56329, subd. (a)(3).)

#### RIGHT TO AN INDEPENDENT EDUCATIONAL EVALUATION (IEE)

7. Under certain conditions parents are entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, §§ 56329, subd. (b), 56506, subd. (c); see also, 20 U.S.C. § 1415(d)(2)(A).) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i)(2006).) To obtain an IEE, parents must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1)(2006).) The public agency need not provide the IEE at its expense if it establishes in a due process hearing that the assessment with which parents disagree was appropriate. (34 C.F.R. § 300.502(b)(2)(2006); Ed. Code, § 56329, subd. (c).)

District's Issue No. 4: Are the following assessments valid and appropriate, so that the District is not liable for the cost of the independent educational evaluation (IEE) obtained by Parents?

- a. Psychological assessment by Brooke Bell
- b. Educational assessment by Wendie Huerta
- c. Speech and language assessment by Lindy Adolph
- d. Assistive technology assessment by Amanda Fisher

Student's Issue No. 19: Did the District fail during SY 2008-2009 to assess Student in all areas of suspected disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities?

8. Based on Factual Findings 1-62, and Legal Conclusions 1 and 3-7, the preponderance of the evidence showed that the District's psychological, educational, speech and language, and assistive technology assessments were appropriate. The District is not liable for the costs of IEEs in those areas.

9. Based on Factual Findings 1-3 and 63-65, and Legal Conclusions 1 and 3, the preponderance of the evidence showed that the District assessed Student in all areas related to any suspected disability. Until January 13, 2009, the District had no reason to suspect that Student displayed autistic-like behaviors. On January 16, 2009, the District offered to assess Student for autistic-like behaviors, but Parents refused to consent to the assessment and withdrew their request for it.

#### ELEMENTS OF A FAPE

10. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

11. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and

related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

12. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

#### LEAST RESTRICTIVE ENVIRONMENT

13. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, 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 would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

14. In *B.S. v. Placentia-Yorba Linda Unified School Dist.* (9th Cir. 2009) 306 Fed.Appx. 397 [nonpub. opn.], a student argued that a District's withdrawal of a student



from his mainstream class for 90 minutes of RSP support violated the congressional preference for education in the LRE. The court disagreed, affirming findings that the educational and noneducational benefits of full-time placement in the mainstream class were minimal and that the blend of mainstream and pull-out instruction "would be better suited to meet [the student's] unique abilities and needs." Those findings were "sufficient to overcome the preference for mainstreaming." (*Id.* at p. 2.) The court reaffirmed that mainstreaming "'is a policy which must be balanced with the primary objective of providing handicapped children with an "appropriate" education.'" (*Ibid.*, quoting *Wilson v. Marana Unified Sch. Dist.* (9th Cir. 1984) 735 F.2d 1178, 1183.)

Student's Issue No. 7: Did the District fail to offer or provide Student an appropriate placement in the least restrictive environment during the SY 2008-2009?

15. Based on Factual Findings 1-3 and 66-179, and Legal Conclusions 1 and 10-14, the preponderance of the evidence showed that the District provided and offered Student placement in the least restrictive environment throughout SY 2008-2009. Under the Interim Placement, Student's full-time placement in a general education class was the LRE. Since Student's difficulties in keeping up with his fourth grade class were not yet apparent by the time of the District's September 24, 2008 IEP offer, that offer was also in the LRE. However, by the time of the November 12, 2008 addendum IEP meeting, the District members of the IEP team reasonably believed that Student could no longer be satisfactorily educated while placed entirely in general education, and that he needed pull-out RSP services to focus on and acquire the skills necessary for accessing his general education curriculum in order to receive a FAPE. The November offer therefore would have placed Student in the LRE. By the time of the January 16 and 26, 2009 IEP meetings, the District members of the IEP team reasonably believed that Student's difficulties in his general education class had worsened, and that he needed the additional pull-out RSP and

SL services proposed in order to receive a FAPE. The January offer therefore would have placed Student in the LRE.

#### STANDARDS FOR INTERIM PLACEMENTS

16. There are no federal or state statutory provisions addressing the situation in which a student transfers between school years, such as during summer vacation. The new school district is only required to consult with parents and to provide a FAPE to the transferring student. The new district is not required to implement the former district's IEP or give the student comparable services. (*Clovis Unified School Dist. v. Student* (2009) Cal.Offc.Admin.Hrngs. Case No. 2008110569; *Acalanes Union High School Dist.* (2008) Cal.Offc.Admin.Hrngs. Case No. 2007100455, 51 IDELR 232, 108 LRP 55665; Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46682 (Aug. 14, 2006).)

District's Issue No. 1: Did the District's August 25, 2008 initial administrative placement offer at the beginning of the school year (SY) 2008-2009 (the Interim Placement) offer Student a free, appropriate public education (FAPE)?

17. Based on Factual Findings 1-3 and 66-79, and Legal Conclusions 1 and 16, the District's Interim Placement document was not required to comply with the standards of an IEP. The preponderance of the evidence showed that the District consulted with Parents in deciding upon the Interim Placement and informed Parents of its terms. In addition, Parents understood its terms from personal observations. Neither Parents nor the District were confused about the terms of the Interim Placement. District employees knew the terms of the Interim Placement and implemented them.

Student's Issue No. 1: Did the District fail to provide Student an appropriate interim placement on August 25, 2008, in the least restrictive environment?

18. Based on Factual Findings 1-3 and 66-106, and Legal Conclusions 1, 10-14, and 16, the preponderance of the evidence showed that the District provided Student an appropriate Interim Placement on August 25, 2008. The District in fact provided Student a FAPE in the LRE during the first 30 days of his presence in the District's school.

#### PRESENT LEVELS OF PERFORMANCE, GOALS, AND OBJECTIVES

19. Federal and state law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345.) An annual IEP must contain, inter alia, 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 involvement and progress in the regular education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1)(2006).) The statement of present levels essentially creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

20. 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)(i)(II).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R. part 300, Question 4 (1999 regulations).) Those goals are then broken down into short-term

objectives, if objectives are used.<sup>14</sup>

Student's Issue No. 5: Did the District adequately address Student's present levels of performance during the development of his IEPs on September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009?

Student's Issue No. 6: Did the District develop appropriate and adequate goals and objectives for Student in its IEP offers of September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009?

Student's Issue No. 11: Did the progress monitoring in Student's IEPs of September 24 and November 12, 2008, and January 16, and 26, and February 17, 2009, meet Student's unique needs?

21. Based on Factual Findings 1-3 and 80-171, and Legal Conclusions 1, 10-14, and 19-20, the preponderance of the evidence showed that the District's offers of September 24 and November 12, 2008, and January 16 and 26, 2009, adequately addressed Student's present levels of performance by using the most accurate data available at the times the IEPs were drafted. The PLOPs were specific and furnished adequate baselines for the measurement of Student's progress.

22. Based on Factual Findings 1-3 and 80-171, and Legal Conclusions 1, 10-14, and 19-20, the preponderance of the evidence showed that the District's offers of September 24 and November 12, 2008, and January 16 and 26, 2009, proposed appropriate and measurable goals and objectives that addressed all of Student's unique needs and were reasonably calculated to allow Student to obtain educational benefit.

23. Based on Factual Findings 1-3 and 80-171, and Legal Conclusions 1, 10-14,

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<sup>14</sup> Since the 2004 amendments to the IDEA, the requirement to develop short-term objectives or benchmarks only concerns children with disabilities who are assessed using alternate assessments aligned to alternate achievement standards. (See, 20 USC § 1414 (d)(1)(A)(i)(I)(cc).) However, states have the option to use them.

and 19-20, the preponderance of the evidence showed that the District's offers of September 24 and November 12, 2008, and January 16 and 26, 2009, adequately provided for monitoring Student's progress.

#### ACCOMMODATIONS, MODIFICATIONS AND SUPPORTS

24. An IEP must also include a statement of the accommodations, modifications or supports, based on peer-reviewed research to the extent practicable, that will be provided to the student to allow him to advance appropriately toward attaining his annual goals, to 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) (2006); Ed. Code, § 56345, subds. (a)(4)(A), (B).) There is no requirement that accommodations and modifications be stated in separate places in IEPs, or be correctly identified as one or the other.<sup>15</sup> Nor is there a requirement that an IEP state the duration, frequency, or location of accommodations and modifications.

Student's Issue No. 8: Did the accommodations, modifications, supports and supplementary aids and services offered by the District at the September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009 IEP meetings meet Student's unique needs?

Student's Issue No. 13: Did the District fail throughout SY 2008-2009 to provide adequate supports and services emphasizing special education and related services designed to meet Student's unique needs and prepare him for employment and independent living?

Student's Issue No. 14 [second part]: Did the District ... fail to provide necessary AT equipment during SY 2008-2009?

25. Based on Factual Findings 1-3 and 80-171, and Legal Conclusions 1, 10-14,

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<sup>15</sup> California law refers to an accommodation as a modification. (Ed. Code, § 56341.1, subd. (c).)

and 24, the preponderance of the evidence showed that the accommodations, modifications, supports and supplementary aids and services provided by the District in the Interim Placement and offered by the District at the September 24 and November 12, 2008, and January 16 and 26, 2009 IEP meetings met Student's unique needs.

#### EXTENDED SCHOOL YEAR SERVICES

26. A district is required to provide ESY services to a student with an IEP if an ESY program is necessary to provide the student a FAPE. (34 C.F.R. § 300.106(a)(2006).) However, the standards for determining whether a student is entitled to an ESY placement in order to receive a FAPE are different from the standards pertaining to FAPE in the regular school year. The purpose of special education during the ESY is to prevent serious regression over the summer months. (*Hoelt v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.) The mere fact of likely regression is not enough to require an ESY placement, because all students "may regress to some extent during lengthy breaks from school." (*MM v. School Dist. of Greenville County* (4th Cir 2002) 303 F.3d 523, 538.) The standard for determining ESY eligibility in California is set forth by regulation:

Extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency

and independence that would otherwise be expected in view of his or her handicapping condition.

(Cal. Code Regs., tit. 5, § 3043, 1st par.) If an IEP team decides that a student requires ESY to receive a FAPE, an ESY placement must be offered in the IEP. (*Id.*, subd. (f).)

Student's Issue No. 12: Did the District unilaterally determine that extended school year (ESY) services in 2009 were not necessary for Student?

27. Based on Factual Findings 1-3 and 80-168, and Legal Conclusions 1, 10-14, and 26, the preponderance of the evidence showed that the District correctly determined that Student was not eligible for ESY services in 2009.

Student's Issue No. 17: Did Student suffer regression during SY 2008-2009 due to the inadequacy of the IEP offers made to him during that school year?

28. Based on Factual Findings 1-3 and 80-171, and Legal Conclusions 1, 10-14, and 26, any regression Student suffered during SY 2008-2009 did not demonstrate eligibility for ESY services in 2009. There was no showing that the alleged regression met the requirements for ESY eligibility. The alleged regression was not caused by any inadequacy in the District's IEP offers, because those offers were not accepted by Parents. The most likely causes of any regression Student may have suffered during the school year were Parents' rejection of the District's three offers of FAPE, and their insistence on leaving Student in the Interim Placement.

Student's Issue No. 16: Did the District alter Student's assessments and records to hide the fact that Student was not making the educational progress reported in his IEPs and educational records during the 2008-2009 school year?

29. Based on Factual Findings 1-3 and 80-179, and Legal Conclusions 1 and 10-

14, the preponderance of the evidence showed that the District did not alter Student's assessments and records to hide the fact that Student was not making educational progress. The evidence did not show that any records were altered for any reason.

District's Issue No. 2: Did the District's September 24, 2008 IEP and the November 12, 2008 amendment IEP offer Student a FAPE for the SY 2008-2009?

District's Issue No. 3: Did the District's January 16 and 26, 2009 triennial IEP offer Student a FAPE for the SY 2008-2009?

Student's Issue No. 20: Did the District offer Student a FAPE during SYs 2008-2009 and 2009-2010?

District's Issue No. 5: Is the District entitled to a ruling that all of the above IEPs offered Student a FAPE, and may it implement the January 16 and 26, 2009 triennial IEP in its entirety without parental consent?

30. Based on Factual Findings 1-3 and 80-171, and Legal Conclusions 1 and 10-14, the preponderance of the evidence showed that the District's offers of September 24 and November 12, 2008, and January 16 and 26, 2009, adequately addressed all of Student's unique needs and were reasonably calculated to allow him to obtain educational benefit. In particular, the RSP support for reading and related skills was sufficient to allow Student to benefit and progress, and outside tutoring for reading was unnecessary to provide Student a FAPE. All of the District's offers were offers of FAPE in the LRE. The District is entitled to implement the January 16 and 26, 2009 IEP offer in its entirety without parental consent.

#### CONSENT TO IMPLEMENTATION OF IEP

31. A school district may not begin to deliver special education and related services until it obtains parental consent. (20 U.S.C. § 1414(a)(1)((D)(ii)(II).) When a parent refuses to consent to the receipt of special education and services, after having consented



in the past, California law requires that the school district seek resolution of the impasse by filing a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) If a parent consents to some but not all of a proposed program, the district must implement only those portions to which the parent has agreed. (*Id.*, subd. (e).)

#### DELIVERY OF RSP SERVICES BY INSTRUCTIONAL AIDE UNDER SUPERVISION OF RSP TEACHER

32. The Resource Specialist Program is authorized by statute. (Ed. Code, §§ 56361, subd. (b), 56362.) The program shall be “under the direction of” a resource specialist who is a credentialed special education teacher, but at least 80 percent of the resource specialists within a local plan must be provided with an instructional aide. (Ed. Code, § 56362, subds. (b), (f).)

Student's Issue No. 2: Did the District implement in their entirety the District's interim placement offer of August 25, 2008, and the IEP offers of September 24 and November 12, 2008, in the absence of parental consent?

33. Based on Factual Findings 1-3 and 60-171, and Legal Conclusions 1 and 10-14, the preponderance of the evidence showed that Parents consented to all the terms of the Interim Placement. The District then implemented the Interim Placement throughout SY 2008-2009, including its provision that Ms. Huerta, the RSP teacher, would both supervise Student's instructional aide and deliver RSP services directly to Student. The District did not implement the IEP offers of September 24 and November 12, 2008.

Student's Issue No. 9: Did the District implement the sections of the SY 2008-2009 IEPs to which Parents did consent?

34. Based on Factual Findings 1-3 and 95-101, and Legal Conclusions 1, 10-14, and 31-32, the preponderance of the evidence showed that Parents did not consent to the portion of the November 12, 2008 IEP offer proposing pull-out RSP services. Instead they

purported to consent to the delivery of RSP services exclusively by a credentialed special education teacher, without addressing the location at which RSP services would be delivered. Since that staffing arrangement was not part of the November offer, there was nothing in the November offer that the District could or should have implemented.

#### PARENTAL PARTICIPATION IN THE DECISIONAL PROCESS

35. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

36. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

#### PREDETERMINATION OF OFFER

37. Predetermination occurs when an educational agency has decided on its offer prior to the IEP 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*

*Dist.* (9<sup>th</sup> Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist., supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs., supra*, 315 F.3d at p. 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)<sup>16</sup>

Student's Issue No. 3: Did the District fail to allow Parents to meaningfully participate as members of the IEP team throughout the 2008-2009 school year by refusing to provide Parents the information they needed to make informed decisions, thus depriving them of the ability and right to give their informed consent?

Student's Issue No. 4: Did the District pre-determine the outcome of Student's IEPs throughout the 2008-2009 school year, before IEP team meetings were held and in the absence of Parents?

38. Based on Factual Findings 1-3 and 172-189, and Legal Conclusions 1 and 35-37, the preponderance of the evidence showed that the District allowed Parents to participate meaningfully and fully in the identification, assessment, educational placement, and provision of a FAPE to Student. The District did not deny Parents meaningful participation by declining to agree with their positions, or by declining to specify the time of day, or subject during which, Student would be pulled out of class for small group RSP

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<sup>16</sup> Student's closing brief contains numerous citations to judicial decisions setting forth generalities about the IDEA. None of them addresses a factual situation nearly similar to those presented here.

instruction under the November 12, 2008, and January 16 and 26, 2009 IEP offers.

## INSTRUCTIONAL METHODOLOGY

39. The *Rowley* decision established that, as long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208; see also, *Adams, etc. v. Oregon, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist. No. 24J* (D. Ore. 2001) 155 F.Supp.2d 1213, 1232.) Courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*L.T. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 83-84 (citing *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992-93).) "[C]ourts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord Sch. Committee, supra*, at p. 992 (citing *Rowley, supra*, 458 U.S. at p. 202).)

40. The United States Department of Education, in its comments to the federal regulations implementing the IDEA, has declined to require all IEP team meetings "to include a focused discussion on research-based methods ... when an IEP team refuses to provide documentation of research-based methods," because it believed "such requirements are unnecessary and would be overly burdensome." (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46665 (Aug. 14, 2006).)

Student's Issue No. 10: Did the District violate the IDEA by refusing to discuss and disclose what, if any, scientifically based methods of instruction would be utilized in its September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009 IEP offers?

41. Based on Factual Findings 1-3 and 172-189, and Legal Conclusions 1, 35-37, and 39-40, the preponderance of the evidence showed that the District did not deny

Parents meaningful participation by declining to specify what, if any, scientifically based methods of instruction would be utilized in its September 24 and November 12, 2008, and January 16 and 26, and February 17, 2009 IEP offers.

#### REQUIRED MEMBERS OF AN IEP TEAM

42. An IEP team must include at least one parent, a representative of the local educational agency, an individual who can interpret the instructional implications of the assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).) In the context of the statute, Congress likely intended the phrase "the assessment results" to mean assessments by the district convening the IEP meeting. Student cites no decision that requires the presence of an individual who can interpret the instructional implications of another district's assessment results.

Student's Issue No. 14 [first part]: Did the District fail to include a required assistive technology (AT) team member in the IEP meetings of September 24 and November 12, 2008 ...

43. Based on Factual Findings 1-3 and 80-194, and Legal Conclusions 1, 10-14, and 42, the preponderance of the evidence showed that the District did not violate the IDEA by failing to include an AT specialist as an IEP team member at its IEP meetings of September 24 and November 12, 2008. The District had not yet conducted an AT assessment. There was nothing in the Fresno AT assessment that needed interpretation. Parents needed no assistance in understanding AT issues because Mother is knowledgeable about AT. Parents could have invited an AT specialist to the meetings but did not.

## PRIOR WRITTEN NOTICE

44. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)(2006); Ed. Code, § 56500.4.) The notice must contain: (1) a description of the action refused by the agency, (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b)(2006).) Prior written notice can be supplied by the terms of an IEP offered to a student. (*A.B. v. San Francisco Unified School Dist.* (N.D.Cal. 2008) 2008 WL 4773417, p. 13.)

45. A district need not provide prior written notice of the methodologies it will or will not use in educating a student. (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540-46541, 46665 (Aug. 14, 2006).)

Student's Issue No. 15: Did the District fail to provide prior written notice when it declined to state what scientifically based, peer-reviewed, research-based intervention program and methodology would be utilized in Student's IEPs during the 2008-2009 and 2009-2010 school years?

46. Based on Factual Findings 1-3, 80-171, and 190-191, and Legal Conclusions 1, 39-41, and 44-45, the preponderance of the evidence showed that the District was not required to provide prior written notice of the scientifically based, peer-reviewed, research-

based intervention programs and methodologies it would utilize in Student's IEPs during SYs 2008-2009 and 2009-2010.

#### REIMBURSEMENT

47. 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 proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].)

48. Based on Factual Findings 1-194, and Legal Conclusions 1-47, the preponderance of the evidence showed that Parents are not entitled to reimbursement of any educational expenses because at all times the District provided or offered Student a FAPE.

#### ORDER

1. The District's psychological, educational, speech and language, and assistive technology assessments were appropriate. The District is not liable for the costs of independent educational evaluations in those areas.

2. The District is entitled to implement the January 16 and 26, 2009 IEP offer in its entirety without parental consent. It may implement the IEP offer until its expiration date of January 16, 2010, unless the parties agree on another IEP before that date, and thereafter until the parties either agree on another IEP or another IEP is ordered implemented by an ALJ.

3. Student's requests for resolution are 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. Here, the District prevailed on all issues.

## 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: October 19, 2009

**CHARLES MARSON** \_\_\_\_\_

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings