

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

LOS GATOS UNION SCHOOL DISTRICT.

OAH Case No. 2013080675

DECISION

Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings, State of California, on August 16, 2013, naming the Los Gatos Union School District (District). On September 30, 2013, the matter was continued for good cause.

Administrative Law Judge (ALJ) Deidre L. Johnson heard this matter in Los Gatos, California, on January 29 and 30, February 4 and 5, and March 18, 19, and 20, 2014.

Attorney Valerie J. Mulhollen represented Student. Mother attended the hearing each day. Father and Student did not appear.

Attorney Laurie E. Reynolds represented District. Marla Rodriguez, District's assistant director of special education, attended the hearing on behalf of District.

On March 20, 2014, a continuance was granted at the request of the parties to submit written closing arguments on April 14, 2014. On that date, the closing arguments were filed, the record was closed, and the matter was submitted for decision.

ISSUES¹

Did District deny Student a free appropriate public education (FAPE) for the 2011-2012 (second grade) and 2012-2013 (third grade) school years, and from May 28, 2013 to the present (fourth grade), including the 2013 extended summer school year, by:

1. Failing to offer, in Student's individualized education programs (IEP's), or provide measurable annual goals that met his unique needs in the areas of:

- a. Academics;
- b. Social and emotional needs;
- c. Behavior;
- d. Social skills;
- e. Expressive and receptive language;
- f. Study skills and organization;
- g. Attention and task completion;
- h. Motor needs; and/or
- i. Vision?

2. Failing to offer, in Student's IEP's, or provide an educational placement, program, and related services that were reasonably calculated to provide educational benefit, in the areas of:

- a. Specialized instruction for written language, study skills, math, and reading comprehension;
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¹ The Administrative Law Judge has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) For purposes of this Decision, the issues have been reframed and reorganized for consistency with the applicable law.

- b. Behavior intervention services;
- c. Speech and language services and social cognitive therapy;
- d. Sensory motor therapy;
- e. Parent training;
- f. Vision services;² and/or
- g. Psychological and/or social worker services?

3. Failing to report to Parents, orally or in writing, accurate information on Student's present levels of performance, thereby denying him educational benefit and substantially impeding Parents' right to participate in the IEP process?³

PRELIMINARY MATTERS

At the outset of the due process hearing, the ALJ reviewed Student's issues as set forth in the OAH Prehearing Conference Order. Student requested clarifications and changes to the language of some of the issues. In particular, Student objected that the Order's language for his third issue was inaccurate as it limited the issue to whether the District *provided* Parents with accurate *reports* on his levels of performance; whereas Student intended the issue to be whether District *orally or in writing reported accurate information*. After consideration of District's objections in light of Student's issues as set

² The Order Following Prehearing Conference dated November 22, 2013 (Prehearing Conference Order), incorrectly identified the vision services issue as excluding the period of time from May 28, 2013 to the present. However, Student clarified at hearing that this issue in his complaint pertained to all time periods and District agreed.

³ See the Preliminary Matters section for the meaning of, and limits to this issue.

forth in his complaint, the ALJ granted some of the requests, and those clarifications and changes are reflected in the Issues identified above.

During the testimony of Mother on the first day of hearing, Student began to litigate the appropriateness of District's 2013 triennial assessment by his attorney's line of questioning. The ALJ requested to know what issue Student's questions were addressing as no assessment issue was identified during the issue review at the beginning of the hearing. District objected that it had no notice of an assessment issue.

District has the right to be notified of the issues for hearing. It is a fundamental principle of due process that the District is entitled to know Student's specific allegations, so that it is able to respond and prepare its defense. (*Tadano v. Manney* (9th Cir. 1947) 160 F.2d 665, 667; *Hornsby v. Allen* (5th Cir. 1964) 326 F.2d 605, 608.)

In this case, Student claimed that his third issue encompassed whether District's 2013 triennial assessment was administered correctly but that problem was not in his complaint. The parties agreed that the problem was limited to the discreet issue of whether the assessment *results* were accurate, and whether any assessors applied assessment tests or interpreted assessment results, or other evaluations of Student's present levels of performance, correctly *in light of his visual impairment*. Accordingly, Student's second issue is limited to whether District reported accurate information regarding his levels of performance in the oral or written assessments, progress reports, or IEP's at issue, including whether tests were administered correctly in light of Student's visual impairment. Student does not have any issues in this case regarding the overall appropriateness of District's assessments.

SUMMARY OF THE DECISION

Overall, Student contends that most, if not all, of District's IEP offers for second and third grade, and fourth grade to date, did not meet his unique needs related to his disability and denied him a FAPE. District argues that each IEP within the relevant time

period complied with the law and provided a FAPE. This Decision finds that District denied Student a FAPE during the 2011-2012 school year for second grade because it failed to offer him direct speech and language services to meet his needs in light of his deficits, including social skills and self-help. In addition, the Decision holds that, during second grade, District failed to accurately report to the IEP team, including Parents, that Student needed direct speech and language services. The Decision also finds that District denied him a FAPE during his 2012-2013 school year, at the beginning of third grade, by failing to offer a math goal and specialized resource instruction for math.

In addition, the Decision finds that District denied Student a FAPE in third grade because it only allocated two 30-minute sessions per month for all of Student's special education providers (resource specialist, vision specialist, speech and language pathologist, school counselor, and occupational therapist) to consult with Student and his classroom teachers. The consultation services were insufficient because this was at a time when Student's maladaptive behaviors had resulted in a behavior support plan and multiple behavior, social skills, emotional regulation, and self-help goals that called for more frequent weekly, if not daily, supports to reduce and redirect his maladaptive behaviors. Finally, the Decision finds that District's IEP offer of May 2013, for the remainder of third grade and the 2013 – 2014 school year in fourth grade, contained goals that met Student's unique needs, and a program and services that would provide him with a FAPE.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Student is now nine years old and in the fourth grade. He resides with Parents within the jurisdictional boundaries of District. Medically, at the age of one, Student was diagnosed with oculocutaneous albinism with astigmatism, a genetic

condition that results in impaired visual acuity. In addition, Student has been medically diagnosed with horizontal pendulum nystagmus, or roving eye movement, which affects his balance and causes stress-related decreased vision; and esotropia, or eyes turning inward, which delays his ability to locate visual information. Student also displayed delayed speech early on. He has also been diagnosed with hypertonia, or weak muscle tone; hypothyroidism; anxiety; and disorders on the autism spectrum, all of which impacted his access to his education.

2. At the age of three, Student was initially made eligible for special education and related services within the District under the educational disability category of Visual Impairment. Student attended a preschool special day class for the visually impaired at Chandler Tripp School in San Jose, operated by the Santa Clara County Office of Education (County). In 2008, a County assessment found he demonstrated some behavior deficits and excesses similar to those found for autism spectrum disorders which were also common for pupils with vision impairments. Student displayed delayed language and deficits in social interaction, avoided establishing eye contact, had sensory issues, rarely initiated conversation, was often oppositional, and had tantrums at school and at home. In the fall of 2009, Student transferred into a mainstream kindergarten class in the District and was provided with continued special education and related services through the 2012-2013 school year when he was in third grade.

3. Following a triennial assessment and IEP team meeting on May 28, 2013, District made an offer of placement and services including Student's advancement to fourth grade, and Parents requested his retention in third grade. Parents did not consent to the offer and later unilaterally withdrew Student from school. At the time of this hearing, Student was attending Skylar Hadden, a private school in San Jose, California.

STUDENT'S UNIQUE NEEDS

4. Student began the 2011-2012 school year in second grade with the annual goals, placement and services, set out in his December 2010 IEP, as finalized in January 2011. At the start of the school year, Student was performing at or above grade level in all academic areas. His academic performance was consistent with the results of District's triennial assessment completed in December 2009, which found that Student's intellectual functioning was in the middle of the average range.⁴ At the start of second grade, Student did not have any unique academic needs that required goals or specialized instruction in the area of academics and there were none in his IEP.

5. Student had needs in the areas of communication, self-help, and social skills. His verbal social skills were immature and below average compared to his same age peers. He responded when prompted and used increased eye contact, but did not often initiate greetings, and needed adult support to express his needs when frustrated or feeling emotional. Instead of playing alone, he played some games at recess with others but did not like losing. He followed classroom routines, and completed his homework regularly.

6. As to his motor skills, Student had some fine motor deficits involving not holding a pencil correctly and needing help to open his food and drink containers. For gross motor skills, he was in the below average range and had unique needs in balance, body coordination, strength and agility. In addition, Student had varying deficits in processing sensory stimulation that had also been assessed in his last triennial. He had difficulty participating in noisy group activities, frequently missed oral directions and

⁴ Despite arguments to the contrary in Student's closing argument, the appropriateness of District's 2009 assessment is beyond the statute of limitations and is not an issue in this proceeding.

slouched in chairs. Student's behavioral deficits included being inefficient and slow to get started; having difficulty tolerating changes in routines; and being immature, inflexible and easily frustrated. His school behavior was age-appropriate for first grade, although he engaged in occasional tears and outbursts.⁵

7. As to Student's vision needs, his distance acuity was 20/100 with correction and his vision was stable. He required prescription glasses indoors and prescription sunglasses and a hat outdoors due to his sensitivity to light. He also needed numerous accommodations and assistive technology to access the written curriculum materials.

2011-2012 SCHOOL YEAR: ANNUAL GOALS, PROGRAM, AND SERVICES FOR SECOND GRADE

8. Student contends that, for his second grade school year, District failed to offer him measurable goals to meet his needs, and failed to offer him an appropriate placement, program, and related services, in specified areas.

9. Student's operative IEP placed him in a general education second grade class for 96 percent of the time. The IEP provided him with direct occupational therapy once a week for 30 minutes; speech and language therapy consultation for 15 minutes twice a month; and resource staff support from an adult aide during lunch and lunch recess for 40 minutes four times a week.

⁵ Student's behaviors were markedly different during kindergarten and first grade in his home environment. There, Student demonstrated extreme anxiety and "meltdowns," and engaged in poor, inflexible, and oppositional behaviors, especially with Mother, including temper tantrums, hitting, whining, disregarding instructions, interrupting, demanding, and acting like he was not potty trained.

10. The IEP accommodations for Student included having extended time for assignments; reduced assignments as needed to accommodate his work speed; breaks as needed to accommodate fatigue; access to an FM amplification system so he could clearly hear teacher directions and filter out noise; a “time-timer” as needed to facilitate independence;⁶ and access to large-lined paper for writing. In addition, Student was provided vision specialist services for 60 minutes three times during the first month of school for his transition to second grade. The IEP contained eight annual goals in the areas of communication, social skills, self-help, and fine and gross motor skills.

Statute of Limitations

11. As determined in the Legal Conclusions, although Student claims the December 2010 IEP denied him a FAPE at the beginning of second grade, he is barred by the applicable two-year statute of limitations from challenging that IEP. Student cannot challenge that IEP for the beginning of second grade unless there was a change of circumstances that triggered District’s duty to revisit his IEP. There is no evidence of new or changed circumstances that called for District to re-examine Student’s goals or services before the next annual IEP team meeting, except in the area of vision, as found below.

Second Grade IEP Team Meetings

12. At Student’s next annual IEP team meeting in December 2011, his levels of academic achievement and functional performance and progress were reviewed. As with all of his IEP’s, some of his goals were met and eliminated, some were modified, and new goals and services were added. All of Student’s IEP goals contained measurement

⁶ This was a timer device that Student and staff could use to set a limit to his time in a quiet or safe place, or to complete a task or assignment.

criteria which stemmed from Student's baseline levels of performance or functioning in the skill area addressed by the goal at the time of that IEP team meeting. District reported Student's progress on the goals to Parents in connection with quarterly goal progress reports, annual IEP updates, and triennial assessments. The goals were written with the expectation for Student to be successful and achieve mastery at a target rate within one year.

13. In April 2012, Student's IEP team met to consider amendment of his IEP and review his progress in light of a letter dated March 8, 2012, from Dr. Damian Korb, a behavioral and developmental pediatrician and the director of the Center for Developing Minds in Los Gatos (the Center), diagnosing Student with Asperger's Syndrome.⁷ At that meeting the IEP team, including Parents, primarily focused on Student's social and communication deficits in light of the diagnosis. No new goals or services were requested by Parents or added to the IEP. Parents consented to the amended IEP.

Second Grade Academic Goals and Instruction

ACADEMIC GOALS

14. Student's operative IEP's for second grade did not contain any goals for academics as he was still working at grade level in reading, writing, and math. Student's performance was not without some problems, as he resisted showing his math

⁷ Official notice is taken of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR, American Psychiatric Association), and the DSM 5, issued in May 2013. The DSM-5 eliminated Asperger's Syndrome as a separate disorder and created a new category of autism spectrum disorder. The specific medical diagnosis is not material as this case involves Student's educational needs.

computation steps, rushed through readings, and did not decode unknown words without teacher assistance. In addition, he could write a story with a beginning, middle and end, but it lacked much detail. However, because Student was at grade level in all academic areas, District did not offer academic goals for second grade.

SPECIALIZED ACADEMIC INSTRUCTION

15. In addition to the absence of academic goals, Student's IEP's for second grade did not provide for a program of specialized instruction to address his levels of academic performance, either in a separate special education special day class, a specialized resource class, or by direct or consultation resource support for his general education class. He was placed in the general education setting for 96 to 97 percent of the time.

16. Student continued to work at grade level in reading, writing, and math, and continued to demonstrate some weaknesses in math problem steps, reading decoding, reading comprehension, and writing. Mother expressed concerns at the December 2011 IEP team meeting about Student's writing as the work demands in the future would increase, and believed the extensive pencil work in math could become a problem. District was "keeping an eye" on these academic areas because staff was aware that schoolwork would get harder for Student as he moved from basic to more abstract concepts and increased work in third grade.

STAR Testing Results

17. Student contends his state testing results showed he should have had academic goals and services in second grade. California's mandatory Standardized Testing and Reporting (STAR) Program measures a child's progress in meeting California academic content standards on an annual basis beginning in second grade. The STAR Program requires pupil participation in academic assessment on one of three tests,

either with or without testing accommodations or modifications: the California Standards Test for typically developing peers, the California Modified Assessment Test, or the California Alternate Performance Test. STAR results are reported using five categories: far below basic, below basic, basic, proficient, and advanced.

18. In the spring of 2012, Student took the STAR California Standards Test with large print text as an accommodation. In addition, for all second graders, the test was read aloud to the pupils and was not timed. Student received ratings of basic in both English language arts and math, showing he was in the average range.

19. Student's report cards for second grade also showed he performed primarily in the average range, with some "needs improvement" marks for reading comprehension, computing math, and completing work on time.⁸

HOME TUTORING SERVICES

20. Beginning with the 2011 summer after first grade, Parents hired Sally Emerson as Student's home tutor twice a week, for three hours per session.⁹ In addition, she accompanied Student as his "shadow" when he attended summer camps, to

⁸ District's report cards did not use letter grades. Instead, the elementary school grades showed a blank for average performance in each subject area, a plus sign for superior performance, and a minus sign for needing more work.

⁹ Ms. Emerson obtained a bachelor's degree in child development. She has been an "educational assistant" or teacher's aide at Chandler Tripp since 2003, where she first met Student. While at times she has held an emergency teaching credential, she did not complete required coursework for either a regular or special education teaching credential. As an aide, Ms. Emerson's experience has been working with disabled children from birth through the age of five.

intervene and redirect Student when he became frustrated and to facilitate his interaction with other children. Ms. Emerson has continued those services to the present. There was no evidence that she was familiar with or had any training regarding elementary school curriculum or IEP's.

21. During tutoring sessions, Ms. Emerson worked with Student on his reading skills, helped with his homework, and was his scribe as handwriting fatigued him. At no time did she work with him on his IEP goals. During Student's second grade year, he was able to work independently for ten to fifteen minutes at a time, needed frequent prompting, displayed some frustration and meltdowns, and was often overwhelmed. For the most part, Student did not display these behaviors at school, and did not require academic IEP goals or services.

Second Grade Goals and Services for Social Skills, Social Emotional, and Behavior Needs

GOALS ADDRESSED MULTIPLE NEEDS

22. Student contends that District denied him a FAPE because his annual goals did not meet his needs in the areas of social skills, social emotional, and behavior. Student's second grade IEP's had multiple annual goals related to these areas and they were intertwined. Regardless whether the goal was labeled a "self-help" goal or a "social skills" goal, they targeted all of these areas to work on his deficits in communicating his needs and interacting in socially and behaviorally appropriate ways with others. The goals addressed his ability to ask clarifying questions or ask for assistance; to use words to appropriately express his needs in overwhelming or frustrating situations; to look at a conversation partner (peer or adult) and use appropriate language for greetings and farewells to enter, participate in, and exit a conversation; and to use whole body listening skills in group settings, defined as keeping his eyes, words, and body in the group and keeping appropriate body space.

23. Student's progress on these goals was reported to Parents at a November 2011 parent-teacher conference in conjunction with his quarterly report card. By that time, District found he had made progress on all of the goals, had met some of them, and some needed to be modified or eliminated at the December 2011 IEP team meeting. The December 2011 IEP offered a new goal for Student to independently utilize a positive social strategy after a problem has occurred because he did not independently solve personal problems at school and required adult prompting or intervention. Student had begun playing in groups at lunch and recess and got along well with his peers, except if he was called out in a game and then he got upset, although he was able to follow adult directions and quickly calm down.

24. Parents informed the IEP team that Student engaged in physical aggression in the home environment and were concerned whether such behaviors occurred at school and needed to be addressed. District assured Parents that he was not physically aggressive at school and no specific goal to deal with such behavior was proposed or offered.

BEHAVIOR SERVICES

25. The evidence established that Student did not need behavior intervention services or a behavior support plan during second grade. Misty Hartung, District's special education manager and supervising resource program specialist, testified persuasively that Student did not display significant behavioral problems in second grade. She was familiar with Student and his levels of performance and functioning, had attended some of his IEP team meetings, and had overseen his resource specialist, Elizabeth Nast, in her work with Student.¹⁰

¹⁰ Ms. Hartung obtained a master's degree in education. She has been with the District for 15 years, holds an elementary multi-subject teaching credential, a special

Parent Training

26. Until the April 2012 IEP team meeting where District staff described some of the methods and strategies they used with Student in detail, District had not provided much information to Parents, or any training to them, on the methodologies, strategies, and tools used at school to support Student's ability to self-regulate. However, Student did not present any evidence that Parents required training during second grade in order to support his access to the school campus or curriculum. Parents had already received private behavioral intervention training in the home from Janel Astor, a behavior and development specialist with Dr. Korb's Center, during Student's kindergarten year.¹¹

Expressive and Receptive Language Goals, Speech and Language Services, and Social Cognitive Therapy

27. Student contends that District failed to offer him adequate annual goals to meet his expressive and receptive language needs in second grade. As found above, Student's second grade IEP's contained multiple goals that addressed his deficits in carrying on conversations, regarding both expressive and receptive concerns. The goals

education mild moderate teaching credential, an autism authorization, an administrative credential, and is a certified behavior intervention case manager. In addition, during third grade, she stepped in for Ms. Nast while she was on medical leave.

¹¹ Ms. Astor obtained a master's degree in special education in 1993, and holds an early childhood specialist credential. She teaches courses related to early childhood development at San Jose state University, and provides student teacher supervision. She has been with the Center since 2007, and has many years of experience and training in behavior intervention and developing behavior plans for children.

addressed his abilities to initiate, participate in, and exit conversations; pay attention with whole body listening to verbal and nonverbal cues; use coping strategies to express his feelings; and use positive social strategies after a problem occurred. Student did not present any evidence that these goals were lacking or that other goals should have been offered.

28. Student claims District should have provided him with direct speech and language therapy services and social cognitive therapy during second grade. District provided Student with 15 minutes of speech and language consultation services twice a month from Gail Wecker, District's speech and language pathologist. Ms. Wecker has known Student since kindergarten and conducted his 2009, and 2013 triennial speech and language assessments.¹² Ms. Wecker wrote Student's communication, self-help, and social skills goals in his IEP's, and provided ongoing speech and language consultation to Student and his classroom teacher regarding his communication and social skill needs. However, although Ms. Wecker consulted on all of Student's self-help and social skills goals, she was not listed in the IEP as a person responsible for them. Instead, the IEP stated, and Ms. Wecker affirmed at hearing, that Student's general education teacher was responsible for the goals.

29. The evidence established generally that social cognitive therapy involves a social and behavioral approach to learning appropriate behaviors and that District staff

¹² Ms. Wecker obtained a master's degree in speech pathology in 1980, and is a member of, and receives continuing education from both the California and American Speech and Hearing Associations. She holds a rehabilitation certificate, a certificate of clinical competence, and is a licensed speech and language pathologist. Ms. Wecker has been employed as a speech and language pathologist by the District since 2001, and was previously in private practice.

utilized its strategies with Student. Social cognitive therapy and social thinking theory involve explicitly teaching the verbal and nonverbal nuances of social interaction to children on the autism spectrum or those with similar behaviors. Social stories is a methodology used for children with autistic-like or other behavioral issues to teach in advance what may happen, plan ahead, and present appropriate social behaviors and responses in the form of a story.

30. Ms. Weeker trained Student's teachers in social conversation tools, and developed the use of social stories for Student, which were used to preplan things with him and make transitions easier. The goals she wrote used various strategies, tools and methodologies, which included social cognitive therapy and social thinking concepts. For example, the conversation partner goal to enter, participate in, and exit a conversation with an adult or peer worked on social thinking and interaction because social communication was difficult for Student. This goal incorporated the social thinking methodology developed by Michele Garcia-Winner, a behavioral expert, along with the social stories methodology and other strategies. Ms. Weeker was persuasive that Student would need to continue working on these goals for many years.

31. In addition to using the social thinking vocabulary with Student and his teacher, District staff were trained to use "the Incredible Five Point Scale" with him so he could use the scale to describe his feelings and learn to regulate and change those feelings. In particular, Student's second grade teacher incorporated the five point scale in his classroom for the whole class to use, and put the chart on the wall near Student so he could see and refer to it. The scale options for Student to check his feelings were: (1) calm, not bothered; (2) slightly bothered; (3) nervous, agitated; (4) upset; and (5) at risk of being out of control, or out of control. The evidence established that both the whole-body listening tool and the five point scale were the same methods as used in the Center's social skills therapy sessions.

32. During the IEP team meeting in April 2012, to consider Dr. Korb's medical diagnosis of Asperger's, District staff responded to Mother's concerns about addressing Student's social skill deficits by explaining in detail how his school program and related services served him. Ms. Weeker explained her consultations and trainings with staff and the various tools and methodologies. Student's teacher explained how she had integrated the five point scale into the classroom so he would not be singled out. Instead, the IEP team, including Mother and her attorney, focused on implementing additional strategies, including daily check-in's with Student, to help him reflect and make choices. District did not offer Student any one-to-one or small group speech and language therapy.

33. The evidence did not establish how Ms. Weeker was able to provide sufficient consultation to Student's general education teachers in second grade to effectuate meaningful implementation of the goals by only providing two 15-minute sessions of consultation a month. Ms. Weeker established that she took time here and there to help implement the goals because she considered the time specified in the IEP to be "flexible." She admitted that she included some direct pull-out therapy services to Student during second grade "as needed." However, there is no record that she reported to the IEP team that he needed direct speech and language therapy services, nor did she recommend it to them. Ms. Weeker claimed to know what Student's expressive and receptive language needs were but did not engage with him sufficiently to be aware of the depth of his deficits and communication difficulties. Her description of Student's third grade difficulties as a "hiccup" further undermined her credibility. Since Student had no other direct special education services at school in second grade except for occupational therapy, there was no one working directly with him to teach and guide him in incorporating the goals' purposes into his daily interactions except the general education teachers, if they had time, and an aide at lunch and recess.

34. Dr. Heather Erba, an autism and developmental specialist at Dr. Korb's Center, has a background in special education. At hearing, she was not asked to, and did not offer any criticisms of District's goals and services for second grade.¹³ However, she did establish that by April 2013, when Student was in third grade and attended her social skills class at the Center once a week after school, he was functioning socially at a delayed first or second grade level. Dr. Erba worked with Student on several social communication goals, including one to participate in a four-part communication exchange with a peer in the group. Dr. Erba was persuasive that Student required direct teaching to master the skills involved. There was little difference between this goal and District's conversation participation goal for Student in second grade, except District did not provide any direct instruction or therapy to effectuate the goal.

35. Overall, based on the foregoing, Student needed direct speech and language services due to his significant communication deficits in second grade.

Second Grade Goals and Services for Motor Needs

36. Student's operative IEP's for second grade had many annual goals to meet his fine and gross motor needs and the evidence did not establish they were defective. The goals addressed his ability to be able to independently walk a low beam to improve his balance; to assume and maintain a prone extended position for 10 seconds to increase his postural strength and target his poor muscular strength and control; to be

¹³ Dr. Erba obtained her doctorate degree in early intervention and family support in 2000, with a focus on alternative treatments for children with autism spectrum disorders, and holds California multiple subject and severely handicapped teaching credentials. She was a programming consultant for inclusion and behavior at several school districts prior to becoming an autism spectrum disorder and developmental specialist at the Center.

able to coordinate both sides of his body, as well as his arms, and legs, in a smooth coordinated manner to complete unfamiliar movement patterns; and to use a functional tripod grasp on pencil and paper tasks without verbal or physical prompts. By November 2011, Student had made progress on these goals, met some of them and some needed to be modified in the December 2011 IEP. Because Student had met the pencil grasp goal, it was eliminated.

37. Since Student met the pencil grasp goal, District added a cursive writing goal to the December 2011 IEP, for Student to use the correct start and sequence of letter strokes while printing, as recommended by his occupational therapist, Luanne Chin. In addition, the December 2011 IEP offered a new typing goal for Student to be able to identify the alphabet keys when typing. This goal addressed his fine motor needs for writing as Student became fatigued with handwriting and had some beginning computer skills. Student's second grade IEP's did not contain any sensory motor goals related to his sensory processing deficits.

MOTOR SERVICES AND SENSORY MOTOR

38. Student's second grade IEP's provided him with direct occupational therapy once a week for 30 minutes to support his progress on multiple annual IEP goals in the areas of fine and gross motor, including motor planning and movement. In addition to the body movement therapies to increase his strength, all of his IEP's provided for his use of a slant board so materials would be lifted off of the horizontal desk surface and be placed at a vertical angle in front of his eyes, so he would not have to slump close to the desk to see.

39. Student claims that District failed to offer him adequate sensory motor therapy in second grade. Sensory motor skills involve how the body reacts or moves in relation to sensory input from all senses. District's 2009 triennial occupational therapy assessment assessed Student's sensory processing of information, and found he had

varying deficits in the areas of auditory processing, visual processing, movement, tactile processing, and behavior.¹⁴ Ms. Chin established that sensory strategies to meet Student's needs were imbedded in the occupational therapy goals and treatments she provided. In addition, Student's IEP's provided that his occupational therapist would consult with Student's teacher to provide strategies for the classroom. The IEP's did not provide for systematic sensory breaks. However, they did provide for breaks as needed if fatigued. Ms. Chin actively used sensory and emotional regulations strategies, including the five point scale, with Student and did not experience behavioral excesses during her weekly therapy with Student. Student's self-help and social skills goals also addressed his emotional regulation, low frustration level, emotional outbursts, and immature responses to situations and sensory input. In addition, the accommodation for an FM amplification system was designed to address Student's sensory sensitivity to noise and help him hear the teacher's instruction more clearly.

STUDENT'S PRIVATE OCCUPATIONAL THERAPIST

40. A private occupational therapist, Joyce Tabasa, was retained by Parents to provide Student with occupational therapy services in August 2011, before he began second grade. She provided those services through June 2013, for 45 minutes once a week.¹⁵ When she began working with Student in 2011, Parents did not provide her

¹⁴ Student also had an oral processing deficit. However, District no longer addressed his oral sensory needs, which were primarily related to food, and left that to Parents at their request.

¹⁵ Ms. Tabasa obtained her occupational therapy license in 2006, and is employed with Pediatric Therapy Services in San Jose. She has prior experience working with pupil on IEPs with other school districts.

with any of his school records or reports. During Student's second grade year, Ms. Tabasa provided therapy to Student without regard to his operative IEP's or annual goals, was not aware of them, and did not communicate with his school.

41. Ms. Tabasa established that Student made good progress during her first year of therapy with him, through second grade. Similar to the District, she worked on increasing his fine and gross motor skills, particularly his postural control, bilateral coordination, core strengthening, self-regulation, and sensory integration. Since she was unaware during that time of the details of District's therapy program, she did not appear to question whether Student made progress because of her effort, the District's therapy, or both. During this first year of her private therapy with Student, he was able to manage his emotional self-regulation in the sessions. As found below, following second grade, Student's ability to do this significantly declined.

42. Ms. Tabasa used a strategy called the "zones of regulation" with Student to help him regulate his emotions. Instead of the five point scale, there were four zones of color for Student to use to identify and regulate his emotions: green (just right), yellow (a little uncomfortable or silly), blue (emotionally sad or tired), and red (out of control). She believed that Student's sensory difficulties needed to be addressed at school as well as at home and that District's IEP's, once she saw them in 2013, did not address those needs. However, Ms. Tabasa seemed to be unaware that District used the five point scale; that its occupational therapist consulted with the teacher; and that Student's behaviors at home were significantly different than those at school through second grade.

Second Grade Goals and Services for Study Skills, Organization, Attention, and Task Completion

43. Student contended that, for second grade, District failed to offer him goals in the areas of study skills, organization, attention, and/or task completion, and failed to

provide him with specialized instruction in the area of study skills. Student's second grade IEP's did not have goals or services for him in these areas.

44. The evidence established that in first grade, at the time of the December 2010 IEP team meeting, Student showed "improvement in his ability to function in class with minimal support from his teacher to initiate and complete work." At the December 2011 IEP team meeting in second grade, the team found that Student was able to follow the teacher's instruction, followed class routines and rules, had good attendance, completed his homework, and turned it in timely. Accordingly, District did not offer any goals or services in the areas of study skills, organization, attention and task completion during second grade. Student was easily distracted and needed redirection on an ongoing basis but his classroom teacher, service providers, and adult recess aide all provided him with daily redirection and prompts. There was no evidence that Student's study skills were deficient, only that he worked at a slower pace and needed extra time to complete tasks.

45. No one testified that Student needed a goal in the area of attention prior to December 2011. On January 26, 2012, District offered Student a new goal in the area of attention by way of a written amendment to the December 2011 IEP, accepted by Mother on January 30, 2012. The amendment added a goal for Student to increase his attention to his teacher's oral instructions or directions with the use of a classroom FM system. Use of the FM system had been removed from an earlier IEP because Student did not use it, but was added back in to the IEP to support the new attention goal.

Second Grade Vision Goals and Services

VISION GOALS

46. Student contends that District failed to provide him with vision goals to meet his needs in second grade. None of Student's IEP's had annual goals in the area of vision. Instead, he required accommodations and services to support his vision deficits

for both mobility on campus, orientation in space, and access to educational materials, and these were provided to him.

47. District's December 2011 IEP added a keyboarding goal for him as a fine motor goal; however, the goal also addressed his visual difficulties by providing access to computer technology that allowed him to see his work and write. The new attention goal added in January 2012, involving use of an FM system, also addressed Student's vision deficit by aiming to improve his oral listening skills and oral access to information and instruction. Student's second grade IEP's did not otherwise contain any annual goals directly related to his visual impairment, nor did the evidence show any were needed, or that Parents ever requested goals in this area.

VISION SERVICES

48. Student contended District should have provided him vision services in second grade, including teaching him Braille. Historically, Student's educationally related vision needs were divided into those addressed by the vision specialist and those addressed by the orientation and mobility specialist. District contracted with the County for both services. The vision specialist focused on Student's access to educational materials and the orientation and mobility specialist was concerned with Student's ability to navigate his environments in light of his visual impairment. In addition, District's health nurse reported on his medical status related to his vision in all of his IEP's, generally using information from Student's medical or eye doctor.

49. Student's identified needs in these areas were addressed in his IEP's by a variety of accommodations and services. For example, District modified the playground equipment for Student, added staff support at lunch and recess, placed him at the front of the class near the teacher and the board, and provided a slant board. In addition, his IEP's provided for a seat wedge, large-lined paper, a time-timer, access to closed circuit

television in the classroom, a projector capable of both visual projection and auditory amplification, and enlarged worksheets.

50. Michelle Dungjen, an orientation and mobility specialist employed by the County, established that Student used his functional vision well.¹⁶ She has known Student since she was his vision impairment teacher in preschool at Chandler Tripp. When Student entered kindergarten, she consulted with District staff regarding the campus and classroom setups and how Student could access the curriculum and materials. During Student's first and second grades, Ms. Dungjen consulted with District regarding Student's vision impairment, orientation, and mobility needs, and recommended accommodations and strategies. She was persuasive that learning Braille required a keen tactile sensitivity that was very difficult for those with sight to develop, and that he had developed neither the tactile skill nor the motivation.

51. Beginning in July 2011, Ms. Dungjen conducted an orientation and mobility assessment at District's request and issued a written report dated September 26, 2011. The assessment results showed that Student's vision was stable. He needed to be four times closer, or the material needed to be four times bigger, for him to easily see near or distant visual information. His distance vision began at about five feet, after which he was able to detect the presence of high-contrast, and most low-contrast objects; but he had difficulty identifying objects or people with complicated background. Student was skilled at sound localization, accurately pointing to the

¹⁶ Ms. Dungjen obtained a bachelor's degree in developmental psychology with a minor in special education. She obtained a special education rehabilitation credential for orientation and mobility in about 2009, and simultaneously obtained a preliminary credential as a teacher of the visually impaired (after two years of courses, including Braille). That credential has expired.

direction of a sound, and used spatial descriptions on request (e.g., "behind me"). Overall, Student displayed an ability to safely navigate the school campus, playground, and other familiar environments. Ms. Dungjen credibly established at hearing that Student had appropriate skills in independent mobility, depth perception, stereoscopic vision, and orientation at school, given his impairment. Student did not present any evidence to the contrary. Ms. Dungjen recommended strategies for verbal communication with Student to model and reinforce his safe mobility and orientation but did not recommend a vision-related goal.

52. At the IEP team meeting to review this assessment, held on September 29, 2011, the team members, including Parents, agreed to add a new related service for the orientation and mobility specialist to direct Student and his classroom teacher on how to go on field trips, to address his safety and other travel communication and mobility needs.

53. In November 2011, Ms. Dungjen observed Student in his classroom to assess his technology needs. She set up a closed circuit television and instructed the teacher how Student could use it in class. Student was resistant to using it. In addition, Ms. Dungjen recommended reinstating the FM system to assist him to stay focused during classroom instruction because otherwise he needed constant redirection to stay on task. Ms. Dungjen attended the December 2011 IEP team meeting and informed the team, including Mother, that she was exploring assistive technology with Student and recommended keyboarding, which was added to his IEP as both a goal and a vision specialist service.

54. Beginning in January 2012, District provided Student with direct one-to-one keyboarding instruction, taught by Leslie Pittman, another teacher of the visually

impaired employed by the County.¹⁷ During the rest of second grade, she provided this service once a week for 20 minutes. Ms. Pittman also provided consultation services to District staff regarding Student's access to reading and provided books for him. Student did not like to be pulled out of his classroom for keyboarding instruction.

Second Grade Psychological and/ or Social Worker Services

55. Student claims District should have offered him psychological services or the services of a social worker during second grade. Educationally related psychological services may include school-based counseling or referral for more in-depth mental health services. Often counseling and mental health services are provided to school districts by licensed social workers. District's operative IEP's for Student in second grade did not contain any program of instruction or services in the areas of psychological or social worker services.

56. In September 2011, Parents had informed the District of Student's anxiety medication but did not request any services. Student did not have behaviors at school that impeded his learning or the learning of others; he was well-behaved and followed class rules. Occasionally, Student showed frustration and was prone to cry or whine, and demonstrated some resistance to his IEP services and accommodations, but those behaviors were not significant at school. Student did not present any evidence that he required educationally related psychological or social worker services in second grade.

¹⁷ Ms. Pittman has many years of experience and holds teaching credentials as a multi-subject teacher, a special education teacher of the visually impaired, and orientation and mobility specialist.

2012-2013 SCHOOL YEAR: ANNUAL GOALS, PROGRAM, AND SERVICES FOR THIRD GRADE

57. For the 2012-2013 school year in third grade, Student contends that District again failed to offer or provide him with annual goals to meet his needs in the areas specified, and that District's placement, program, and specified services were not appropriate and denied him a FAPE.

58. By the beginning of the third grade school year, Student had developed increased difficulties at school, including a significant increase in behavioral incidents and outbursts. For example, in September and October 2012, Student hit a teacher, became extremely upset during a game of "wall ball," eloped from his designated area several times, and engaged in other troubling behaviors, involving almost daily verbal outbursts on the playground and often in the classroom as well. On October 5, 2012, he was placed on an in-school suspension in the principal's office after he attacked and bit a teacher. Ms. Emerson, Student's home tutor, and Ms. Tabasa, his private occupational therapist, established that his behaviors at home also took a significant turn for the worse beginning in the summer before third grade, compared to his behaviors in second grade.

59. Markedly beginning in about August 2012, Student engaged in significant struggles with his emotional self-regulation and had frequent emotional meltdowns. Student had become more self-aware of his disabilities and differences, compared to his typically developing peers at school, was very critical of himself, and complained that tasks were too hard or that he could not do them.

November 2012 IEP Team Meeting and IEP

60. Student's operative IEP for the beginning of third grade was the December 2011 IEP, as amended by the April 2012 IEP. Student's triennial assessment and IEP team meeting were due in December 2012. However, at Parents' request,

District convened the IEP team meeting early, on November 7, 2012, because of the new information and changed circumstances regarding Student's academic performance, social skills, and behavioral needs.

61. Student's anxiety medication had been adjusted and he was having medication reactions during that time that affected his behaviors. In addition, Student's self-esteem and frustration tolerance had plummeted, and his oppositional behaviors included not cooperating with his accommodations and service providers in addition to verbal and physical aggression. Parents believed it was not a good time to subject him to assessments and asked District to delay his triennial assessments until the spring. In addition, they asked to move his annual IEP to that time so that it would annually be held just prior to his transition to the next grade level. District agreed with Parents' request. In the absence of triennial assessments, the November 2012 IEP offered Student specialized academic resource instruction support, a behavior support plan, and increased goals, services, and supports. Parents consented to the IEP with exceptions. Among other things, Parents wanted unspecified social worker services, a social skills group, a better behavior support plan, and assistive technology.

BEHAVIOR SUPPORT PLAN

62. In connection with the November 2012 triennial IEP team meeting, District proposed a behavior support plan for Student. Ms. Hartung designed the plan with input from Ms. Weeker, and Linda Williams, a school counselor, after they observed Student in various settings at school.¹⁸ Ms. Hartung established that Student's verbal

¹⁸ Ms. Williams obtained bachelor's degree in elementary education in 1982, a master's degree in counseling psychology in 1999, and holds a pupil personnel services credential in school psychology. In addition to her private practice and prior experience with other school districts, she has worked with the District since 2009, and been an

outbursts impeded his learning because all instruction stopped during the episodes and it was difficult to get Student back on track to learn. Student's verbal outbursts ranged from mild to severe in intensity and could last from a few seconds to several minutes at a time. In some instances, it took Student 20 minutes to recover from an incident. The outbursts occurred "almost daily" on the playground and occasionally in the classroom.

63. The behavior support plan identified certain predictors of Student's behaviors, gave him choices he could make instead of engaging in the negative verbal outbursts, and proposed behavior goals and objectives for him, with staff support. The plan included teaching strategies, including use of the five point scale and zones of regulation, direct weekly instruction with the speech and language pathologist, weekly counseling to teach and monitor the scale, and a social behavior map to be used by all staff. It also contained reinforcement procedures, including rewards, and reactive strategies.

64. Parents were critical of the IEP and behavior support plan, did not believe they were sufficient, and requested an instructional or behavior aide to provide one-to-one support for Student. Specifically, Parents believed that the plan did not address "teaching strategies, consistent monitoring and implementation," and did not provide staff who could maintain the data collection or reinforcement on a consistent basis. The behavior plan is evaluated in more detail below.

THIRD GRADE GOALS FOR SOCIAL SKILLS, SOCIAL EMOTIONAL, AND BEHAVIOR NEEDS

65. Student began third grade with the annual goals in the December 2011 IEP, as amended. Student contends that his IEP goals were measurable or met his needs.

employee for two years. Ms. Williams has had training and experience in social cognitive therapy with Michelle Garcia-Winner and her Social Thinking Group, and is a qualified behavior intervention case manager.

As found above for second grade, Student's December 2011 IEP contained multiple annual goals related to his social skills, social emotional, and behavior needs. As determined in the Legal Conclusions, Student's second grade goals were measurable and met his needs. For the beginning of third grade, therefore, the goals remained valid until District held the November 2012 IEP team meeting to consider Student's declining emotional regulation and behavior.

66. Student's goals were reviewed at the November 2012 IEP, and most of them were continued. In addition, District offered new and modified goals in emotional regulation, self-help, and behavior that were tied to the behavior support plan. A social skills goal for Student to use appropriate eye gaze and language with a conversation partner was modified to include his use of a calm voice and respectful behavior because he had increased difficulty regulating his emotions. Student was critical that this goal did not have a measurable baseline because it showed he was able to meet this goal with 80 percent accuracy when calm. However, that baseline implied a much lower level when Student was not calm, and Ms. Weeker credibly established that Student's baseline conversation ability when not calm was nil. This lack of clarity did not render the goal fatally defective.

67. The goal for using problem solving strategies was redesigned to list some of Student's options, such as "take unfinished work to resource, take a quiet time, [or] go to the office/resource as needed to regulate himself . . ." Student's problem solving goal was rewritten to address his emotional regulation in more detail. The goal was for Student to use a social strategy scale with staff support when he got frustrated or overwhelmed. This strategy required him to identify the size of the problem; identify which zone of the scale he was in; identify what tool he could use to get in the appropriate zone for the circumstances; and ask staff for help; or tell staff if he did not know what to do next. Another new behavior goal provided that Student would exhibit

safe and expected behaviors because his baseline level of performance was that “in the moment” in a frustrating situation, Student used unexpected behaviors of crying, yelling, and physical responses or aggression.

68. In view of the negative attitudes Student had developed about himself, his refusal to use his accommodations, such as his slant board, and resistance to services that required him to leave his class, two new self-help goals were offered for him. The first was for Student to identify his IEP accommodations and attempt to use them with adult support. The second was for Student to accurately identify ways his abilities would impact his school day and participate in discussion about strategies to address his needs.

69. Student did not present any competent evidence that the goals in these areas were deficient or did not meet his needs. Dr. Korb and his behavioral specialist, Ms. Astor, conceded they were not educational experts and offered no specific criticism of any of District’s annual IEP goals for Student in second or third grade.

BEHAVIOR SUPPORT PLAN AND SERVICES

70. Student contends the November 2012 IEP failed to offer him appropriate behavior intervention services. The IEP offered Student multiple layers of behavior intervention services, including the new behavior support plan and the numerous behavior goals found above. The IEP called for 30 minutes weekly of direct one-to-one and small group counseling with Ms. Williams, along with 15 minutes weekly of her observations and consultations with staff. In addition, the IEP provided 30 minutes weekly of direct small group speech and language therapy services.

71. The behavior support plan provided that to achieve replacing Student’s negative behaviors with calm, safe, and problem solving behaviors, he would need to be taught alternative behaviors and those behaviors would need to be reinforced. Teaching Student about self-regulation strategies and positive replacement behaviors involved

instruction from the speech and language pathologist once a week on both social skills and expected versus unexpected behaviors, and counseling with Ms. Williams once a week using the five point and/or zone scales. The plan also provided Student would be allowed breaks during the day. The strategy included a plan for staff to take in implementing interventions. Ms. Weeker presented the behavior plan to staff and trained them in its implementation.

72. The IEP also provided that District's special education staff, including Student's resource specialist and school counselor, would consult with him and his classroom teacher for 30 minutes twice a month. Ms. Williams was to provide counseling to Student once a week to work on the behavior goals and use social thinking strategies to help him regulate his emotions. In addition, she was to participate in consulting with Student's general education teachers with other special education staff for 30 minutes twice a month.

73. At the November 2012 IEP team meeting, Parents requested an aide for Student to support his focus, attention, and behavioral needs. As found above, during kindergarten and first grade, Student's behaviors at home had long involved verbal outbursts and physical tantrums and aggression, while only mild whining, tears, and resistance had occurred in school. Dr. Korb had advised District and Parents in 2009, given Student's low threshold for frustration and history of behavioral acting out, that after Student became comfortable with his teacher, there would probably be an increase in acting-out behavior at school. Based on that premise, Dr. Korb had recommended District "strongly consider" the option of a classroom aide, especially if he showed signs of struggle.

74. At the November 2012 IEP team meeting, District denied Parents' request for an aide because the District staff members of the team believed the offer of increased services and supports was appropriate. In addition, they asserted that Student

would be resistant to an unknown adult aide, as he did not want to be different from his peers and was actively resisting most of his IEP accommodations and services.

75. However, in view of Student's significant behavioral needs on a daily basis, District did not provide any evidence to show how it concluded that all of Student's special education providers, combined, would only have a limited consultation role in its implementation for 30 minutes twice a month. While the resource specialist and counselor were added as responsible persons on some of the goals, the bulk of the responsibility to implement the goals and the behavior support plan fell to the general education teacher, not the speech and language therapist and counselor or other special education staff who should have been responsible and should have been provided more direct time on a daily and weekly basis to work with Student and the general education staff. In addition, or in the alternative to offering increased special education staff consultation and/or direct instruction, District should have offered a trained special education behavior aide to assist the special education and general education staff to implement the behavior intervention plan and related goals.

EXPRESSIVE AND RECEPTIVE LANGUAGE GOALS AND LANGUAGE SERVICES FOR SOCIAL COGNITIVE THERAPY

76. Student contends that District failed to offer him appropriate communication goals, speech and language services, and social cognitive therapy. The evidence established that for third grade, District continued to provide Student with goals that addressed his communication needs in the context of his social emotional regulation, social skills, self-help, and behavioral goals. As found above, the November 2012 IEP added more goals in these areas as provided in the behavior support plan.

77. The November 2012 IEP offered him direct small group speech and language therapy once a week for 30 minutes and included working with Student on his emotional regulation, behaviors, and social skills. District's speech and language services

continued to use various methodologies and strategies, including social cognitive therapy and social thinking strategies, along with social stories, the zones of regulation, and five point scale. Adult support at recess was expanded. In addition to 25 minutes of lunch recess support four times a week, the IEP provided 15 minutes of additional recess support five times a week "to facilitate and/or intervene in social activities . . . including smaller groups for games and activities." The addition of direct speech and language therapy services and expanded support at lunch and recess were reasonably calculated to meet his needs.

THIRD GRADE ACADEMIC GOALS AND INSTRUCTION

Academic Goals

78. Student contends that District failed to offer him appropriate academic goals for third grade. In addition to Student's cursive writing and keyboarding goals to support his academic performance, the November 7, 2012 IEP offered him two new academic goals. The IEP team found that Student's reading fluency and math were at grade level but his reading comprehension skills were inconsistent and below grade level. Mother noted that Student's reading comprehension had declined as the volume of work had increased, and he did poorly on an accelerated reading program at home over the summer. District therefore offered an annual reading goal for Student to use active reading strategies to demonstrate his understanding. In addition, Student's written work (written or typed) failed to include needed standard conventions such as capitalization and punctuation. District therefore offered a written language goal for Student to demonstrate accurate writing conventions.

79. The evidence established that even though Student's math grades were in the average range, he had continuing difficulty doing subtraction and math word problems. His math assignments were modified to allow him to only show one method of computation steps. He had difficulty doing that, and his negative attitude led him to

believe he could not adequately do the work. However, no math goal was offered but should have been.

Specialized Academic Instruction

80. Student contends that District failed to offer him appropriate specialized academic instruction. District's November 2012 IEP offered Student 30 minutes of small group specialized resource instruction services four times a week as a pull-out from his class to support his academic performance in the areas of English and writing. The IEP placed him in the general education setting for 85 percent of his time, and the remainder in special education. Because Student had difficulties in math, the specialized resource instruction should have been increased to accommodate math as well.

81. Student had long demonstrated difficulties with transitions and, during third grade, had developed resistance and opposition to being pulled out of his classes. However, Ms. Williams was providing him with counseling and coaching on how to transition back into his classes, and provided consultation to his teachers on how to help him join the class. As found below, District increased his specialized resource instruction to 45 minutes, four days a week in the May 2013 IEP, and should have done so in the November 2012 IEP.

82. Dr. Korb testified that Student should be educated in a restrictive, small classroom setting with a low pupil-teacher ratio, suggesting that he should not have any general education classes. However, his testimony was not persuasive. As found above, Dr. Korb was not an educational specialist but a pediatrician. Although he had educational psychologists on his staff, none of them had ever formally assessed Student. Dr. Korb did not observe Student in the school setting in second or third grade, and only observed him in the home or in the Center's social skills group in 2013. In addition, he did not evaluate the District's obligation to education Student in the least restrictive environment.

THIRD GRADE GOALS AND SERVICES FOR FINE, GROSS, AND SENSORY MOTOR SKILLS

83. Student contends that District failed to offer him goals to meet his motor needs, and appropriate services to address his sensory motor needs. In the November 2012 IEP, Student's keyboarding goal was changed. This goal addressed both his fine motor and vision needs. The previous goal had been for him to identify the alphabet keys when typing. Based on Student's new baseline progress of knowing some of the keys, the goal was for him to learn the remaining letters and punctuation on a "qwerty" keyboard with proper finger placement. Additionally, the label of the goal was changed from "fine motor" to "vocational." The IEP retained Student's two gross motor goals for him to maintain a prone extended position, increased to 30 seconds; and to be able to coordinate both sides of his body, arms, and legs in a smooth coordinated manner to complete movement patterns.

84. The IEP continued Student's individual occupational therapy services for 30 minutes once a week, to work on his fine and gross motor skills, with sensory motor strategies imbedded in the therapy. Ms. Chin continued to use the five point scale during her therapy and Student did not engage in any extreme acting out in her sessions. In addition, as noted above, the behavior support plan included allowing Student breaks throughout the day to meet his sensory processing needs.

GOALS AND SERVICES FOR STUDY SKILLS, ORGANIZATION, ATTENTION, AND TASK COMPLETION

85. Student contends District failed to offer him goals and services to meet his needs regarding his study skills, organization, attention, and task completion. District's November 2012 IEP continued to provide Student extended time for homework to be completed, and for him to be given preferential seating and extra time to process and respond to visual tasks. The specialized resource instruction support in a small group with the resource specialist also had a focus on study skills, organization and task

completion built into the program. In addition, the small group setting offered more intensive opportunities to redirect Student and help build his attention and focus.

86. The IEP offered and provided Student a goal in the area of attending skills. This goal provided as a baseline that he did not use the FM amplification system that had been added as a goal to his January 2012 IEP at Parents' request. This goal required Student to restate the teacher's three-step instructions using the system, and thereby increase his attention. Student did not present any evidence that other goals and services in these areas should have been offered.

THIRD GRADE VISION GOALS AND SERVICES

87. Student contends that District failed to offer him vision goals to meet his needs and vision services but did not specify what they should have been, other than teaching him Braille. The November 2012 IEP team was informed that Student's private ophthalmologist found his visual acuity to be stable at 20/125, a change from his December 2011 visual acuity of 20/100. Student did not present any evidence as to the significance, if any, of the decline. In the absence of any other evidence, therefore, District was not obligated to revisit Student's unique vision needs since his vision was stable. As found above for second grade, the evidence did not show that Student needed a goal in this area during third grade. District retained Student's goal to improve his attention using the FM system, which also served to address his visual impairment by providing for focused auditory access to the teacher's instruction.

88. The IEP increased Student's vision services from the County specialists by providing direct vision services for 20 minutes twice a week as a pull-out service from his classroom to learn keyboarding; and orientation and mobility services as needed for any field trips and for consultation to the his IEP team. The IEP also included many accommodations to support Student's vision needs. The IEP continued most of Student's earlier accommodations, including allowing him to provide dictated responses

for assignments and testing, and having strategies from the occupational therapist and vision therapist utilized by the classroom teacher. By November 2013, Student's third grade teacher had developed motivation for Student to use his slant board, and he began using the slant board for cursive writing. There was no evidence that Student should have been taught Braille.

THIRD GRADE PSYCHOLOGICAL AND/ OR SOCIAL WORKER SERVICES

89. As found above, the November 2012 IEP also provided Student with school-based counseling services with the school counselor, Ms. Williams, for 30 minutes of direct counseling each week, and consultation with staff weekly as a supplemental service to help implement the behavior support plan. The behavior support plan, and the related speech and language therapy and counseling services, were designed to address not only Student's behaviors but his low self-esteem, lack of confidence, and difficulties in relating to his peers in the classroom and on the playground. In addition, Student was periodically seeing Dr. Korb.

90. By about March 2013, Parents began to seek other outside supports for Student, as they believed his self-esteem and sense of self-worth were crumbling. Beginning in mid-March 2013, Student saw a counselor, Mila Shank, through the Child and Family Counseling Group in San Jose. However, the fact that Student saw a private therapist once a week in addition to receiving school-based counseling from Ms. Williams did not establish that he needed psychological and/or social worker services to obtain educational benefit at school.

PARENT TRAINING

91. The November 2012 IEP did not offer or provide any training to Parents. The behavior support plan clearly emphasized teaching Student new, alternative behaviors and consistent reinforcement. District had already provided Parents with

information on the five point scale, and Parents were already familiar with the zones of regulation from the private occupational therapist, Ms. Tabasa. Parents were represented by legal counsel at the meeting, and did not request any training. They participated in the meeting and had the opportunity to ask questions about how the behavior plan worked and how it would be implemented. Student did not present evidence at hearing as to what type of training he believed District should have provided to Parents.

IMPLEMENTATION OF THE BEHAVIOR SUPPORT SERVICES

92. Following the implementation of the November 2012 IEP, Student continued to engage in maladaptive behaviors. On November 20, 2012, he attacked another pupil during a game of wall ball. He was suspended from playing the game for one week. In January 2013, Student hit other pupils twice during wall ball games and was prohibited from playing it. He was written up or referred for discipline nine times through March 2013. One example of Student's behavior during this time occurred in February 2013. Student got upset during a competitive classroom game, dumped over his desk, and ran out of the room. Student's teacher, Barbara Bersano, understood competitive games triggered his frustrations, so she stopped using them in his classroom with good results. Student's behaviors during that time period also included spitting on adults and peers, and knocking over a dollhouse in Ms. Williams' office. None of the incidents involved serious physical harm to Student, other children, or staff.

93. There was no evidence as to where Student's recess aide was when all of the behavioral incidents on the playground occurred. The evidence established that the aide's primary function during recesses had been to help keep Student safe and open his food and beverage containers due to his visual impairment. District had knowledge since kindergarten that Student had difficulty losing in games, playing tag, and in waiting his turn. The behavior support plan documented that most incidents were

occurring on the playground as well as in his classes. There was no evidence that District provided any training to the aide or Student on how to play games, what the rules were, or what his choices were.

94. Ms. Williams began providing school-based counseling to Student in mid-November 2013, and worked with him about three to four times a month through the end of May 2013, excluding school breaks, holidays, and Student's absences. She was able to observe him in other settings, walked with him to help him transition into his next class, and consulted weekly with his general education teacher on how to help him rejoin the class. In addition, Ms. Williams worked with Student following some of his behavioral incidents and used the five point scale, the zones of regulation, social thinking, and other tools to support his ability to understand and express his feelings, make different choices, and apologize for his outbursts and aggressions. Ms. Williams was credible in describing Student's progress through the months and established that he was slowly grasping these concepts despite continuing behavioral incidents.

95. In April 2013, while District's behavior support plan was operative, Student began going to a social group class at Dr. Korb's Center for an hour or so once a week after school. The class was taught by Ms. Astor, who had last seen Student in kindergarten when she provided home behavior services to the family. The classes run in six-week themed sessions and involve small groups of pupils aged four through 11. The program incorporates the social thinking methods of Michelle Garcia-Winner and others in the behavioral intervention field.

96. On April 9, 2013, Ms. Astor observed Student at school for several hours. In class, Student did not demonstrate active interest or engagement and slouched over his desk with his head down close to his paper. Primarily, Ms. Astor did not see the general education teacher use social thinking strategies, language, or tools in the classroom or otherwise prompt Student to support his social interaction with his peers

or engage in the class lessons. There were no behavioral incidents during her visit. Neither was there any consultation or support to the classroom teacher by any special education staff. The evidence established that by May 2013, Student's behavioral incidents at school had declined.

DENIAL OF FAPE FROM MAY 2013 TO THE PRESENT

97. Student contends that from May 28, 2013, to the present, including the 2013 extended school year, the IEP District offered on that date continued to deny him a FAPE because the annual goals, program, placement, and related services continued to not meet his unique needs or provide him with educational benefit.

May 2013 Triennial Assessment and IEP Meeting

98. Beginning in the spring of 2013, District personnel began the process of conducting Student's delayed triennial assessment. District convened an IEP team meeting to review this assessment and consider Student's program and services on May 28, 2013. The meeting did not conclude and was continued to June 4, 2013. (The IEP offer made on that date is referred to as the May 2013 IEP offer.)

99. Marc Goldstein, District's school psychologist, led a multidisciplinary team that reviewed Student's prior records and assessed his levels of performance in the areas of health, vision, academics, cognitive performance, social/adaptive functioning, speech and language, occupational therapy, and behavior. The triennial assessment included classroom and testing observations, standardized test instruments, and rating scales.¹⁹ Mr. Goldstein found that Student demonstrated average intelligence overall. Another district psychologist, Nathan Jones, assessed Student's neuropsychological

¹⁹ The appropriateness of the 2013 triennial assessment is not at issue in this proceeding.

development in the areas of attention and executive functioning. The results showed that Student scored in the “well below average range” in the areas of auditory attention and executive functioning, and showed impulsivity and poor cognitive flexibility. In subtests for memory and learning, Student scored in the bottom end of the average range overall (16th percentile), significantly below average in the second percentile for narrative memory, and below the second percentile in theory of mind.²⁰ These results showed cognitive processing deficits.

100. As part of the triennial, District also did a functional behavior assessment, and a speech and language assessment, that were both conducted by Anjlee Patel, a private behavior analyst and licensed speech and language pathologist.²¹ The results of

²⁰ Theory of mind refers to the ability to identify and understand mental states and perspective to oneself and others, including their thoughts, desires, and intentions, and relates to perspective-taking, a skill often lacking in children on the autism spectrum. Executive functioning involves the abilities to plan, organize, sustain attention, and inhibit impulsive responses.

²¹ Ms. Patel obtained a bachelor’s degree in clinical and counseling psychology, a master’s degree in early childhood special education, a master’s degree in speech and language pathology, and is the owner and director of Synergic Therapy, Inc., a certified nonpublic agency. She has completed the course work to become a board certified behavior analyst. She also holds a state clinical rehabilitative services credential in speech, language, and hearing; and an early childhood special education services credential. Ms. Patel has received extensive training in myriad areas related to children’s behavior, including autistic-like behaviors, such as applied behavior analysis, discrete trial training (by the Lovass Institute), social thinking (by Michelle Garcia Winner), floor time (by Stanley Greenspan), and relationship development intervention.

the functional behavioral assessment were consistent with the psychoeducational assessment. Ms. Patel's functional behavioral assessment spanned 38 hours of observation of Student in most if not all school settings on multiple occasions. She established that he had significant skill acquisition and performance deficits: weak central coherence, poor self-awareness, limited emotional coping, impaired theory of mind, weak social attention, and impaired executive functioning. Ms. Patel found that Student had considerable difficulty socially communicating with his peers. 79 percent of Student's interactions in class were designed to meet his own needs. In addition, 72 percent of Student's limited interactions with peers in the classroom were negative experiences, in which he made negative comments, was ignored, made inappropriate noises, or engaged in acts like pushing papers off his desk. Overall, she found that, while Student's visual impairment contributed somewhat to his inefficient social interactions, his cognitive deficits played a larger role. He also did not understand group dynamics or the social hierarchy of the playground. Ms. Patel also conducted the triennial speech and language assessment which also noted Student's executive functioning and social communication deficits.

101. The May 2013 IEP offer included Student's matriculation to fourth grade for the 2013-2014 school year in a general education class as the least restrictive environment in which he could obtain educational benefit. It included 45 minutes of specialized resource services four times a week for English and math (effective May 28, 2013), plus an additional 45 minutes beginning in fourth grade (effective August 19, 2013), for a total of 90 minutes of resource instruction four times a week. Thus, as of fourth grade, the IEP provided that Student would be in the general education setting

for 66 percent of the time and in special education for 34 percent of the time. The IEP also offered a comprehensive behavior intervention plan and related goals.²²

102. The IEP offered 30 minutes of small group speech and language therapy once a week; 30 minutes of occupational therapy once a week; 20 minutes of vision impaired services twice a week for a session (for vocational typing); and 30 minutes of small group counseling once a week. At Parents' request, the IEP added 15 hours of consultation by the behaviorist, Ms. Patel, to help Student transition to fourth grade, and to "frontload" training for his new teacher on the new behavior intervention plan and to monitor it. The IEP offered additional accommodations consistent with the behavior intervention plan. These hours also included monitoring the intervention plan throughout the school year. The IEP contained 22 annual goals in the areas of social skills, social emotional and emotional regulation, self-help, reading, behavior, vocational typing, math, written language, attention, expressive language, and fine and gross motor skills. Parents disagreed with the IEP offer and did not accept it.

ACADEMIC GOALS AND SERVICES

103. Student contends that District failed to offer measurable academic goals to meet his needs, and failed to offer him sufficient specialized academic instruction. For the triennial, Student scored in the average range on standardized academic assessment tests, except in the areas of oral language and math fluency where he scored in the below average range. He demonstrated strong foundational reading skills but struggled with inferences. In the classroom, Student was reading on grade level with a good

²² In addition, in light of Student's executive functioning deficits and autistic-like deficits, as noted in the triennial assessment, District offered to add Other Health Impairment as his secondary category of eligibility and Parents agreed. Student's eligibility is not at issue in this proceeding.

understanding when answering an oral question, and got about 75 percent right on a multiple choice comprehension test. In writing, it took him longer to complete tasks than typically developing peers, but his writing was legible. While he included writing conventions for a single sentence, including punctuation, he often omitted the conventions in paragraphs. In math, Student became frustrated with math word problems and worked more slowly, but he was receiving assistance and his grades were satisfactory. Vocationally, however, only 50 percent of his homework was turned in on time, a marked departure from prior years. Student completed 80 percent of his modified work on a daily basis and the modifications reduced his work to half that of his peers. Student's behaviors had improved in class with the elimination of competition and the implementation of his behavior support plan.

104. Based on his academic levels of performance, the May 2013 IEP offered Student goals for reading, math, and written language. The reading goal was designed to address his narrative language and reading comprehension skills. The written language goal addressed his needs to use writing conventions and to organize paragraphs. The math goal addressed his difficulty with multi-step problem solving tasks with a structured system in a small group. The goals were based on the triennial assessment data in Student's areas of need. None of Student's witnesses criticized District's academic assessment results, including his levels of classroom performance, or the measurability of the goals.

105. District increased Student's small group resource instruction from 30 to 45 minutes a day for English, writing, and math four days a week. In addition, for the fall, it offered an additional 45 minutes of specialized resource instruction in math in a small group. For fourth grade, District therefore offered a total of 90 minutes a day of specialized academic instruction, four days a week, in a small resource group for English language arts and math instead of a general education classroom. This increased

Student's participation in specialized instruction and special education pull-out services to 34 percent, and still allowed him to participate in the general education setting with typically developing peers the rest of the time. None of the District members of the IEP team concluded that Student needed to be completely removed to a restrictive special education setting to obtain educational benefit.

Extended School Year Instruction

106. Student contends that District should have offered him extended school year instruction for the summer of 2013, but did not do so. Student did not present any evidence that he required specialized instruction over the summer to avoid regression in his academic subjects. In addition, he did not present evidence that his deficits involved the likelihood of regression over the summer, or that he had limited capacity for recoupment. In general, by the time of the May and June 2013 IEP team meetings, there had been a reduction in Student's maladaptive behaviors in the school setting. Ms. Patel, who had conducted Student's functional behavior assessment and developed the behavior intervention plan, was confident that the plan could effectively be implemented in fourth grade in a streamlined fashion so that it would not be noticeable to the rest of his class. Student did not show he needed extended school year instruction.

COMMUNICATION, SOCIAL SKILLS, SOCIAL EMOTIONAL, AND BEHAVIOR GOALS, SOCIAL COGNITIVE THERAPY, AND BEHAVIOR INTERVENTION PLANS AND SERVICES

107. Student contends that the May 2013 IEP failed to offer him measurable goals to meet his needs in the areas of expressive and receptive language, social skills, social emotional, and behavior; and failed to offer him appropriate social cognitive therapy and behavior intervention services. As found above, all of these goal and service areas were intertwined. The IEP offered Student 13 annual goals to address his

communication, social skills, social and emotional regulation, self-help, and behavior needs, all of which also involved his expressive and receptive language needs. Most of these goals were part of, or modified in light of the behavior intervention plan offered with the IEP. The goals all provided measurement criteria based on Student's assessment results and levels of performance. Student did not present any evidence that any of the goals in this IEP were not measurable or used incorrect data.

108. Ms. Patel targeted three behaviors for the intervention plan: elopement, verbal disruption, and physical aggression. She found that Student's behaviors functioned to obtain what he wanted: either attention in the form of teacher support, or to obtain what he perceived to be justice and fairness for himself; or escape from, or removal of an unpreferred task and protest of a perceived outcome. She established that District staff, and Ms. Bersano in particular, were inadvertently reinforcing Student's maladaptive behaviors by giving him what he wanted when he displayed these behaviors. For example, when he immediately complained about an assignment in class, interrupting what Ms. Bersano was doing, she inadvertently rewarded his behavior by modifying the task for him. Significantly, after Ms. Patel provided some training to them, the number of occurrences of the behaviors declined.

109. The behavior intervention plan provided structured instruction and behavior strategies to be implemented consistently across all school settings. Some things, like teaching Student inferential thinking and problem solving, and emotional regulation, District was already doing. Other components of the plan included improving his narrative language, using visual representations of flexibility, such as a slinky or Gumby; using social stories in more depth to teach social rules, including for games at recess; providing frequent praise and positive reinforcement, and providing a sensory break after 15 minutes of work to assist in reducing his feelings of being overwhelmed and to refocus his energy.

110. To reinforce positive replacement behaviors, the plan provided a concurrent schedule of reinforcement with a visual token system, one to reinforce academics, and one to reinforce appropriate behavior and the reduction of the targeted behaviors. It also provided for strategies and consequences, and detailed Student's behavior goals.

111. Consistent with the behavior intervention plan, numerous behavior goals were designed or modified. A perspective-taking goal was added to improve Student's ability to communicate with peers and adults more successfully, to have him demonstrate basic comprehension of cognitive perspective in situations by identifying at least one emotion for each person, and explaining an appropriate intention of each person. His conversation partner goal was modified to increase his ability to engage in reciprocal communication. Goals were added for Student to develop a more accurate interpretation of nonverbal cues and messages, and to initiate a brief reciprocal interaction upon entering his class. A goal was added to improve his cognitive flexibility and self-awareness of his overreactions by describing his feelings, and identifying replacement behaviors or responses. A goal was offered to identify warning signs prior to engaging in his target behaviors and select a coping strategy. A separate goal was offered to facilitate Student's use of executive function skills to problem solve an appropriate reaction based on the size of his problem. To address his negativity, a goal was added for him to identify the positive aspects of a situation instead of focusing on the negative. The goal to exhibit safe and expected behavior was modified to list his choices and tied to his behavior intervention plan. A goal was also added to increase his ability to remain focused and regulated from a baseline ability of three minutes to an annual goal of 20 to 30 minutes. In addition, his goals to identify his accommodations and strategies were changed to goals to initiate a request to, or use an accommodation

if he perceived a difficult or challenging academic task; and to positively identify his learning strengths and challenges.

Behavior Accommodations and Parent Training

112. The May 2013 IEP added accommodations based on Ms. Patel's recommendations, the behavioral goals, and the behavior intervention plan. Ms. Patel found Student required frequent sensory breaks "to alert, refocus, decrease frustration, and/or regulate emotions," and the IEP provided for these breaks after every 15 minutes of work.

113. Student had difficulties being transitioned back into his general education classroom after a pull out, as he felt stressed and left behind and did not know what to do. Therefore, the IEP required District to provide Student with a transition in which he would be given information on what the class was working on, and would be given two choices or options to integrate back into the class efficiently. In addition, District staff would prompt Student to use social story concepts and tools and offered to provide him a "to do" list as a tool for him to address his goals and needs.

114. The IEP did not offer Parents any training in the behavior plan. Mother believed the behavior intervention plan could not be implemented because it was too complicated. However, her belief reflected a lack of communication, rather than training. Given Ms. Patel's extensive training and experience, she was persuasive that the behavior intervention plan and the goals related to the plan to meet Student's multiple needs could be implemented in Student's fourth grade setting with her training and oversight. Student did not present any evidence as to what training Parents thought District should provide.

VISION GOALS AND SERVICES

115. Student contends District failed to offer vision goals and services to meet his needs. As with the previous IEP's, the May 2013 IEP did not offer Student a vision goal, per se. It continued to offer him myriad accommodations for his visual impairment as had all prior IEP's, including sitting in front, near the teacher, and having more time to complete tasks. The keyboarding goal continued and the keyboarding instruction service was provided by the County vision specialist, Ms. Pittman. The goal and the service were intended to provide him with another method of writing instead of handwriting. By May 2013, Student knew most of the alphabet and punctuation keys and had shown progress. The goal was therefore changed to increase his typing speed.

116. Ms. Patel learned during her assessment that Student's claim that he could see regular print was suspect or unreliable. Previously, Student often declined large print worksheets or books because he wanted to fit in. The IEP therefore required enlarged print work to be provided to him in addition to regular or "reduced" size work. There continued to be no evidence that Student needed to learn Braille to obtain educational benefit.

PSYCHOLOGICAL AND/ OR SOCIAL WORKER SERVICES

117. As found above for second and third grades prior to May 28, 2013, Student did not present any competent evidence that he needed the services of a psychologist or social worker in order to obtain educational benefit. Parents terminated the services of Student's private therapist, a social worker, in June 2013, so he could attend a summer therapeutic camp, Quest Camp, and there was no evidence that he resumed that therapy. While the summer camp was run by a clinical psychologist, the evidence did not establish he needed such supports at school, where he received effective weekly school-based counseling.

FAILING TO ACCURATELY REPORT STUDENT'S LEVELS OF PERFORMANCE

118. Student contends that, beginning in second grade, District failed to provide Parents with accurate oral or written information about his present levels of performance in both second and third grade. As determined in the Legal Conclusions, the law does not require "accurate reporting" as the basis of a violation of special education requirements.

119. As to second grade, there is no evidence that District's staff had information about Student's grades, academic levels of achievement, or functional levels of performance that they failed to share with Parents, or that was inaccurate or misled Parents.

120. For third grade, Ms. Bersano, Student's teacher, reported his present levels of performance to the team in the November 2012 IEP, stating that Student's reading fluency and math were at grade level. She omitted any written report about his reading comprehension levels. However, during the IEP team meeting, she reported that his reading comprehension skills were inconsistent and below grade level. Therefore, Ms. Bersano corrected the information immediately during the IEP team meeting. There is no evidence that any of her other oral or written information about Student's academic performance was incomplete, inaccurate, or misleading.

2013 Psychoeducational Assessment

121. Student challenged District's 2013 psychoeducational assessment because the school psychologist, Mr. Goldstein, admittedly did not follow the protocols of the publishers of some assessment tests to assess his cognitive abilities, including choosing subtests of different assessment tests in a "cross-battery" approach. However, the overall legality of the assessment, including its administration, is not an issue in this proceeding. Student did not demonstrate that this challenge was related to

considerations about his vision impairment. There is no evidence that Mr. Goldstein chose that approach due to such considerations.

122. Student also challenged Mr. Goldstein's psychoeducational assessment because he did not assess Student's processing speeds due to his vision impairment, and did not therefore calculate a full scale IQ. As noted in the preliminary matters section, this issue is limited to whether tests were administered correctly in light of Student's visual impairment.

123. Mr. Goldstein disclosed in his assessment report that he did not conduct processing tests other than auditory processing tests. He reported, and testified credibly at hearing, that he did not assess Student's visual processing speeds due to his visual impairment and motor difficulties. Mr. Goldstein has known Student since kindergarten and conducted his first triennial psychoeducational assessment in 2009. He was familiar with Student's vision needs and made accommodations for them during the testing. Mr. Goldstein established that Student's visual impairment, and the nystagmus in particular, resulted in horizontal visual effects and impacted visual tracking such that visual processing tests could not be administered. The test protocols did not allow for flexibility to accommodate the visual deficits that would impact the test results. Student did not present any competent evidence on this point to contradict Mr. Goldstein's testimony. Student did not establish that the psychoeducational assessment was fatally defective on this ground.

Failing to Conduct a Functional Vision Assessment

124. Student contended that District did not report accurate information regarding his vision impairment because it failed to conduct a functional vision assessment in connection with Student's triennial. A functional vision assessment is an observational assessment that is typically done when a pupil is initially made eligible for special education and again as needed in connection with triennial assessments.

However, failure to conduct an assessment is a separate issue and was not raised by Student's complaint. Such a claim does not involve the reporting of accurate information but involves omission of a statutory assessment obligation.²³

PRIOR WRITTEN NOTICE

125. As found above, at the May 2013 IEP team meeting, Parents requested that District retain Student in third grade for the next school year. On July 8, 2013, a month after the June IEP team meeting, District's assistant superintendent, Ms. Rodriguez, wrote a letter to Parents denying their request to retain Student in third grade for the 2013-2014 school year. District's board of education had a policy for pupils between second and fourth grade to be identified primarily on the basis of their level of proficiency in reading. Student had met all grade level reading benchmarks for third grade, despite his reading comprehension deficits. District concluded Student had obtained educational benefit and made progress, and that his reading deficits could be addressed at the fourth grade level and did not require remediation by another year in third grade. In addition, District did not believe that another year in third grade would remediate the gap between Student and his peers but would rather exacerbate that gap,

²³ Even if failure to assess could be construed as a failure to accurately report, Patricia Leader, District's vision expert, provided her persuasive opinion that in May 2013, District had ample information regarding Student's vision and did not need to conduct a functional vision assessment. County's vision and orientation and mobility specialists were in frequent consultation with District staff, and had conducted an orientation and mobility assessment in September 2011, and a classroom technology trial in November 2011. In addition, Ms. Pittman provided the May 2013 IEP team an update report that included information from Student's doctor on his visual acuity, learning media, and recommendations.

draw negative attention to him, and adversely impact Student's self-perception and confidence.

126. On July 12, 2013, Student's attorney replied in writing and provided Ms. Rodriguez with Parents' ten-day notice to unilaterally place Student in another educational program because they believed that he had not received educational benefit because of the District's "inaccurate or lack of reporting" of his functioning at school. The notice informed District that Parents would seek reimbursement for the unilateral placement.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1, et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.)²⁵ The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

²⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

²⁵ All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

2. A FAPE means special education and related services that are available to an eligible 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(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a). [In California, related services are also called designated instruction and services.])

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational

benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student had the burden of persuasion.

ISSUE 1: FAILURE TO OFFER MEASURABLE ANNUAL GOALS TO MEET STUDENT'S NEEDS

5. Student contends that for his second and third grade school years, and his fourth grade school year to date, District failed to offer or provide him measurable annual goals to meet his unique needs related to his disability in the following areas: academics, social and emotional needs, behavior; social skills, expressive and receptive language, study skills and organization, attention and task completion, motor needs, and/or vision. District contends that Student did not present evidence that any of its annual goals in any of the claimed areas was deficient or did not meet his needs. District contends that it offered and provided annual goals to meet Student's needs related to his disabilities.

Statute of Limitations

6. Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

IEP Requirements

7. At the beginning of each school year, each local educational agency must have an IEP in effect for each child with a disability within its jurisdiction. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a); Ed. Code, § 56344(c).) An IEP is a written document detailing, in relevant part, the pupil's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which the goals will be measured, a statement of the special education and related services that are to be provided to the pupil and the date they are to begin, and an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The IEP consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A)(i); Ed. Code, §§ 56032, 56345.)

8. The measurable annual goals must be designed to meet the pupil's needs that result from the disability to enable him or her to be involved in and make progress in the general education curriculum and meet the pupil's other educational needs that result from the disability, including a description of how the pupil's progress towards meeting such goals will be measured and when periodic reports will be provided. (20 U.S.C. § 1414(d)(1)(A), Ed. Code, § 56345, subds. (a)(2), (3).) School districts must evaluate a pupil's progress on his goals on an annual basis, including determining whether the

pupil has made expected progress and whether the goals should be revised. (34 C.F.R. § 300.324(b).)

9. An IEP is to be evaluated in light of information available at the time it was developed and offered, and is not to be evaluated in hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d 1141, at 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” (*Ibid.*) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

Overview of Annual Goals

10. Student cannot legally challenge the appropriateness of the annual goals he began second grade with, because the December 2010 IEP is beyond the two-year statute of limitations applicable to this case. Student is barred from litigating the appropriateness of District’s goals, programs, or services prior to August 16, 2011, two years prior to the filing of his complaint in this action. If, after August 2011, while implementing the December 2010 annual goals, District knew or should have known of any new changes, incidents, or information that called into question the appropriateness of the goals in place, District would have been obligated to re-examine the goals. District was otherwise required to review Student’s goals on an annual basis.

11. The law required Student’s IEP’s to include a statement of his measurable academic and functional goals. District’s annual goals were required to be designed to meet Student’s needs to enable him “to be involved in and make progress in the general

education curriculum and meet the pupil's other educational needs that result from the disability." Thus, there is no legal requirement for the goals to be "adequate" or "appropriate" as Student argued. In addition, the IEP as a whole must be "reasonably calculated" to confer some educational benefit and provide a free, appropriate education. Using these legal standards, Student's IEP's for all time periods at issue contained goals reasonably calculated to meet his educationally-related needs in all areas, except in math as determined below.

MEASURABILITY OF THE GOALS

12. Aside from Mother's testimony criticizing all of District's IEP goals and claiming they were not measurable, Student presented no witnesses who criticized the measurability of District's annual goals for him during the relevant time periods. Although Student's closing argument attached pages of charts on his goals from year to year, his argument did not shed light on his claims of goal deficiencies except for the claims that his levels of performance reported for the goals were based on inaccurate information. Student's argument does not go to the question of measurability, but to the separate requirement that the IEP must contain a statement of his "current levels of academic and functional performance." In that regard, Student is barred from contesting his performance levels determined in his 2009 triennial assessment, and the December 2010 IEP. In all subsequent IEP's, the evidence established that his then-current levels of performance were established by the District's teachers, progress reports, grades, and the May 2013 triennial assessment. District used the data from Student's levels of performance to design goals that all had measurement criteria. Indeed, Student's three witnesses from Dr. Korb's Center for Developing Minds all testified candidly that they accepted District's evaluation of Student's academic and functional levels of performance in his IEP's and did not question the goals. Student did not present any

persuasive evidence that his annual goals during the relevant time periods were not measurable.

ACADEMIC GOALS

13. Student contends that District denied him a FAPE by not providing him any academic goals for second grade, and that the academic goals it provided for third grade did not meet his needs. The evidence established that, during second grade, Student did not need any annual goals in his academic subjects. District staff consistently reported that he was performing at grade level and there is no evidence to the contrary. While Parents may have preferred for him to be performing without any struggle, Student performed in the average range, met second grade standards, and made some educational progress. District was not required to offer academic goals in second grade.

14. For third grade, the academic work increased in difficulty. Student's reading comprehension skills were below average, he struggled in written expression, and with math word problems, showing his computation steps, and subtraction. Although Student's math grades were still average, his struggles and negative attitude resulted in completion of less assignments. At the November 2012 IEP team meeting, District correctly responded and added goals in reading and writing to his IEP to meet his needs in these areas. In the May 2013 IEP, these goals were continued and expanded. These goals were reasonably calculated to meet Student's needs in those areas.

15. District did not add a math goal in the November 2012 IEP because Student was still performing in the average range. However, his math abilities involved considerable struggle. Ms. Hartung had stepped in for Ms. Nast for that IEP team meeting and gave his math skills short shrift in the IEP. By the time of the May 2013 IEP, District acknowledged that Student's math skills were weaker and he scored in the

below average range in math fluency on the triennial assessment. He became frustrated with math word problems, worked more slowly, the amount of work for him was modified to reduce it and he did not complete all of it. In May 2013, District therefore added an academic goal in math because Student's difficulties in solving math problems had increased along with his negative attitude about it.

16. Student sustained his burden to establish that the absence of a math goal in the November 2012 IEP was not reasonably calculated to meet his needs. There is no evidence that his math skills had suddenly declined by May 2013 when the goal was added. Rather, his math fluency skills had declined beginning in third grade but District delayed the triennial assessment. District should have added a math goal at the November 2012 IEP team meeting. District therefore denied Student a FAPE for about seven months until it added the math goal in May 2013.

GOALS FOR COMMUNICATION, SOCIAL SKILLS, SOCIAL EMOTIONAL, AND BEHAVIOR NEEDS

17. Student contends that District failed to offer him annual goals to meet his needs in the areas of expressive and receptive language, social skills, social emotional, and behavior for both second and third grade, and to date. District argues that it complied with the law and responded to Student's needs in these areas as they arose.

18. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) As noted by the comments to the 2006 federal implementing regulations, "[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child's IEP team." (64 Fed.Reg. 12620 (2006).) A school district is not required to address a pupil's behavior problems that occur outside of school when

the pupil demonstrates educational progress in the classroom. (*San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office* (N.D.Cal. 2007) 482 F.Supp.2d 1152, 1160.) A school district is required to address behavioral problems extraneous to the academic setting only to the extent they affect the student's educational progress. (*Id.* at p. 1162.)

19. The evidence was clear that District offered many annual goals to address Student's needs in these areas in both grades. The law does not require a separate goal for each area of need. Regardless of the labels of the goals, they worked on his expressive and receptive language, self-help, and social skills in reciprocal conversations, taught perspective taking and whole body listening, and how to enter, participate in, and exit a conversation; and addressed his ability to solve problems and regulate his emotions. Student did not present any evidence that the goals were not appropriate in his second grade year. The second grade goals in the areas of communication, social skills, and self-help were reasonably calculated to meet Student's needs. There was no evidence that he manifested marked behavioral problems in second grade in the school setting that required annual goals.

20. By the beginning of third grade, Student developed significant maladaptive behaviors at school including almost daily outbursts and frequent physical aggression. District responded to Student's increased emotional dysregulation and behavioral difficulties in both the November 2012, and May 2013 IEP's, by modifying them and creating additional goals to meet his needs in the areas of social skills, self-help, emotional regulation, social interaction and communication, and behavior.

21. When District completed the triennial assessment of Student and convened IEP team meetings in May and early June 2013, Ms. Patel's functional behavior assessment and proposed behavior intervention plan recommended additional annual behavior goals. These goals were developed at the IEP team meetings with the participation and input of Parents and their attorney. The goals were designed to meet

Student's unique needs in the areas of emotional regulation and cognitive perspective taking, including identifying his zones of emotions and communicating socially with peers and adults in carefully designed goals. In addition, the May 2013 IEP offered both an expressive language goal for Student to improve his processing skills, summarize ideas, and make inferences, and an articulation goal.

22. Parents approved of the functional behavior assessment even though they disagreed with the IEP, the behavior intervention plan, the goals, and services. The nature of Student's opposition to the goals designed to support the intervention plan is unexplained, except for Mother's belief that the plan itself could not be implemented correctly. None of Student's expert witnesses or District's witnesses were critical of District's goals in these areas. The evidence established that these goals were reasonably calculated to meet Student's needs in these areas.

GOALS FOR MOTOR NEEDS

23. Student contends that District's IEP's for his second and third grade years, and to date, failed to provide him with goals to meet his motor needs. District's IEP's during Student's second and third grade school years all had annual goals addressing his fine and gross motor needs and there is no competent evidence that these goals were not measurable or otherwise deficient. The goals addressed his fine motor pencil grasp and cursive writing skills, his keyboarding abilities, and his gross motor needs to improve his posture and gain core strength, balance, and the ability to move and coordinate his body better. Student did not sustain his burden to establish that they were invalid or not measurable. Student's private occupational therapist, Ms. Tabasa, provided therapy to Student in the same areas that District's fine and gross motor goals covered. District's fine and gross motor goals for Student for both school years were reasonably calculated to meet his needs in these areas and there is no evidence to the contrary.

24. In the area of sensory motor processing and integration, District had known since Student's kindergarten occupational therapy assessment that he had varying degrees of sensory processing deficits that created difficulties for him in the way he processed auditory, visual and movement input information. However, Student did not meet his burden to establish that District should have developed and offered annual motor goals to address these needs. Rather, the evidence established that Student's sensory needs were embedded in the therapy and addressed through accommodations, strategies, and tools. For example, District's IEP's for Student in second and third grades contained an accommodation for his use of an FM amplification system to address his sensitivity to noise. However, there is no evidence that Student needed sensory breaks in second grade except for fatigue, which his IEP's provided as an accommodation.

25. For third grade, to the extent that Student's sensory integration deficits impacted his emotional regulation, the November 2012 IEP provided for sensory breaks in his behavior support plan. Since this was an accommodation, no frequency or duration were required by law. There is no evidence to suggest that this provision was not appropriate or not implemented. In connection with the May 2013 IEP and behavior support plan, systematic sensory breaks after every 15 minutes of work were offered, based on Ms. Patel's functional behavior assessment.

26. Student did not sustain his burden to establish that he should have had sensory motor goals. He did not present any evidence as to what a sensory motor goal would look like or address, or why the accommodations were not sufficient. Thus, even if Parents would have preferred sensory goals, District did not deny Student a FAPE by not having any.

STUDY SKILLS, ORGANIZATION, ATTENTION, AND TASK COMPLETION

27. Student contends that District's IEP's for his second and third grade years, and to date, failed to provide him with measurable goals to meet his unique needs in the areas of study skills, organization, attention, and task completion.

28. The evidence established that, during second grade, Student followed class routines and rules, had good attendance, completed his homework, and turned it in timely. While he was easily distracted and needed redirection on an ongoing basis, District staff provided him with daily redirection and prompts. There was no evidence that Student's study skills were deficient at school, only that he worked at a slower pace and needed extra time to complete tasks. Ms. Emerson's experience with Student's homework difficulties during her three-hour tutoring sessions with him after school did not establish that he needed goals in these areas at school. However, the IEP team was concerned about his ability to attend to his teacher's directions, and added an attention goal to the December 2011 IEP via an amendment in January 2012. This attention goal also addressed his vision and sensory motor needs to filter out noise by using the FM system.

29. During third grade, Student demonstrated problems turning in his homework and was only completing about half of his assignments in full. District's IEP's addressed his needs by giving Student extended time for homework to be completed, preferential seating, and extra time to process and respond to visual tasks. These accommodations did not require goals and there is no evidence to the contrary.

30. In addition, the November 2012 IEP provided Student specialized resource instruction and support for 30 minutes a day, four days a week, to support his academics and organization, and study skills were imbedded in those services. That IEP also offered him a goal in the area of attending skills by requiring him to restate his

teacher's three-step instructions. Thus, for the spring of second grade, and all of third grade, Student had goals to meet his attention needs.

31. None of Student's witnesses, aside from Mother, claimed that he needed additional goals in the areas of study skills, organization, attention, and task completion in order to obtain educational benefit. Student did not sustain his burden to establish that District should have offered him goals in these areas during second and third grade to obtain educational benefit. Therefore, District did not deny him a FAPE because goals, other than attention, were not in his IEP's. In addition, there is no evidence that the attention goals were not designed to meet his needs.

VISION GOALS

32. Student claims that District's IEP's for his second and third grade years, and to date, failed to provide him with goals to meet his unique needs in the area of vision. Student did not establish that a goal in the area of vision was appropriate or needed because there was no evidence that his vision was a skill that could improve in the category of "measurable academic and functional goals" required by law. Student's IEP's included multiple accommodations for him to address his vision needs. During second grade a keyboarding goal was added for him as a fine motor goal, to access his written expression by typing rather than writing. This goal also related to his vision needs as it helped him see the print better and not fatigue his hand, continued through third grade, and was offered again for fourth grade in the May 2013 as a vocational goal to increase his typing speed.

33. Student did not present any evidence that he had vision-related deficits or needs that were not known to District personnel or that were not addressed by a goal in his IEP's in second or third grade. In particular, many of Student's witnesses, as well as District's witnesses, concluded that his vision impairment did not play a significant role in the behavioral difficulties he experienced after second grade. Accordingly, District did

not deny Student a FAPE by not having annual goals in the relevant time period in the area of vision.

ISSUE 2: FAILURE TO OFFER OR PROVIDE PLACEMENT, PROGRAM, AND RELATED SERVICES REASONABLY CALCULATED TO CONFER EDUCATIONAL BENEFIT

34. Student contends that in second and third grades, and to date, District failed to offer him an educational placement, program, and related services adequate to meet his needs. As noted above, District's offer does not have to be "adequate" to meet Student's needs. Instead, using the "snapshot" criteria, the legal standard is whether District's offers were reasonably calculated to meet Student's needs at the times they were offered. Student's challenges to the IEP's are limited by his complaint to the following areas: specialized academic instruction; behavior intervention services; parent training; speech and language services and social cognitive therapy; sensory motor therapy; vision services; and/or psychological and/or social worker services.

Specialized Academic Instruction

35. Student contends that beginning in second grade, District should have offered him specialized academic instruction for written language, study skills, math, and reading comprehension, in a small group setting instead of placing him in a general education class. District contends there was no evidence Student required a special education placement or specialized academic program until third grade, at which time District did offer him specialized resource services. District contends that its IEP offers of placement and instructional programs have been in the least restrictive environment in which Student may obtain educational benefit, as required by law.

LEAST RESTRICTIVE ENVIRONMENT

36. Federal and state laws require local educational agencies to provide a program in the least restrictive environment to each special education pupil. (20 U.S.C. §

1412(a)(5); 34 C.F.R. § 300.114; Ed. Code, §§ 56033.5, 56040.1.) In order to provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and removal of children with disabilities from the regular education environment occurs only when the nature and the severity of the student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2); Educ. Code, § 56040.1.)

37. To determine whether a special education pupil could be satisfactorily educated in a regular education environment, the Ninth Circuit has required four factors to be evaluated: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect [the pupil] had on the teacher and children in the regular class; and 4) the costs of mainstreaming [the pupil]. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]. However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.)

38. As determined in Legal Conclusions 13 through 16, above, with respect to his academic goals, Student did not meet his burden to establish that he needed specialized academic instruction to be offered in his second grade IEP's in any form. While Parents may have preferred Student to be in a specialized small class with other children with disabilities, there is no evidence in the record that they ever expressed any preference to have him removed from an inclusion setting in a general education classroom with supports. Student was performing at grade level in English language

arts, writing, and math at an average level of performance. Although he had some difficulties, there was no evidence that he required specialized academic instruction for that school year. Student's homework difficulties and home-based behavioral excesses did not manifest in the school setting.

39. Beginning in third grade, Student demonstrated below average performance in his reading comprehension abilities and written expression, struggled in math even though he was still in the average range, and was no longer completing all of his assignments. He was emotionally dysregulated and his self-esteem had plummeted. In the November 2012 IEP, District responded to the changed circumstances and offered Student specialized resource instruction for English and written expression (along with all the other supports and services). As found above, the specialized resource class or small group pull-out included imbedded work on study skills to support his academics. District did not offer resource services for math until the May 2013 IEP, when it offered him increased resource services. As of fourth grade, the IEP provided that Student would be in special education for 34 percent of the time and in general education for 66 percent of the time. This constituted a significant change from the beginning of second grade, when he was in a general education placement for 96 percent of the time, and significantly increased his time in specialized small group settings.

40. Thus, District recognized that, as Student experienced the increased and more abstract academic workload and social sophistication of third grade, he needed specialized instruction, and offered a blended program so Student could remain in the general education setting a good percentage of the time, also receive specialized instruction for an increased percentage of time, learn to regulate his emotions with his behavior plan, and make progress. Student's verbal outbursts halted work in his class for some moments until his negative behaviors started to lessen in the spring of 2013. The evidence demonstrated that Student enjoyed playing with his peers and received

educational and social benefits from being in the general education setting, although he needed increased supports and supplemental services to interact with his peers, and obtained nonacademic benefits as well. Student did not present any evidence at hearing about what other special education classes or specialized education options were available in the District and there is no evidence of any alternatives. Instead, Parents unilaterally removed him from the District during the 2013 summer break.

41. Student did not sustain his burden to establish that the nature of his disability was so severe that education in a general education class in an inclusion program, with specialized instruction and the use of supplementary aids and services, could not be achieved satisfactorily, to the extent that he needed to be removed to a restrictive special education setting.

42. Based on the foregoing, District's failure to add specialized instruction for math in the November 2012 IEP, when he exhibited a need for such extra support and instruction, denied him a FAPE for about seven months. Beginning with the May 2013 IEP, District corrected the violation when it offered him specialized instruction services for math, and increased the time for all specialized instruction for fourth grade to 34 percent. District did not deny Student a FAPE by not offering to remove him from the general education setting altogether and place him in a restrictive special education setting. District's IEP's offered Student a FAPE in the least restrictive environment.

Behavior Intervention Services and Parent Training

43. Student contends that District failed to offer him adequate behavior intervention services during second and third grade, and to date, along with sufficient parent training. District contends that it responded to his behavioral difficulties as they escalated, and provided services to meet his needs.

44. As determined above, while Student displayed frustration during second grade and engaged in some whiny behaviors and crying, he did not display significant

negative or maladaptive behaviors that year in the school setting. The evidence established that during the summer before third grade, Student experienced a significant change in his emotional regulation and began engaging in increased verbal outbursts and physical aggression which he brought with him into third grade. District responded timely and responsibly to call the November 2012 IEP team meeting and District staff collaborated to observe him and create a behavior support plan. The plan provided Student with multiple layers of behavior intervention services, including numerous behavior goals, weekly counseling with Ms. Williams, and weekly direct speech and language therapy services. In the spring of 2013, District's functional behavior assessment, part of its triennial evaluation, recommended that Student have a behavior intervention plan with multiple goals to meet his needs. Student did not present competent evidence that District's behavior support plan, and his behavior intervention plan were insufficient except as found herein.

45. District's November 2012 IEP and behavior support plan were not reasonably calculated to provide Student educational benefit related to his behavioral and emotional regulation needs because of its material lack of sufficient special education staff support to implement it, either in the form of additional staff consultation with Student's general education teachers, increased direct resource support, and/or the addition of a behavioral aide. That IEP only offered 30 minutes of special education staff consult, twice a month, from all of Student's specialists to support his behavior plan and the general education staff. The IEP left most of the fundamental implementation of the behavior plan to Student's general education teacher, which was unreasonable. By the time of the May 2013 IEP, District had corrected the violation because the IEP offered a substantially increased behavior intervention plan and behavior related goals, with 15 hours of staff training and plan

oversight, and increased special education involvement in Student's placement and program. Accordingly, that IEP offered Student a FAPE.

Speech and Language Services and Social Cognitive Therapy

46. Student claims that beginning in second grade, District failed to provide him speech and language services and social cognitive therapy that were reasonably calculated to meet his needs. District contends that it provided Student with sufficient speech and language services and social cognitive therapy in both grades.

47. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies or programs for educating children with autism. (*Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F. Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts 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* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

48. In general, Student's claim that District failed to use one particular methodology with him, social cognitive therapy, to teach him the verbal and nonverbal nuances of social interaction, must fail under the above legal authorities. District has the discretion to select among methodologies or programs those which have been shown to work for similarly aged children with social communication deficits. Here, District established through multiple witnesses that it has embraced social cognitive therapy and social thinking strategies in its approach to working with its special education

pupils, including Student. Thus, Student's claim fails because the methodology, although discretionary, was used in both second and third grade in the implementation of Student's social skills, emotional regulation, and behavior goals. In addition, they are not the only exclusive strategies and methodologies available to work with children with social skill or behavioral deficits.

49. In the 2011-2012 school year for Student's second grade, District provided him speech and language services on a consultation basis for 15 minutes twice a month, from Ms. Wecker, District's speech and language pathologist. In connection with the December 2011 annual IEP team meeting, the speech and language services remained unchanged. District also did not recommend changing these services in connection with the April 2012 IEP team meeting, at which they learned of Dr. Korb's medical diagnosis of Asperger's, but focused on strategies instead. It was not until the following school year in third grade that the November 2012 IEP provided him with direct small group speech and language services once a week for 30 minutes. By that time, it had become apparent that Student's expressive and receptive communication skills and social cognitive functioning were significantly deficient. In connection with the May 2013 triennial assessment and functional behavior assessment, Ms. Patel determined that 72 percent of Student's interactions with peers in the classroom were negative experiences. Overall, she was persuasive that, while his visual impairment contributed to his inefficient social interactions, there were also weak cognitive processes, including poor self-awareness, limited emotional coping, impaired theory of mind, and executive function deficits.

50. However, the decline in Student's emotional regulation did not cause these deficits. A closer look at Student's levels of performance showed that District was long aware of his communication deficits. As of the 2009 triennial assessment, District knew that Student's oral social skills were immature and below average compared to his

same-age kindergarten peers, and his use of age-appropriate social rules was just emerging, including his ability to greet or respond to greetings from others, or to ask for, or respond to information. As of his December 2011 IEP for second grade, District knew Student did not always understand the intention of others, overreacted emotionally, and had difficulty solving problems on his own. Student's social skills and self-help goals in second grade were intended to provide him with foundational skills for interpersonal communication and social interaction and needed to be worked on frequently, as well as consistently. Based on Student's communication, social skills, and self-help needs and annual goals, his speech and language therapist should have provided direct weekly one-to-one and/or small group instruction to implement and work on his goals, and provide focused and consistent practice. Instead, Student's second grade IEP's left the bulk of this responsibility to his general education teacher. It was therefore unreasonable in these circumstances to expect Student's general education teacher to be the primary staff to implement and work on these goals. Consequently, District denied Student a FAPE.

51. While Ms. Patel's 2013 functional behavior assessment cannot be used with hindsight to evaluate the appropriateness of District's offer of speech and language services during second grade, District already had the underlying information regarding Student's significant social skills and pragmatic deficits, regardless of whether they stemmed from autistic-like characteristics or visual impairment limitations on his ability to read and understand social cues and intentions. Given the significance of these deficits, and the complexity of the social skills and self-help goals, District should have offered him direct speech and language services during second grade.

Sensory Motor Therapy

52. Student contends that District failed to provide him with any sensory motor therapy beginning in second grade, which denied him a FAPE. The evidence did

not substantiate his claim. District was aware since its 2009 occupational therapy assessment that he had varying deficits in the areas of auditory processing, visual processing, movement, tactile processing, and behavior. The evidence established that District incorporated accommodations, strategies, and occupational therapy support services into his IEP's, including the five point scale for emotional regulation. In addition, the accommodation for an FM amplification system was designed to address Student's sensory sensitivity to noise and help him hear the teacher's instruction more clearly, although he did not like to use it. Due to Student's sensory integration and emotional regulation needs, the November 2012 IEP offered Student breaks during the day to support his sensory needs as part of the behavior support plan. The May 2013 IEP added an accommodation for Student to have frequent sensory breaks.

53. There is no evidence that District's provision of services to address Student's fine and gross motor skills, including sensory regulation, during second or third grade was deficient in any material respect. The evidence established that Student developed a need for sensory breaks in third grade. Since District added sensory breaks in the November 2012 IEP, District's IEP was reasonably calculated to meet Student's unique needs, and continued that accommodation in the May 2013 IEP for the remainder of third grade and the 2013-2014 school year in fourth grade. District therefore did not deny Student a FAPE on this basis.

Vision Services

54. Student contends that beginning in second grade, and to the present, District failed to provide him adequate vision services. He contends the District should also have offered him assistive technology, and taught him to read Braille. Student did not provide any evidence to explain what he meant by a vision goal or why he believed he needed one.

55. The evidence established that Student's IEP's consistently addressed his vision needs with multiple accommodations, and the vision specialist's or orientation and mobility specialist's consultation with District staff. There were a few goals that incidentally addressed his vision needs such as the attention goal to use an FM system to increase his auditory access to teacher instructions, and the keyboarding goal. Student presented no evidence to substantiate his claim that District should have taught him Braille. District's vision expert, Ms. Leader, was persuasive that Student had sufficient functional vision since preschool, and did not have the tactile skill set or motivation to learn to read Braille. Finally, Student's claim that District failed to offer him assistive technology failed, as District offered multiple technological tools including the FM system, closed circuit television, hand magnifier, overhead projector, and other things.

Extended School Year Services

56. In addition to special education instruction and services during the regular school year, extended school year services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Extended school year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).) Pupils to whom extended school year services must be offered under section 3043 ". . . 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 recoument 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.” (See also *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1209-1210.)

57. Student did not sustain his burden to establish that he required special education and related services, and specifically, specialized academic instruction, during the 2013 extended school year after the end of the regular school year. Student did not present any evidence to show that he was at risk of regressing academically or behaviorally that summer, or that he had a limited capacity to recoup his skills at the beginning of the 2013-2014 school year, in fourth grade. Ms. Patel established that by the end of May 2013, Student's maladaptive behaviors had significantly declined. The fact that he required behavioral interventions at a therapeutic summer camp shows that he was still learning to regulate his behaviors and does not establish that District was required to offer extended school services to meet his educational needs.

Psychological and/ or Social Worker Services

58. The evidence did not support Student's claim that District denied him a FAPE by not offering him psychological and/or social worker services in either second or third grade, or fourth grade to date. There was no evidence that Student required these services in the school setting in second grade. In third grade it became readily apparent that Student needed school-based counseling services in order to have one-to-one help with his self-esteem and emotional regulation. District therefore convened the November 2012 IEP team meeting and offered counseling once a week, along with the behavior support plan. Ms. Williams was a qualified school counselor with many years of training and experience. She provided Student direct one-to-one counseling and small group counseling, along with consultations with staff. The evidence therefore established that these services were reasonably calculated to provide Student with educational benefit.

59. Beginning in March 2014, Parents retained a licensed clinical social worker who saw Student once a week as well. However, the fact that Parents preferred Student to have additional therapy did not establish that District's weekly counseling was inadequate. Ms. Williams credibly established that she built a relationship with Student and saw him progress in learning to use the five point scale to identify his emotions, make choices about what to do, go to a safe place, and ask for help. The fact that his verbal outbursts and acts of physical aggression continued through the spring did not invalidate District's counseling services, and by May 2013, they had measurably declined. District developed a comprehensive behavior intervention plan to address his natural progression to fourth grade. Accordingly, District did not deny Student a FAPE by not offering Student psychological or social worker services.

ISSUE 3: FAILING TO ACCURATELY REPORT STUDENT'S LEVELS OF PERFORMANCE

60. Student contends that District committed a procedural violation by failing to accurately report to Parents, orally or in writing, his present levels of performance, so that Parents could understand his levels of achievement and performance. Student claims that District's failure to do this significantly impeded Parents' rights to meaningfully participate in the IEP process.

Procedural Violations

61. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

Parental Participation

62. Parents are required and vital members of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (20 U.S.C. § 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of the IEP], (d)(4)(A)(ii)(III) [during revision of an IEP]; Ed. Code, § 56341.1, subds. (a)(1) [during development of an IEP], (d)(3) [during revision of an IEP], & (e) [right to participate in an IEP].) The requirement that parents participate in the IEP process ensures that the best interest of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.)

63. The applicable law does not require "accurate reporting" as a statutory obligation in a pupil's IEP. A special education hearing is not a civil proceeding in which principles of negligence apply. Instead, as found above, the law requires that the IEP must contain current levels of academic and functional performance, and that the IEP as a whole must be reasonably calculated to provide the pupil with educational benefit.

64. The evidence established that, for third grade, Student's general education teacher issued a written report as part of the November 2012 IEP, stating that his reading fluency and math were at grade level and omitted any report about his reading comprehension levels. However, during the IEP team meeting, she reported that his reading comprehension skills were below grade level. Thus, her written report of his levels was incomplete if not inaccurate. However, since the error was immediately corrected during the IEP team meeting, Parents were not misinformed or misled. In addition, Mother was already aware that Student's reading comprehension had declined. Overall, District did not deny Student a FAPE on this basis.

65. There is no other persuasive evidence that District's staff had information about Student's grades, academic levels of achievement, or functional levels of performance that were inaccurate or misled Parents. While Parents challenge District's reports that Student worked at grade level in both English language arts and math, they merely point to his STAR scores and decline in proficiency in third grade to conclude that his second grade levels must be lower. However, this is speculation and not evidence, and there is no other competent evidence to support these claims.

66. As to speech and language therapy, Student contends that Ms. Weeker must have inaccurately reported Student's communication development abilities because his communication deficits were found to be so different by Ms. Patel in the May 2013 assessments. However, as found above, District had already known about Student's significant communication deficits, regardless of whether they were related to autism or visual impairment, and that information had been provided to Parents as well. Student's characterization of Ms. Patel's assessment does not take into account her credible testimony that she viewed her assessment as consistent with the District's psychoeducational assessment. In addition, for second grade, District did not provide Student with any weekly direct speech and language therapy services. Although Ms. Weeker may not have been aware of the depth and nuances of Student's communication deficits, she was aware that she provided him with extra direct speech and language services that were not reported to the IEP team. Although the amount and frequency of her extra services is unknown, the evidence supports Student's claim that she failed to accurately report that he required direct speech and language services and did not do so. This denied Parents meaningful participation in Student's IEP's. Accordingly, District denied Student a FAPE on this basis.

67. Student challenges the accuracy of District's 2013 triennial assessment. As noted in the preliminary matters section, Student's language used to describe this issue

was confusing and was limited at the outset of the hearing. As found above in evaluating Student's annual goals from year to year, "levels of performance" is a term used to describe his levels of academic achievement and functional performance in specific skill and deficit areas related to his unique educational needs. Instead, Student expanded this issue to include not just accurately reporting assessment results but also failing to properly administer the assessment. Based on District's nonopposition, Student was permitted to challenge the administration of the assessments only to the extent they implicated his visual impairment. Therefore, Student's argument that the school psychologist, Mr. Goldstein, violated the law by conducting a cross-battery psychoeducational assessment fails because the appropriateness of the assessment is not at issue in this case.

68. Student also challenges Mr. Goldstein's psychoeducational assessment because he did not assess Student's processing speeds and did not therefore calculate a full scale IQ. Mr. Goldstein made this decision based on consideration of Student's visual impairment, which would have impacted his visual tracking on the tests. Mr. Goldstein was persuasive that the test protocols did not allow for flexibility to accommodate the visual deficits that would impact the test results. Moreover, he pointed this out in his assessment report and did not provide inaccurate information.

REMEDIES

1. Student prevailed on Issues 1(a) (academic math goal for the beginning of third grade), 2(a) (third grade specialized instruction for math), 2(b) (third grade behavior supports), 2(c) (second grade speech and language services), and 3 (inaccurate reports as to Student's second grade speech and language needs).

2. As a remedy, Parents request reimbursement for the costs of their unilateral placement of Student in a nonpublic private school, Skylar Hadden, plus reimbursement for a myriad of other private services, and an order for District to fund

Student's continued prospective placement there. District contends that Student failed to establish his private placement was appropriate, and failed to provide District with requisite notice prior to providing private services.

3. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.*, supra, 471 U.S. at pp. 359, 370; *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496. [Pullyaup.]

4. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.

5. A parent may be entitled to reimbursement for placing a pupil in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington*

v. Department of Ed. (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE.) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); Florence County School Dist. Four v. Carter (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

6. A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).) However, the District Court for the Northern District of California upheld an ALJ's authority to reimburse, as compensatory education, a pupil's ongoing placement at a noncertified school. (Ravenswood City School Dist. v. J.S., (N.D. Cal. 2012) 2012 WL 2510844, p.7.)

7. Student did not establish that placement in, or reimbursement for, a restrictive educational setting at a private school, Skylar Hadden, was appropriate in light of his unique needs, academic functioning, disabilities, and the nature of the violations found. At that private school with only about six disabled pupils, Student's academics were taught in isolation, and he had no access to, or interaction with typically developing peers. Skylar Hadden is not a certified nonpublic school and there was insufficient evidence about its curriculum or services. At hearing, Mother was unable to describe what grade Student was in, what curriculum the school was using, what his

grades were, or whether the teacher held a state teaching credential. In addition, District's violations did not rise to a level of denying Student a placement in the least restrictive environment in which he could receive educational benefit. Rather, the violations, while significant, related to one academic goal and several related services that fell short and denied him a FAPE. The speech and language violations in second grade, for failing to report that Student needed direct speech and language services, and failing to provide those services, were egregious. However, they were corrected in District's November 2012 IEP. The remaining violations that occurred with the November 2012 IEP were corrected in the May 2013 IEP offer. Student did not establish that the other private services Parents preferred him to have, including private occupational therapy, psychological therapy from a social worker, home behavioral services, summer camps, social skills groups, and home-based tutoring were required for him to obtain educational benefit at school.

8. As determined above, District denied Student a FAPE by failing to provide him any direct speech and language services in second grade. The consultation services by the speech and language pathologist for only 15 minutes, twice a month, were not reasonably calculated to meet Student's significant communication, social skills, and self-help deficits. In addition, the speech and language pathologist provided extra therapy and consultation but failed to report to the IEP team that Student needed direct speech and language services in order to process and work on his goals with repetition and fidelity. As an equitable remedy, in the absence of evidence as to the length of the second grade school year, the ALJ has calculated 36 weeks, multiplied times one 30-minute session of speech and language therapy per week, for a minimum of 18 hours of compensatory services. Although District added one 30 minute session of direct speech and language in November 2012, it did not add more to make up for the loss of direct services the year before, which had a cumulative effect. In determining the amount or

length of time over which compensatory education should be provided as an equitable remedy for District's violations, it is noted that second grade was a critical school year in which Student's communication skills languished, as evident by Ms. Patel's findings when she assessed his significant communication and behavior deficits in third grade. In addition, the growing gap between Student's still emerging social interaction abilities and those of his peers led to his emotional dysregulation by the fall of 2012. Accordingly, as an equitable remedy, the number of compensatory hours is tripled, for a total of 54 hours of direct compensatory speech and language services.²⁶

9. District denied Student a FAPE by failing to offer him a math goal, and failing to offer any specialized resource instruction for math in the November 2012 IEP during third grade. In connection with the May 2013 IEP for the rest of third grade, and the 2013-2014 school year in fourth grade, District corrected the violation and offered a math goal and increased specialized resource instruction for math. Therefore, Student was denied a FAPE for about seven months. The ALJ has calculated seven months times four weeks in a month to equal 28 weeks, multiplied times one weekly 30-minute session of compensatory math tutoring, for a total of 14 hours of compensatory education. However, by May 2013, Student's math fluency was below average, and as an equitable remedy, District should therefore provide an increased amount of 20 hours of compensatory math tutoring.

10. District denied Student a FAPE by providing insufficient special education staff consultation support to implement and monitor his behavior support plan in the

²⁶ Student's private social skills class did not begin until April 2013, and the May 2013 IEP offered him a FAPE. Therefore, reimbursement for those classes was not ordered. However, the fact that Student's social skills needed additional remediation was taken into consideration in increasing the amount of this compensatory therapy service.

November 2012 IEP. The lack of sufficient special education support, by increased consultation, direct resource services, and/or a behavioral aide, left the bulk of the implementation of the behavior plan to the general education teacher, supplemented by direct services to Student in only one weekly counseling session and one weekly speech and language session. Since he was engaging in verbal outbursts on a daily basis, this level of staff support was not sufficient to handle interventions on a daily basis. The violation continued for about seven months and was remedied in the May 2013 IEP when District offered the services of Ms. Patel or another nonpublic agency behavioral consultant to provide 15 hours of frontloaded training to District staff and monitoring of the behavior intervention plan. As an equitable remedy, the ALJ has calculated seven months times four weeks in a month to equal 28 weeks, multiplied times one 30-minute session of compensatory behavioral or other tutoring, for a total of 14 hours of compensatory education.

ORDER

1. District shall provide Student 54 hours of direct one-to-one, and/or small group speech and language therapy services by a licensed speech and language pathologist.
2. District shall provide Student 20 hours of one-to-one academic instruction in the area of math by a credentialed special education teacher.
3. District shall provide Student 14 hours of one-to-one, and/or small group behavioral intervention therapy and/or social skills therapy by a qualified behavior specialist.
4. The above compensatory education services shall begin within 45 days of the date of this Order, under the following terms:
 - (a) The above compensatory education services shall be delivered not later than June 30, 2016.

- (b) The specialists to provide the above services shall be chosen by Parents, provided the specialists meet the agency criteria of District's special education local plan area (SELPA) as to qualifications, costs, and locations. District shall deliver the SELPA's agency criteria to Student within five days of the date of this Decision.
- (c) District shall directly fund the above ordered compensatory services and shall immediately contract with the specialists. Solely at Parents' option, they may elect to privately pay for some or all of the above services and request reimbursement on a monthly basis from the District. In that case, Parents shall notify District at the outset of the services, and/or at any change in providers, and submit invoices for the services along with standard proofs of payment including receipts, cancelled checks, and/or credit or debit card verifications. If Parents elect this reimbursement method for any or all of the above services, District shall reimburse the costs of the above compensatory services to Parents within 45 days of receipt of standard invoices, receipts, and proofs of payment.
- (d) The timing and duration of the above service sessions shall be determined by Parents after consultation with each specialist, based on then-current circumstances.
5. The terms of this Order may be altered only by written agreement of the parties.
6. All of Student's other requests for relief are denied.

PREVAILING PARTY

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

Student prevailed on Issues 1(a), 2(a), 2(b), 2(c), and 3. District prevailed on all other issues in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: May 7, 2014

/s/

Deidre L. Johnson

Administrative Law Judge

Office of Administrative Hearings