

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ENCINITAS UNION SCHOOL DISTRICT.

OAH CASE NO. 2010050263

**DECISION**

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, heard this matter on September 20-23, 2010, at Encinitas, California.

Student was represented by Robin J. Champlin, Attorney at Law, of Champlin & Sciacca, LLP. Student's mother (Mother) was present on all hearing days.

Encinitas Union School District (District) was represented by Jonathan P. Reed, Attorney at Law, of Fagen Friedman & Fulfroost, LLP. Maria Waskin, Director of Pupil Personnel Services and Director of Special Education for the District, was present on September 20-22, 2010. Jamie Salter, Program Specialist for the District, was present on September 23, 2010.

On May 7, 2010, Student filed his Due Process Complaint (Complaint). On motion of the parties, the matter was continued on June 22, 2010.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file and serve closing briefs by no later than 5:00 p.m. on October 11, 2010. The parties each timely filed their closing briefs on October 11, 2010. On that date, the record was closed and the matter was submitted.

## ISSUES<sup>1</sup>

1. Whether the District denied Student a free appropriate public education (FAPE) during the 2008-2009 school year by reason of the following:
  - A. Failing to meet its child find obligations; and
  - B. Failing to find Student eligible for special education.
  
2. Whether the District denied Student a FAPE during the 2009-2010 school year by reason of the following:
  - A. Failing to appropriately assess Student in the areas of
    - (i) Occupational therapy (OT);
    - (ii) Behavior;
  - B. Predetermining Student's placement at the individualized education program (IEP) meetings of January 7, 2010, and February 12, 2010;
  - C. Failing to establish appropriate and measurable goals at the January 7, 2010, January 26, 2010, and February 12, 2010, IEP meetings that addressed Student's unique needs in the areas of fine motor skills, visual motor skills, sensory processing, behavior, and nutrition;
  - D. Failing to offer a specific placement at the January 26, 2010, IEP meeting;
  - E. Failing to include a general education teacher at the February 12, 2010, IEP meeting;
  - F. Failing to offer Student an appropriate placement in the January 7, 2010, IEP in the least restrictive environment (LRE) that addressed Student's unique sensory, behavior, pragmatic language, and social-emotional needs;
  - G. Failing to offer Student an appropriate placement in the January 26, 2010, IEP in the LRE that addressed Student's unique sensory, behavior, pragmatic language, and social-emotional needs;
  - H. Failing to offer Student an appropriate placement in the LRE in the February 12, 2010, IEP, that addressed Student's unique sensory, behavior, pragmatic language, and social-emotional needs;

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<sup>1</sup> The issues have been restated and reorganized for clarity, and therefore do not appear as they were written in the Prehearing Conference Order.

I. Failing to offer Student the following services in the January 7, 2010, January 26, 2010, and February 12, 2010, IEPs:

- (i) A one-to-one ABA-trained aide;
- (ii) OT services;
- (iii) Behavioral services; and

J. Failing to include transition services in the January 7, 2010, January 26, 2010, and February 12, 2010, IEPs to address Student's transition from his parent-funded preschool to the placements offered in those IEPs.

### REMEDIES REQUESTED

Student's requested remedies include (1) placement in an appropriate general education preschool program, five days per week, for a minimum of 25 hours per week, with transportation, a minimum of two hours per day of free play opportunities with typical peers, a one-to-one ABA-trained aide and staff trained in ABA techniques, autism, and behavior management; (2) participation in a social skills program that has a social skills curriculum; (3) an independent psychoeducational assessment that includes an functional behavioral assessment (FBA); (4) a behavior support plan (BSP) based on the FBA; (4) An independent OT assessment; (6) compensatory education; and (7) reimbursements for Student's placement in a private preschool program, transportation, and services obtained by Student's parents.

### FINDINGS OF FACT

#### *General Background and Jurisdictional Matters*

1. Student is a four-year-old boy, who has resided in the District with his Mother since November 2008. At all relevant times, Student's home school has been Flora Vista Elementary School (Flora Vista). He was diagnosed with mild autism in October 2009. District found him eligible for special education as a student with autism in January 2010, as is further described below.

2. Mother was concerned about Student's development since birth, but there was no evidence that Student was specifically evaluated for any disability until he was evaluated by Children's Care Connection at Rady Children's Hospital (Rady) sometime in 2008, when Student was two years old. In fall 2008, when Student was still two years old, he was also evaluated by the San Diego Regional Center (Regional Center). Both of these evaluations indicated that Student was developmentally delayed, but there was no evidence as to the content, nature, or specific results of those evaluations. Neither of these agencies found Student eligible for publicly funded supportive services in 2008, or advised Mother that the District offered special education services. In August 2009, when Student was just over

three-and-one-half years old, Student started preschool full-time at Del Mar Hills Nursery School (Del Mar Hills), a private preschool that serves typical children. Del Mar Hills is located outside of the District boundaries, but is within the boundaries of the San Diego County North Coastal Consortium for Special Education (NCCSE), which is the special education local plan area (SELPA) of which the District is a member.

#### *Student's Enrollment at Del Mar Hills*

3. On October 9, 2009, Polly Trump, the Executive Director of Del Mar Hills, wrote a report describing Student's experiences at the school. The report stated that prior to formally enrolling at Del Mar Hills, Student and Mother spent time at the preschool to assist in Student's transition there. Mother accompanied Student during his day at Del Mar Hills for at least two weeks. The report stated that Ms. Trump and school staff noticed that Student did not willingly participate in many group activities. He was toilet-trained, but he would have toileting accidents during group activities. Student had difficulty transitioning to lunch, and would not readily eat his lunch. Instead, he would refuse to open his lunch box, would throw a tantrum, or would lie on the floor, crying. He inconsistently accepted help from staff members. He also had difficulty napping during naptime, preferring to disrupt the class and move about the room. Many of these behaviors improved during fall 2009, such that he would participate more at group, drink his juice at lunch, and nap regularly during naptime. He would still become easily upset, at which time he would lay on the floor and cry and yell, and would behave aggressively towards those who were nearby. In addition to his difficult behaviors, the Del Mar Hills staff had concerns that his speech was delayed, as he said phrases such as "I do it myself," or "I not touch it," instead of more grammatical versions of these phrases. In her report, Ms. Trump and the staff recommended that Student have a one-to-one aide at preschool, as the staff could not always give Student the individual attention and support that they felt he required, for his safety and that of others.

4. Due to Student's behaviors at Del Mar Hills, which included aggression towards others and self-regulation issues, in August or September 2009 Ms. Trump recommended to Mother that Student be evaluated for an autism spectrum disorder. On November 2, 2009, Student's attendance at Del Mar Hills decreased from full-time to part-time, and he attended from Monday through Friday, from 8:45-12:30. His behaviors improved when this schedule alteration occurred. Ms. Trump testified, consistent with her report, that Student needed a one-to-aide in her preschool.

#### *Assessments Performed at Rady in Fall 2009*

5. Also in fall 2009, Student's pediatrician referred Student to the Developmental Evaluation Clinic at Rady for a developmental evaluation. Renee Barbieri-Welge, Ph.D., performed the evaluation on October 13, 2009, when Student was almost three-years-and-nine-months old. Dr. Barbieri-Welge wrote a report of the evaluation. She did not testify at hearing. The evaluation included the Wechsler Preschool and Primary Scales of Intelligence-III (WPPSI-III), the Child Behavior Checklist; a Social Communication Questionnaire, the Childhood Autism Rating Scale (CARS), the Autism Diagnostic

Observation Schedule Module 2 (ADOS), and the Developmental Test of Visual Motor Integration. On the WPPSI-III, Student's standard composite scores ranged from 104 (Verbal Composite) to 128 (Performance Composite.)

6. Dr. Barbieri-Welge reported that Student scored within the autism spectrum disorder range on the ADOS, and as mildly autistic on the CARS. Dr. Barbieri-Welge also reviewed Ms. Trump's report regarding Student's performance at Del Mar Hills. Dr. Barbieri-Welge concluded that Student's delays in language, social, and play development as well as some restrictive behaviors met the diagnostic criteria for autism. She referred Student to the District for an evaluation to determine his eligibility for special education services, and she reported that a letter was drafted during her assessment to expedite the process. She reported that it was critical that Student receive intensive intervention services to help him achieve his full developmental potential.

7. Dr. Barbieri-Welge also reported that Student's standard score on the Developmental Test of Visual-Motor Integration was 97, with an age-equivalent of 3 years, 6 months. She reported that those results suggested fine motor development and visual motor integration skills generally in the average range. She noted that Student had a tendency to grasp and write with a pencil, and that typically children of Student's age used a more sophisticated grasp. Besides autism, she also diagnosed Student as having possible sensory sensitivities and delays in language development.

8. Based upon her conclusion that Student had possible sensory sensitivities as well as mild fine motor difficulties, she recommended Student have an OT evaluation. She also recommended that Student have speech therapy and, after some speech therapy, that he be considered for a social skills group.

9. On October 22, 2009, Neha Patel, OTD, OTR/L, at Rady, performed an OT assessment of Student, and wrote a report of the assessment. Dr. Patel did not testify at hearing. The reports stated that the evaluation lasted 90 minutes. The report noted Student's health history, his diagnosis of mild autism, and that he was attending Del Mar Hills. He was alert and cooperative during the evaluation, but sometimes became overstimulated when he was not allowed to perform the activity he wanted, or when he was not ready to transition from the activity. He interacted with toys and with people, including Dr. Patel. However, he occasionally became rough in his play with Dr. Patel. He followed one-step verbal requests, but had moderate difficulty with transitions. He had difficulty transitioning from a preferred item, but he transitioned without difficulty from non-preferred items. He was easily upset by small changes or when he was not allowed a preferred activity.

10. Dr. Patel reported that the following instruments were used to assess Student: Peabody Developmental Motor Scales-2 (Peabody), the Sensory Profile, Clinical Observations, and Caregiver Interview. In the neuromuscular area, Student's range of motion, muscle tone, and upper extremity strength were within normal limits. In the bilateral coordination area, he occasionally and inconsistently crossed his midline. Dr. Patel noted that the tactile area was a possible area of concern. Student displayed discomfort at dental

work or with tooth brushing. He occasionally reacted emotionally or aggressively to touch. He frequently touched people and objects. He avoided wearing shoes and loved to be barefoot.

11. Dr. Patel reported that the vestibular area was a possible area of concern. Student frequently sought out all kinds of movement activities, to such an extent that it occasionally interfered with his daily routines. The report noted the proprioceptive area was another possible area of concern. Student frequently walked on his toes. During testing, Student appeared to appropriately grade the amount of force needed on tools. The report notes that the auditory area was not an area of concern, but Dr. Patel commented that Student frequently appeared not to hear what others said to him, and Mother reported that he was previously diagnosed to have hearing loss.<sup>2</sup> Dr. Patel reported that the visual area was an area of concern, as Student looked intensely at objects and people, and had a difficulty time finding objects in competing backgrounds. Dr. Patel also noted that oral sensory processing was a possible area of concern. She reported that Student craved certain flavors.

12. Dr. Patel reported Student's motor skills scores on the Peabody. On the Grasping subtest, Student obtained a raw score of 43 and a scaled score of 5, which Dr. Patel interpreted as "Poor." On the Visual-Motor Integration subtest, Student obtained a raw score of 116 and a scaled score of 7, which Dr. Patel interpreted as "Below Average."

13. Dr. Patel's report included observations of Student's Visual-Motor/Visual Perceptual skills. Student imitated vertical and horizontal strokes, and copied crossed lines. He produced circular scribbles when he attempted to copy a circle. He correctly copied block models. He snipped with scissors, but could not cut across paper. He strung beads and laced string. Dr. Patel also reported on her observations of Student's fine motor skills. He used a pincer grasp to pick up small objects. He required assistance positioning and working scissors. He grasped two cubes in one hand for more than three seconds. He used a fist grasp on a marker, which was an immature grasp for his age. He unbuttoned 3 buttons, and could button a button on a buttoning strip.

14. Dr. Patel's report discussed Student's daily living skills. He could put on his socks and shoes independently. He required minimal assistance with putting on his shirt, moderate assistance with putting on his pants, and maximum assistance with buttoning and unbuttoning his clothes. He independently took off his shirt, pants, socks, and shoes. Mother reported that Student preferred that she help him dress. Student could eat with a spoon and fork, and drink from a cup and sippy cup. Mother reported that she needed to feed him, because, although Student was able to feed himself, he preferred Mother do it. He ate a variety of foods.

15. Dr. Patel concluded that Student demonstrated delays in both fine motor and visual motor skills, which were "impacting his performance with school based tasks."

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<sup>2</sup> The evidence demonstrated that Student had failed two hearing tests between the ages of 10 and 18 months. Student's ability to hear was not raised as an issue in this case.

Student also showed some probable difficulties in sensory processing that could be contributing to his behavioral regulation, but Student also had difficulty with his regulation due to behavior difficulties regarding transitions, limit setting, and social skills. Dr. Patel noted that Student's delays in fine motor and visual motor skills "may impact his academic performance," and recommend that the District conduct an OT evaluation to assess whether those delays were impacting his ability to access his educational curriculum. The report stated that OT in the school setting would address his fine motor and visual motor delays.

16. Catherine Dabasinskas, a speech pathologist at Rady, performed a speech and language (LAS) evaluation of Student on November 6, 2009, and wrote a report of the evaluation. Ms. Dabasinskas did not testify at hearing. She assessed Student using the Goldman-Fristoe Test of Articulation -2, the Clinical Evaluation of Language Fundamentals-Preschool, an oral motor examination, a clinical observation, and parent report. She concluded that Student demonstrated age-appropriate skills in receptive and expressive language. She determined that Student's pragmatic language skills were mild to moderately impaired for his age. Ms. Dabasinskas also reported that it may be appropriate for Student to have some additional support in the preschool setting, and recommended that a shadow or one-on-one aide be considered.

#### *District's Child Find Activities During 2008 and 2009*

17. During the relevant time periods, NCCSE had child find policies for itself and the District to ensure that they actively and systematically sought out children in need of special education and related services, including those enrolled in private and nonpublic, nonsectarian schools. The NCCSE child find efforts included placing lengthy advertisements annually in various local papers, including the San Diego Union Tribune and the local paper that served the District, which described the procedures families should follow to obtain special education services. NCCSE also held annual meetings for all private schools in the SELPA geographical area, and would invite all of those private school providers to the meeting. The District contacted local preschools and the local Head Start to advise them of the District's special education services. The District received referrals from the local preschools, the Regional Center, and pediatric offices and agencies. The San Diego County Office of Education maintained the Hope Infant Program, directed at children from birth to three years of age, which actively sought out children in the County who may have special needs by sending out brochures and fliers to local agencies, pediatric offices, and day care centers. The Regional Center was aware of the District's special education services, as the District was in regular contact with the Regional Center regarding children who were nearing the age of three who were receiving Regional Center services and who would be referred to the District for special education services when they reached the age of three. The Regional Center would arrange a meeting with the parents of each such child with Melissa Dawson, the District school psychologist for the District's Early Intervention Preschool Program. At that meeting, Ms. Dawson would explain the process by which the parents could obtain special education preschool services for the child through the District.

*Assessments by District, Fall 2009*

18. Mother was unaware of the District's and SELPA's child find activities until October 2009, when Dr. Barbieri-Welge advised Mother to seek special education services from the District, as documented in the report of Student's developmental evaluation at Rady. On approximately October 14, 2009, Mother first contacted the District, and she left several voicemail messages on the District's main line. District personnel did not forward these messages appropriately, such that Maria Waskin, the District's Director of Pupil Personnel Services who typically handles such calls, was unaware of them. Mother followed up with an e-mail dated October 19, 2010 to Ms. Waskin and Nancy Vail, Ms. Waskin's office manager. On that day, Ms. Vail called Mother in response to the e-mail, and advised her that the District was on break, and would be back in session on November 2, 2010. On approximately November 2, 2010, Ms. Dawson contacted Mother. Shortly thereafter, Ms. Dawson met with Mother and gave Mother an assessment plan and a packet of forms to complete. Mother signed consent to the assessment plan on November 6, 2009, and on November 16, 2009, District received the signed assessment plan and the packet of forms Mother completed.

19. On the signed assessment plan, Mother wrote that she was interested in having Student attend a preschool where he could receive special education intervention and be assimilated into a regular preschool environment all at a single location. She wrote that if that type of placement required a shadow aide, she would be "very interested" in that also. The packet Mother submitted to the District included a Student Information Survey, on which Mother reported that Rady's evaluation had identified delays in fine and gross motor movement. She reported that Student was toilet-trained, but had accidents due to behavioral issues. She reported that Student was interested in interacting with other children, but had difficulties doing so. She noted his tantrums, and that his behavior affected his ability to participate in structured and group activities at school. She wrote that Student needed help communicating his needs and negotiating social conflicts. Mother submitted several documents to the District at the same time as, or shortly after, she submitted the Student Information Survey, including: Ms. Trump's report; a list of Student's Areas of Concerns/Challenges that Mother had prepared (Mother's Report); the Developmental, OT, and LAS evaluations from Rady; and a Health and Developmental History form.

20. Mother's Report described 14 areas Mother wished District to consider. The areas were speech and language, fine and gross motor skills, verbal and nonverbal communication, reading the body language of others, social interaction (including recognition of social boundaries and self control), play challenges/peer conflict/physical aggression, repeating part of conversations or questions over and over, speaking completely out of context, transitions, frequent tantrums and other negative behaviors, inconsistently having difficulty in participating in predictable rituals, difficult to soothe or help, difficulty eating independently of Mother, and the need for a shadow aide. Within a few weeks of submitting Mother's Report, and prior to the time that District had completed its assessment of Student as described below, Mother submitted a revised Mother's Report. The revised

Mother's Report added details and areas of concern. The additional areas of concern included compliance and behavior problems, difficulty sleeping, hyperactivity, walking on toes, headaches, Mother's concern that Student suffered from tuberous sclerosis, and reading or looking at puzzles upside-down.

21. On or about November 13, 2009, Mother submitted to the District copies of 16 injury or incident reports pertaining to Student's conduct at Del Mar Hills. Several of the reports were undated, but most of the reports were generated in October 2009. The reports reflected a variety of behaviors, some of which involved tantruming, throwing sand or other objects at other children, and intentionally running into, hitting, kicking, biting or pinching other children. A few of the reports memorialized occasions when Student was particularly well-behaved.

22. During December 2009, District conducted a transdisciplinary assessment of Student. District produced an assessment report dated January 5, 2010. Mother received a copy of the report in advance of the January 7, 2010, IEP meeting, discussed below.

23. The assessment team consisted of Ms. Dawson (a District school psychologist), Elizabeth Lang (a special education teacher), Rebecca Riseling, a speech and language pathologist (SLP), and Joann Sorg, OTR/L, an occupational therapist. Ms. Dawson, a licensed educational psychologist in California, received her B.A. in psychology in 1990, and her M.S. in school psychology in 1994, both from San Jose State University. She holds a Pupil Personnel Services credential. She has been employed as a school psychologist since 1994, and she has been employed by the District as a school psychologist since 2001. Ms. Sorg received her B.S. in occupational therapy, magna cum laude, from Boston University in January 2004, and her M.S. in occupational therapy in May 2006, also from Boston University. She is a licensed occupational therapist in California, and is certified by the National Board for Certification in Occupational Therapy. She has been employed as an occupational therapist from 2004-2006, and from 2006-2007, by Tufts-New England Medical Center in Boston, Massachusetts. From 2007, through the present she has been employed as an occupational therapist by Progressus Therapy in San Diego, California, providing school-based OT services, including assessments, therapy, and the development of IEP goals. Through her employment with Progressus Therapy, she has provided OT services for the District since August 2008, specifically as the occupation therapist for the Flora Vista preschool and elementary programs.

24. The team assessed Student to obtain his current levels of functioning and to determine his eligibility for special education services. The team used the following measures:

- Developmental Profile-3 (DP-3)
- Behavior Assessment System for Children—Second Edition (BASC-2)
- Gilliam Autism Rating Scale (GARS)
- Brigance Diagnostic Inventory of Early Development—II (Brigance)
- Rosetti Infant-Toddler Language Scale

Pragmatic Language Checklist  
Speech and language sampling  
Records review  
Observations and interviews

25. With the exception of two observations at Del Mar Hills, the team assessed Student at Flora Vista over the course of, at least, two sessions. During one of the sessions at Flora Vista, Ms. Dawson and Mother discussed the special education program at Flora Vista in general. Mother mentioned to Ms. Dawson that she wanted Student to have an aide immediately. Mother testified that Ms. Dawson told her that was not the way the process worked, and that the District did not provide aides because the students become dependent upon them. The assessment report noted that Student lived with Mother part of the time and with Father and stepmother part of the time. The report described Student's family history and his developmental history, incorporating the information in the Health History form Mother had submitted. Student's early developmental milestones were timely met for smiling, sitting, crawling, first words, and first phrases. Student had delays in self-feeding and independent toileting. He had a history of frequent ear and sinus infections. He had an atypical walking gait. He had headaches and skin growths. Mother reported that Student had speech problems and toileting accidents.

26. The assessors noted that Student had been attending Del Mar Hills, and that his Mother's assistance was necessary to help Student transition into the program. His behaviors improved over time, especially as his day was shortened, but he continued to have occasional toileting accidents when upset, could be aggressive with peers and staff, and could refuse to cooperate. When he was upset, he would cry, yell, drop to the floor, and become aggressive when staff tried to intervene. The preschool staff reported that Student had more difficulty when he arrived to school late or arrived with preferred objects that were not allowed at school.

27. The assessment noted Mother's comments about Student. Mother described Student as very smart, caring, sweet, inquisitive, honest, playful, happy, compassionate, and engaging. He had great difficulty with emotions and behavior. He had some difficulty with overall school performance, relationships with other children, and acceptance of responsibilities. He did well in the areas of overall confidence and self-esteem, relationship with Parents, interest in and understanding of school work, learning and remembering details, and demonstrating academic knowledge and understanding. Student was interested in socializing with other children, but his low frustration tolerance and overreaction to situations interfered with his social interactions. The report noted that Student had been seeing a behavior specialist one hour per week.

28. The report summarized the developmental assessment report from Rady. The report described Student's results on the WPPSI-III, the CARS, the ADOS, and the Developmental Test of Visual-Motor Integration. The assessors noted that Rady had diagnosed Student with Autism, and that Rady had observed delays in sound production along with rote phrasing and pragmatic language difficulties. The report also noted that

Student had met clinical significance levels for social communication difficulties on the Social Communication Questionnaire. In Ms. Dawson's view, Student's scores on the WPPSI-III and the Developmental Test of Visual-Motor Integration showed that those were not areas of concern. His atypical scores were in the social and behavioral areas, and those areas concerned her.

29. The report summarized Dr. Patel's OT report, stating that Dr. Patel had identified delays in fine motor and visual motor skills along with sensory processing difficulties. The report also summarized the LAS evaluation conducted by Ms. Dabasinskas in November 2009.

30. The assessment report also summarized Mother's Report. The assessors noted that the areas of concerns described in the report included fine and gross motor skills, pragmatic language, social interaction and play skills, self-regulation and coping skills, compliance, behavioral difficulties, transition, unpredictable and excessive reactions to minor situations, eating and sleeping difficulties, hyperactivity, toe-walking, and headaches.

31. The report affirmed that the test materials were provided in the Student's primary language and were administered by credentialed personnel. The tests and assessment materials were considered to be racially and culturally unbiased, and were used in the manner for which they were validated. Overall, the assessors believed that the test results provided a valid estimate of Student's current levels of functioning in the educational setting.

32. The behavioral assessment area of the report consisted of behavioral observations and Student's scores on the BASC-2 and the GARS-2, which were administered by Ms. Dawson. The report noted that Student was initially noncompliant, but he eventually responded to some examiner requests when structured choices were provided, when it was "on his terms," and when highly motivating reinforcements were offered. He would not perform all tasks, even with these strategies. He demonstrated rigidity and impulsivity, swiping objects off the table and throwing toys across the room. He spoke in a loud and demanding voice to Mother and the examiners. He was interested in the other children in the testing building, and spontaneously greeted them, asked them questions, and waved to them. He showed interest in a tricycle, but refused to try pedaling, and instead pushed with alternating feet.

33. As part of the assessment, Ms. Dawson observed Student two times at Del Mar Hills. One of the observations lasted for 30 minutes, and the other observation lasted for 45 minutes. The assessment report stated that during one of these classroom observations, Student attended to teachers during story time, but impulsively interrupted with questions or comments. He asked questions about the sad mood of another child. He complied with teacher directions, and independently chose an activity. He had a conflict with another child over the activity, which he resolved. Student transitioned to snack time, and became upset when he wanted to sit next to a friend but another student was sitting there. Student successfully returned to his seat when redirected. He did not verbally engage with other students during snack, but he observed them as they talked.

34. During a second classroom observation, Student initially refused to transition from outside play back into the classroom. With teacher encouragement, he joined his classmates on the rug. He did not participate with singing or hand motions. During a story, he looked at the pages and listened, but stood up in the the middle of the story and commented. He followed directions to wash his hands, but initially refused to get his lunch box. After some coaxing from his teacher, he complied, and he then sat with his peers for lunch.

35. The report listed and discussed Student's BASC-2 ratings from Mother and a teacher. The scores on the BASC-2 parent rating were in the "Clinically Significant" range in the areas of Hyperactivity, Depression, and Somatization. The BASC-2 parent rating scores in the "At-Risk" range were in the areas of Aggression, Anxiety, Atypicality, Withdrawal, and Adaptability. Behaviors that warranted close attention on the parent rating included sleeps with parents (almost always), hits other children (often), bullies others (sometimes), falls down (sometimes), is easily annoyed by others (often), wets bed (sometimes), and has toileting accidents (sometimes). The assessment report also specified various behaviors that Mother had observed "almost always" and "often." Mother's ratings of Student in the areas of attention problems, social skills, activities of daily living, and functional communication were within normal limits.

36. The scores obtained on the BASC-2 teacher rating were in the "Clinically Significant" range in the area of Aggression. The BASC-2 teacher rating scores were in the "At-Risk" range in the areas of Hyperactivity, Anxiety, Depression, Anxiety, and Atypicality. Behaviors that warranted close attention on the teacher rating included bullies others (sometimes), hits other children (often), threatens to hurt other children (sometimes), has toileting accidents (sometimes), and is easily annoyed by others (often.). The report also specified behaviors that teacher had observed "almost always" and "often." Teacher rated Student as within normal limits in the same areas that Mother had, with the exception of Activities of Daily Living, for which teacher provided no rating.

37. On the GARS-2, Mother's and teacher's ratings resulted in Student receiving a standard score of 111 (based on Mother's rating), and a standard score of 85 (based on teacher's rating). Each of these ratings placed Student in the "Very Likely" range of probability of autism. The report specified behaviors observed "frequently" and "sometimes" by Mother and by teacher. Mother reported to the assessors that Student had demonstrated delays in social interaction and social communication during Student's first three years of life. Mother also reported that Student had demonstrated behavioral difficulties since infancy, and they occurred across settings. Mother reported that Student's most difficult areas included communication, social interaction, attention, self-regulation, and interpersonal communication/interaction, and that Student's deficiencies in these areas were severe.

38. Ms. Dawson also evaluated Student's Developmental Functioning using the DP-3, and reported his scores in each area. The report stated that Student's scores indicated average functioning in all developmental areas: physical, adaptive behavior, social-

emotional, cognitive, and communication. The report noted that Student was very independent and wanted to do many things on his own. He had emerging skills with prepositional and number concepts.

39. Ms. Lang, the District's special education teacher, administered the Brigance to evaluate Student's preacademic functioning. Student's developmental age in all Brigance areas tested was at least 4.0. Based on his Brigance scores, Ms. Dawson considered Student to have strong pre-academic skills. He could attend to preferred tasks up to five minutes and transitioned well between tasks. He often clung to Mother and refused to participate in non-preferred tasks. Student's preschool teacher reported that Student participated in class activities but did not follow game rules, even with teacher guidance. He followed class routines, fed himself, and followed toileting procedures at preschool. The report stated that Student appears to be an intelligent child who was very attached to Mother, and was happy and talkative around familiar adults and peers. The assessors noted reports that Student was responding well to changes in his schedule and appeared to be settling into the routine and expectations at preschool, as well as interacting more comfortably with his peers at preschool.

40. Ms. Riseling, the SLP, assessed Student's speech and language functions by informal testing, since Student had recently received an LAS evaluation from Rady, as well as due to his age-appropriate communication skills. The assessor used parent interview, the Rosetti Infant-Toddler Language Scale, the Pragmatic Language Checklist, and speech and language sampling to evaluate Student. The assessor concluded that his speech and communication skills, in general, were age-appropriate, including receptive, expressive, and pragmatic language skills.

41. Ms. Sorg, the District's occupational therapist, evaluated Student in the areas of fine motor functioning and sensory processing. Her assessment lasted between 30 and 45 minutes. Ms. Sorg described the results of Dr. Patel's evaluation. She interpreted Dr. Patel's report as recommending a school-based OT evaluation to determine whether fine motor delays were impacting his school participation. Ms. Sorg evaluated Student based upon records review, and observation at preschool for approximately 45 minutes, as well as on a 30 to 45 minute observation session at Flora Vista during the District's psychoeducational assessment.

42. During the preschool observation, Ms. Sorg reported that Student participated in whole group activities, and the classroom environment offered frequent changes in auditory and visual input. Peers played and moved around in close proximity to each other. Student did not demonstrate over- or under-responsiveness to the changes in sensory input, and tolerated the close quarters and occasional physical interaction. He transitioned inside from recess with teacher encouragement, but independently transitioned from the read-aloud session to the group game, and appeared attentive and engaged in both of these activities. At lunch time, Student resisted getting his own lunch, and insisted that his teacher do it for him. Once he transitioned to the lunch table, he could independently unpack his lunch box, store it under his chair, and open his food container. During an evaluation session at Flora Vista,

Student was resistant toward several adult-directed activities. When presented with an inset puzzle, he flung it off the table.

43. The report summarized the results of the evaluations, noting Student's pragmatic issues impacted his participation with peers, and that he demonstrated many functional fine motor skills and was able to successfully participate in preschool activities. His sensory regulation and behavioral difficulties interfered with participation and interaction. Despite his autistic-like behaviors, the assessment report stated that Student demonstrated many strengths and had shown improvement over the past several months. Based upon the assessment, the report recommend the IEP team consider a variety of educational strategies, including preferential seating, structured choices, visual supports, a designated quiet place for calming and regulation, have Student repeat directions to ensure attention and comprehension, sensory and movement breaks throughout the school day, clear consistent expectations and predictable routines, verbal warning prior to transitions, positive reinforcement, social stories for appropriate social skills and behaviors, adult facilitation, opportunities for leadership and special jobs, and sensory strategies such as fidgets, tearing paper, shoulder rubs, and crunchy snacks.

44. At hearing, Ms. Sorg elaborated upon the OT assessment she conducted. In addition to the records review and observations she performed, she stated that she spoke with Student's teachers, and she informally interviewed Parents during the observation at Flora Vista. Mother denied that she spoke to Ms. Sorg except to exchange social greetings. Ms. Sorg not only provided Student with functional fine motor activities, but she also observed him perform the fine motor tasks inherent in what others asked him to do during her observations. The activities she requested him to perform during her observation at Flora Vista also encompassed Student's visual-motor skills. She did not perform any standardized assessments. She believed that her assessment, coupled with Dr. Patel's formal standardized or norm-referenced assessment, gave her a complete picture of Student's abilities. Furthermore, she did not want to administer the Peabody, which Dr. Patel had recently administered, as she was concerned that the results would be skewed with a "practice effect." She concluded that Student's fine motor skills were age appropriate and functional for pre-school activities, and she did not detect any visual motor delays that would impact his school performance. She distinguished the focus of her evaluation from Dr. Patel's on the grounds that she was attempting to determine whether Student had any OT impairments that were directly impacting his ability to perform school activities.

45. Ms. Sorg's testimony regarding the adequacy of her assessment was affirmed by Kelli Donahue, OTR/L, a Solana Beach School District occupational therapist who provided consulting services to Student after the District placed Student in a regional preschool program in Solana Beach, as described below. Ms. Donahue obtained her B.A. in psychology in 2006 from the University of Southern California, and her M.A. in occupational therapy in May 2008, also from the University of Southern California. She has been employed by the Solana Beach School District as an occupational therapist from August 2008, through the time of the hearing. Ms. Donahue testified that Ms. Sorg's assessment identified all suspected needs. She also agreed with Ms. Sorg that no fine motor

goal was necessary, as the preschool classroom addresses grasping and scissors skills. Based upon her knowledge of Student as his consulting occupational therapist, she did not think that Student had a fine motor deficit, rather, she felt that his fine motor skills were rather strong, and he had no visual motor deficits. He could write his name with one verbal prompt, which she stated was not a typical skill for a four year old. He could cut, and he was excellent at coloring within the lines. She presented work samples of Student which demonstrated his fine motor skills and supported her testimony regarding his skills. These work samples were generated at the end of the semester or the beginning of the extended school year (ESY) period. Ms. Donahue did not believe that Student needed direct OT services, as he had the skills necessary to function in the classroom.

*Behavioral Specialist's Observation of Student at Del Mar Hills*

46. On January 5, 2010, Timothy Deak, a behavioral health specialist with the YMCA, wrote a report of an observation he performed of Student at Del Mar Hills. Mr. Deak obtained his B.F.A. from Otterbein College in Westerville, Ohio, and has completed the required course work at Rutgers University to be a BCBA (Board Certified Behavior Analyst.) Mr. Deak has been employed by the YMCA as a behavioral health specialist since 2009, as part of a publicly funded YMCA program which serves children who have challenging behaviors. In that capacity, he observes and assesses children and formulates plans to address their challenging behaviors at home and at school. If necessary, he can provide up to four sessions of direct services to model or implement the behavioral plans he has developed. He has worked with children with autism as an ABA therapist, and has also worked as a shadow aide for special needs students, including those on the autism spectrum. He is also a yoga instructor who is certified to teach yoga to students with special needs. Mr. Deak provided direct behavioral services to Student on at least four occasions, and also provided training to the staff at Del Mar Hills regarding Student. Mr. Deak's report was submitted to the IEP team, as described below.

47. Mr. Deak observed Student at Del Mar Hills for two hours during his assessment. Under the heading Body Awareness/Sensory/Motor Skills, Mr. Deak observed Student playing on the playground. Student occasionally seemed unaware of others and would invade their space, disrupting the activity. He seemed to have a slight delay in gross motor skills, as he had difficulty climbing down from a tree. At times, he seemed to require isolation, and would remove himself from the group. For a good part of the time, he ran around the playground alone, with no apparent purpose except to seek sensory input. Student was impulsive in class. He moved around during circle time and invaded the personal space of others. During parallel play, he would grab other children's toys and play rough with them, with little awareness of the effect of his conduct. He seemed to be sensitive to physical contact. He enjoyed music, and became very stimulated, but it was then difficult for him to calm down and move to the next activity.

48. Under the heading Attachment, Mr. Deak noted that Student seemed to lack an understanding of boundaries in personal relationships. He displayed inappropriate skills in initiating peer interactions. When he interacted with a peer, it was based on Student's

interests and boundaries. He was alone during most of the “free play” time. He did not always respond to overtures from teachers.

49. Under the heading Communication/Language, Mr. Deak observed that Student used age-appropriate language, but his usage seemed to be awkward and at times inappropriate. He demonstrated a delay in receptive language skills, as many times he ignored teacher requests, or the teachers had to repeat themselves. Under the heading Social/Emotional Skills-Regulation, Mr. Deak noted that often Student had little or no interaction with peers, and, when he did interact, it was on his own terms. He could be defiant and impulsive in response to instructions, and teachers reported that he had outbursts of crying. Under the heading Initiative (Cognitive/Problem Solving), Mr. Deak noted that Student could problem-solve and, when prompted, he could make decisions from an array of choices. He could participate in fantasy play and could concentrate on a task or an activity.

50. At hearing, Mr. Deak elaborated upon his report. He stated that Student was very close to Mother. In the Communication/Language area, he observed that Student did not understand social cues. Mr. Deak felt that Student wanted to interact with adults more than peers. He testified that Student needed a one-to-one aide, as Student’s impulsivity and need to control situations was high, and therefore he needed the immediate redirection that a one-to-one aide could provide. Mr. Deak recommended that the one-to-one aide be trained in such areas as behavioral modification, autism, and child development. Without a one-to-one aide, Mr. Deak testified that Student would miss learning opportunities relating to behavior or social interaction that would spontaneously arise in the environment, such as opportunities to initiate conversations and play with others. Further, a one-to-one aide would provide structure and guidance, even during unstructured times. Mr. Deak also felt Student needed OT for his impulsivities, and needed a social skills group. Mr. Deak thought highly of Del Mar Hills, but he testified that Student’s placement should be somewhat more structured than that of Del Mar Hills, with a small class size and access to typical peers. Mr. Deak thought Student should not be placed in a class with only special education students, as Student was bright and had good language skills. Mr. Deak believed that Student should be with typical peers to model social skills.

*January 7, 2010, IEP Meeting*

51. On January 7, 2010, District convened an IEP meeting to discuss the results of the assessments. The team members were Ms. Dawson, the school psychologist who assessed Student; Elizabeth Lang, a special education teacher who also assessed Student; a speech and language pathologist; Mother; Father; Mr. Deak and Josh Bariuan (who was, like Mr. Deak, a YMCA behavioral specialist); Joanne Sorg, the occupational therapist who assessed Student; Dianna W. Little, the NCCSE Program Specialist who took notes at the IEP meeting; Pamela Groom, Student’s pre-school teacher at Del Mar Hills; Ms. Trump; and Mary Baker-Ericzén, Ph.D., Student’s psychologist. The meeting lasted approximately three hours; Dr. Baker-Erickzén was present for the last one and one-half to two hours of the meeting.

52. The team determined that Student's eligibility category was autism, and that his social and behavioral difficulties had an adverse impact on his participation in preschool activities. The team determined present levels of performance. The team recorded Mother's report of Student's strengths, preferences, and interests, and parental concerns relevant to Student's educational progress, and took them into account in determining the present levels of performance. Mother reported that Student was smart, and was interested in a variety of things, including nature and building things. He enjoyed music and movement, and had recently begun to try to sing. Parents expressed concerns regarding fine and gross motor skills, pragmatics, social interaction and play skills, self-regulation and coping skills, compliance, behavior difficulties, transition, eating and sleeping difficulties, hyperactivity, aggressiveness, difficulty with delayed gratification, toe-walking, and headaches. The team noted that in the area of preacademic/functional skills, Student could expressively and receptively identify all basic colors, and sort by age-appropriate categories. In the area of reading, Student could turn pages one by one, enjoyed books, and pointed to and named pictures of interest. In the area of written expression, he could copy intersecting lines. In mathematics, Student expressively and receptively identified basic age appropriate shapes, and mimicked counting to 10. In the area of communication development, the team noted that student was age-appropriate in common parameters of receptive and expressive language, but displayed some difficulties with pragmatics. In the area of gross/fine motor development, Student could climb low playground equipment, push himself forward on a tricycle, alternate feet on stairs, throw a ball a distance of five feet, and walk on tiptoes for at least 10 feet. He stacked eight blocks, could build a three-block bridge, and used scissors to snip paper, with assistance. In the social-emotional/behavioral area, the team noted that Student participated in class activities and routines, engaged in pretend play with peers, and was interested in peers. He actively participated in music-based activities, and enjoyed music and movement. He did not readily comply with adult directives and had difficulty with social negotiation and problem-solving. He could be aggressive toward peers and adults, refused to participate in group activities, and was easily frustrated. He had difficulty with self-regulation and coping skills. He presented as a sensitive and caring student at his private preschool.

53. The team noted that Student was in good general health. In the pre-vocational/vocational area, the team recorded that Student was able to follow one-step directions and classroom routines, but he could occasionally be strong-willed and resistant. In the area of adaptive/daily living skills, the team noted that Student fed and dressed himself and was independent with toileting. He had occasional toileting accidents at school when he was upset. He washed and dried his hands and cleaned up after meals.

54. The team noted that Student did not require assistive technology devices or services, and that his primary language was English. The team noted that Student's behavior impeded his learning or that of others. He was easily frustrated and had difficulty with compliance, rigidity, self-regulation, social negotiation, aggression, and coping skills. The team recommended positive behavioral interventions and supports. These included visual supports, a token economy system, verbal redirection, preferential seating, structured choices, a designated "safe" place, nonverbal cues, sensory supports, clear/consistent

expectations and predictable routines, social stories, adult facilitation for social interaction, and opportunities for leadership and special “jobs.” The team recommended behavioral goals. The team noted Student’s areas of need to be pragmatics, compliance, and social skills.

55. The team developed four annual goals, each with short-term objectives. Parents were to be informed in writing of Student’s progress on the goals each trimester. Goal Number 1 was directed at Student’s pragmatic/social language skills, as the team noted that Student initiated peer communications less than 50 percent of the time. The goal required that Student appropriately and independently initiate interactions with peers throughout his school day, with 80 percent accuracy over four occasions, as measured by data taken by the SLP, and classroom teacher observations. The goal was to be implemented by the SLP and the special education staff. The short-term objectives gradually increased the percentage of time that Student was to perform the goal, and the amount of modeling or prompting.

56. Goal Number 2 was directed at Student’s pragmatics/social language skills, as the team noted that Student sustained peer communications less than 50 percent of the time. The goal required that Student appropriately and independently engage in dialogues of at least three to four turns with peers with 80 percent accuracy over four consecutive occasions, as measured by SLP data and by classroom teacher observations. The goal was to be implemented by the SLP and the special education staff. The short-term objectives gradually increased the time that Student was to perform the goal, the number of conversational turns, and the amount of modeling or cueing.

57. Goal Number 3 was directed at Student’s social/behavior skills, as the team noted that Student occasionally became agitated, defiant, or threw tantrums during a transition or during a non-preferred activity. The goal required that Student consistently regulate his feelings and impulses when waiting for desired items, when told “no” for desired activities/items, or during transitions, with a maximum of three verbal prompts with 80 percent accuracy over three consecutive days as measured by teacher observation and data. The goal was to be implemented by the special day class (SDC) teacher and staff, and by the OT. The short-term objectives gradually increased the percentage of accuracy at which Student was to perform the goal.

58. Goal Number 4 was directed at Student’s compliance/behavioral skills, as the team noted that Student preferred to participate in class routines on his own terms. The goal required that Student follow adult directions and participate in class activities with 80 percent accuracy on four out of five, consecutive days, as measured by class data and teacher observation. As with Goal Number 3, this goal was to be implemented by the SDC teacher and staff, and by the OT. The short-term objectives gradually increased the percentage of accuracy at which Student was to perform the goal.

59. The team decided that Student would receive visual and sensory supports as needed at school. The team offered placement in a regional special education preschool class

at Flora Vista for four days per week, with one hour per month of OT consultation services, and 30 hours per year of group LAS. Student would be in special education 80 percent of the time. He would not participate in the general education environment for speech therapy and social and behavioral support. He was to participate in general physical education. The District would provide transportation. The team also offered extended school year (ESY), including one hour per month of OT consultation, to assist with Goals 3 and 4 and to develop sensory strategies. As an “activity to support transition,” the IEP offered Parents the opportunity to visit the program before Student started the program.

60. The IEP notes stated that the results of the transdisciplinary assessment were reviewed, and that parents had an opportunity to ask questions about the assessment. The team discussed the requirements of eligibility under the category of specific learning disability, but decided that Student met the eligibility criteria for autism. This discussion was generated by Mother’s inquiry. The notes state that the team would revisit the issue as to whether Student met the criteria for eligibility as a student with specific learning disability in the future, when school would place greater academic demands on Student. The notes state that Student’s father (Father) expressed concerns about Student’s aggressive behaviors.

61. The notes stated that Mr. Deak presented his written Observation/Assessment Summary for review. The team reviewed present levels of performance, developed goals and objectives, and discussed accommodations and modifications. The notes state that the team considered a continuum of services.

62. The Flora Vista preschool class the District offered to Student met in the afternoon, from 11:40 a.m. to 2:40 p.m., four days per week. The District members of the IEP team had initially considered offering the program for two days per week, but offered it for four days per week after discussion. The IEP notes reflect that Parents expressed concerns about the timing of the afternoon program, which concerns were shared by Student’s private preschool staff and his private therapist, as Student was tired in the afternoon. At hearing, the evidence reflected that Mother and Ms. Trump expressed concerns about Student’s ability to eat his lunch, and Mother and Dr. Baker-Ericzén had expressed concerns that the amount of time in the program was not sufficient to address Student’s needs. The District members of the team recommended the afternoon program as it had higher-functioning students than the morning program, and strong social/behavioral role models. The IEP notes reflect that Parents inquired about the possibility of placement at Del Mar Hills with a one-to-one shadow aide. Parents declined to consent to the IEP. The team continued the meeting to January 26, 2010, so that Mother could observe the Flora Vista program, and also agreed to discuss at that time Parents’ request of placement at Del Mar Hills with a one-to-one shadow aide. The District agreed to provide information regarding the hours of and possible openings in a regional program in Del Mar.

63. The IEP document reflects that the parties discussed all aspects of the IEP, including the results of the assessments, Mr. Deak’s report, the present levels of performance, the goals and objectives, and possible placements and services. The IEP document reflects that Mother’s concerns, as presented to the District in Mother’s Report,

and as summarized in the District's assessment report, were considered. The District witnesses who were present at the IEP, Ms. Dawson, Ms. Sorg, and Ms. Little testified consistently with the IEP document that the topics in the IEP document were discussed, and that Parents and their invitees at the IEP meeting commented and asked questions. None of the District witnesses remembered specific questions that were asked about such matters as the goals and objectives, but one or more of them remembered Parents and others raising concerns about Student's needs for a one-to-one aide, his eating behaviors, and his need for a nap.

64. Mother, Ms. Trump, and Dr. Baker-Ericzén did not believe that they had the opportunity to participate in discussions at the IEP, and that the District members of the IEP team were not responsive to their questions or concerns. The January 7, 2010, IEP meeting, and the subsequent meetings discussed below, were not conducted as Mother, Ms. Trump and Dr. Ericzén had expected, as they anticipated more "give and take" during the meetings. However, the weight of the evidence demonstrates that Parents had the opportunity to raise their questions and concerns, and that the District addressed those questions and concerns. This is substantiated by the testimony of Mother, Ms. Trump, and Dr. Baker-Ericzén themselves, in which they stated the District's responses at the meetings to their concerns about Student's naptime, and the need for a one-to-one aide. Furthermore, the IEP meeting notes are a contemporaneous written record of the meetings. There was no issue at hearing regarding whether Parents had received the IEP and its notes. Yet, there was no evidence that Parents or anybody else had submitted to the District any written objection, supplement, or addendum to the IEP meeting notes to correct the notes' contents regarding any matter, including statements in the notes that the Parents were offered the opportunity to ask questions, and that the IEP team discussed numerous issues.

65. At hearing, Dr. Baker-Ericzén testified as an expert regarding Student's needs and her recommendations as to the program and services he should receive. Dr. Baker-Ericzén received her B.A. in psychology, with honors, from the University of California, Santa Barbara, in 1993. She received her M.A. in 1996 in counseling psychology, with an emphasis on children and families, and her Ph.D. in 1999 in clinical psychology, as well as a post-graduate doctoral level degree in human development, all from the University of California, Santa Barbara. She is licensed as a clinical psychologist by the State of California, and has had a private practice as a child clinical psychologist in San Diego since 2001. She has extensive experience as a researcher, writer, instructor, and presenter regarding issues affecting children with autism, developmental, emotional, and mental health disabilities, including social-emotional and behavior issues. Since 2001, she has been a research scientist for the Child & Adolescent Services Research Center at Rady, and a program evaluator at the Exceptional Family Resource Center at the San Diego State University Foundation. Since 2009, she has served as an adjunct instructor in the Special Education Advocacy Certificate program in the Continuing Education Department at the University of San Diego, where she teaches a half-day course on Psychological Assessment two semesters a year.

66. Dr. Baker-Ericzén had been providing clinical treatment to Student from November 2009, to January 2010, one session per week, for one hour each session. She treated him for approximately six or seven sessions. She also had involvement with the family in coordinating care and obtaining services for Student. She has no training as an occupational therapist or speech pathologist. She has not assessed Student, or administered any standardized tests to him. She never formally observed Student at Del Mar Hills, but she informally observed him there for a few minutes when meeting with staff there.

67. Dr. Baker-Ericzén testified that Student had strengths in that he had a high level of cognitive functioning, he wanted attention, and he wanted to communicate and interact with others. He had social deficits in terms of play skills and social communication, speech delays, and delays in fine motor skills. For example, he had difficulty manipulating and using a toy hammer in her office. He also had difficulty grasping a pencil and coloring. He had toileting accidents. He was sensitive to touch, taste, smell, and noises. Behaviorally, if he did not have the communication skills to express himself, if he felt overly challenged, or if he was reacting to sensory issues, he would engage in such behaviors as crying, throwing himself on the ground kicking and flailing, knocking things over, and pushing things away, and he might have a toileting accident. He had meltdowns if his space was violated.

68. Dr. Baker-Ericzén criticized the District's assessment in that it did not include a functional behavioral assessment. She discussed the importance of understanding the functions of Student's behaviors so that adults could correctly respond to them pursuant to principles of applied behavioral analysis (ABA). She also criticized the OT assessment, particularly because there was no standardized assessment to identify sensory needs and their significance. She thought that the IEP goals were deficient, as they did not address holding a pencil correctly, writing, following routines and transitions, and problem behaviors such as crying and tantruming. She did not believe that Goal Number 3 was sufficient to address those areas. She also felt that goals on daily living skills, such as toileting and eating, were necessary.

69. Dr. Baker-Ericzén did not observe the proposed Flora Vista placement. She criticized its schedule, its length, and its nature as an SDC. She believed that its schedule interfered with Student's naptime. She believed that Student's behavior was adversely affected when he did not have a nap, and she felt the District did not sufficiently address this concern at the IEP meeting. She also did not believe that the school day and week were sufficiently lengthy. She felt that Student needed, and could handle, a longer school day and lengthier school week. She referred to research that had concluded that children such as Student needed a minimum of direct one-to-one intervention for 25 hours per week, equivalent to a full-day program of 5 days per week. She also referred to research on child development that he should have two hours per day of free play, such as recess, lunch, and other non-academic time, when he can learn to generalize his skills, and the offered placement did not allow for that amount of free play time. Furthermore, Student had difficulties transitioning, and a five-day week would minimize any difficulty transitioning back to school on Monday. She was also concerned that the program was an SDC, when she believed Student should be mainstreamed because of his cognitive abilities and because he

needed to interact with typical peers, who could serve as role models for him. Dr. Baker-Ericzén noted that if Student were mainstreamed in a typical class, he would need trained staff and a significant amount of time with a one-to-one aide focused exclusively on him. She also testified that the services offered were not sufficient for his needs. He needed additional OT, a behavioral plan, and support for social interactions with typical peers.

70. She felt that the District did not consider her opinions or Mother's opinions at the meeting. She wanted to continue discussing the placement, but the District simply said that the Flora Vista placement was the offer. There was no discussion of placing him in a typical class. The District mentioned that there were some YMCA programs on campus, but offered no details.

71. She testified that Student needed compensatory education, consisting of at least 20 minutes daily in each area, including direct OT and direct instruction in social skills. She wrote a letter report on May 15, 2010, in which she elaborated upon and affirmed many of the matters to which she testified. The report recommends that Student participate in a preschool setting five days per week for a full week with the following interventions: (1) active participation with typical peers and a minimum of 2 hours per day of free play opportunities that are supported by an autism-trained adult; (2) a structured environment that provides regular immediate positive reinforcement; (3) staff trained in autism, behavior management, and ABA techniques, which support can be provided through direct teaching staff or a one-to-one aide; (4) one-to-one and group speech therapy services; (5) weekly OT to address his significant sensory sensitivities, including feeding issues, underdeveloped fine and gross motor skills, and his significantly impaired self-regulation skills; (6) a behavior management plan; and (7) a teacher-parent communication log to ensure daily communication. Dr. Baker-Ericzén believed that she made those recommendations at the January 7, 2010, IEP meeting also. She clarified that her recommendations as to the appropriate placement and services for Student did not refer to the legal definition of the term "appropriate," rather she was using the term in the clinical context, based upon research guidelines.

#### *Flora Vista Placement*

72. The proposed placement at Flora Vista had, at a minimum, one teacher and two trained instructional assistants. The maximum number of students was 12, but, at the time the placement was offered, there were only 7-10 children in the placement. There were morning and afternoon preschool SDC programs, as well as morning and afternoon pre-school general education programs, provided by the YMCA. The students could go back and forth between the SDC and general education programs. In accordance with his IEP, Student would spend 20 percent of his time with his general education peers, including at recess, music, and various learning centers. The children in the morning SDC had more intensive needs than those in the afternoon SDC, and those in the afternoon program were higher functioning. Many of the children in the afternoon program entered general education kindergarten this year. ABA principles were used in the SDC classrooms, as were different ABA methodologies. The classrooms were divided into learning centers, and at least one

center every day focused on social skills. There was an autism specialist and a behavioral specialist available. There were rich language opportunities throughout the day, as the SLP was frequently present, and met weekly with staff to consult with pragmatics and social skills. The program also included approximately four parent education meetings per year.

73. The District believed that this placement was appropriate. The District believed that Student would be able to move to general education without a one-to-one aide, but he needed a more structured environment to develop his skills. The District also considered that Flora Vista was Student's home school, and by attending preschool there he would have the opportunity to be with peers who would go to kindergarten with him. Additionally, District felt that day care would be more convenient for Parents if Student was in a nearby placement.

#### *Mother's Observations of Offered and Potential Placements*

74. Subsequent to the IEP meeting, and before it reconvened on January 26, 2010, Mother visited the offered placement at Flora Vista for over an hour. She observed the proposed classroom for approximately 20-30 minutes. She observed at story time, and noticed aides standing behind some children. She saw only one typical child. Mother's observation did not change her opinion that it was not appropriate for Student. She observed that there were two activities before lunch, and if he were not successful with those activities, he would be going to lunch in a state of escalation and would not be able to eat. Then, he would want to nap but he would be expected to participate in additional activities instead.

75. At some point, Ms. Little advised Mother that there was no room for Student at the Del Mar placement mentioned at the IEP meeting. Ms. Little suggested a placement in a regional program in Solana Beach. Before the IEP team reconvened on January 26, 2010, Mother visited several Solana Beach preschool programs at the Child Development Center (CDC) in the Solana Beach School District with Mary Ellen Nest, Director of Pupil Services, for the Solana Beach School District. Mother and Ms. Nest observed three classrooms, an inclusion classroom, which seemed chaotic to Mother, and which Mother thought would not be appropriate for Student. Ms. Nest also showed Mother another, quieter classroom, and then a third classroom, which Ms. Nest told Mother would be appropriate for Student. Throughout this period, Student continued to attend preschool on a part-time schedule at Del Mar Hills.

#### *January 26, 2010, IEP Meeting*

76. On January 26, 2010, the District reconvened the IEP meeting. The team members who attended were Ms. Dawson, Ms. Lang (a special education teacher), the SLP, Parents, Mr. Bariuan and Mr. Deak (the behavioral specialists from the YMCA), Ms. Sorg, Ms. Little, Ms. Groom, and Ms. Trump. The meeting lasted approximately one and one-half hours.

77. The IEP notes reflect that Mother reported on her observations of the Flora Vista program, as well as a regional program in Solana Beach. The notes specify that the team had the opportunity to discuss Mr. Deak's report, and noted Mr. Deak's observation, with which Parents agreed, that Student required more structure in his preschool day. At hearing, Mr. Deak acknowledged that his report was discussed, and that he probably was asked questions about it. The notes reflected Parents concerns regarding Student's ability to transition to an afternoon program, and the team discussed the program and the number of hours Student needed to make progress. Parents expressed their goal that Student be mainstreamed full time into a general education pre-school program.

78. District offered placement in the regional special education afternoon preschool program at Flora Vista four days per week (11:40 a.m.-2:40 p.m.) This is the same program as it had offered at the January 7, 2010, four days per week. The IEP team also offered the same related services as it had offered at the January 7, 2010, IEP meeting. The IEP notes also stated that Student would eventually participate in the YMCA general education preschool program at Flora Vista on two of the four days per week (to wit: Tuesday and Thursday from 9:00 a.m. to 2:00 p.m.). At hearing, Ms. Little testified that the offer of the SDC at Flora Vista was not the afternoon program offered at the January 7, 2010, IEP meeting. The transition from the Flora Vista SDC to the YMCA would occur gradually. The team recommended meeting in 30 days to discuss Student's transition to the Flora Vista program and to develop a plan to transition Student to the YMCA program. District offered to invite the District's autism behavior specialist to the transition planning meeting. District did not convey to Mother that it planned to observe him in the Flora Vista placement and collect behavioral data on him during those 30 days, to assist in the transition planning to the YMCA program.

79. The IEP notes reflected that the team reviewed the goals and objectives developed at the last meeting, with the staff explaining each goal in further detail. The notes also state that Parents had the opportunity to ask questions regarding teaching strategies, supports, and accommodations. The team notes also reflect that Parents expressed concerns that the Flora Vista program was in the afternoon, and was not encompassing enough. The notes state that district considered Parents' concerns, but believed that the Flora Vista program adequately addressed Student's needs. The notes also stated that Del Mar Hills staff commented that Student had made significant progress and was accustomed to a half-day routine. He continued to have difficulties during lunch, but had made progress, and he was more compliant during circle time, but did not seem to be cognitively following the discussion.

80. Mother had not observed the proposed YMCA program. The team gave Mother no details as to the when or why Student might be placed there. Mother did not believe that Student would be successful in such a general education environment without an aide, that the program would not meet his needs, and that the program was not of sufficient length. Parents did not consent to the IEP. Student remained at Del Mar Hills.

81. Subsequent to this meeting, Ms. Little notified Mother that the District wanted to hold an IEP meeting to discuss the possibility of placing Student in a regional preschool program in Solana Beach. She offered no details regarding the program. Mother agreed to meet, but advised that none of the individuals whom she had brought to the previous meetings would be available.

82. On February 9, 2010, Patricia Snider, the interim Program Manager for the Solana Beach School District wrote to Ms. Dawson (the District school psychologist), advising that there would be an IEP meeting for Student at the office of the Solana Beach District on February 12, 2010, and that “[W]e will place him in the [Solana Beach regional preschool] inclusion class which runs from 8:45 until 12:45 Monday through Thursdays. Encinitas will provide transportation.” At the time she wrote the email, Ms. Snider believed that the decision to place Student in the Solana Beach regional program had already been made by the Student’s IEP team. Ms. Snider denied that she had any authority to make any decision as to Student’s placement.

*February 12, 2010, IEP Meeting*

83. On February 12, 2010, the District reconvened the IEP meeting. The IEP team consisted of Mother, Ms. Snider, Ms. Little (the NCCSE program specialist), a special education teacher who was teaching in that program at the time of the IEP meeting, and a Solana Beach District SLP, and Amanda Emmert, a school psychologist who would become the substitute special education teacher in the Solana Beach regional preschool program that was the subject of the meeting. Ms. Emmert received her B.S. degree in psychology from the University of California, San Diego in 2004, and her M.A. in educational psychology from Chapman University College, San Diego, in June 2009. She holds a California State Pupil Personnel Services Credential. Mother was advised that Ms. Emmert would be the substitute special education teacher in the class. The meeting lasted approximately one hour and 15 minutes.

84. The IEP notes stated that the Solana Beach regional program special education teacher explained the CDC preschool inclusion program. District offered placement in that program for 240 minutes per day, four days per week, with transportation. The District also offered LAS services consisting of 30 minutes per week individual and 30 minutes per week group therapy, and OT services to consist of one hour monthly consultation. The team agreed to reconvene in 30 days to review the program and services. District offered no transition plan.

85. Mother did not consent to the IEP at first. She felt that she had received very little information about the offered placement at the IEP meeting, and was under the impression that it was a pilot program that might not be available beyond the 2009-2010 school year. She eventually agreed to try the Solana Beach placement for 30 days. To assist in Student’s transition to the program, she requested pictures of the school and of the teachers. When she received the pictures, she showed them to Student, and created social stories for Student about the placement. To interest him in, and acquaint him with, the

placement, she and Student would eat lunch by the school property, and they talked about the train station that was by the school. Throughout this time, Student continued to attend preschool at Del Mar Hills. On April 12, 2010, when Student was approximately four years and three months old, Student began attending the Solana Beach program. He continued to attend this program through the time of the hearing. Part of the delay in Student's commencement of the program was due to Parents' personal circumstances, part of the delay was due to the District's spring break, and part of the delay was due to the time that Mother was implementing her transition plan. In addition to attending the Solana Beach program, Student continued to attend preschool at Del Mar Hills on a part-time basis.

#### *Description of Solana Beach Program*

86. The Solana Beach preschool inclusion program the District offered had approximately 15-16 typical preschoolers, 4 special education preschoolers, a general education preschool teacher, a special education preschool teacher, and an instructional aide. There was a behavioral specialist on campus, a school psychologist on campus, and an SLP on campus. The occupational therapist rotated among several campuses. The classroom was managed as a typical preschool program, with four learning centers, into which the children were randomly split each day. Three of the learning centers were facilitated by adults, while one center was student's free choice. Including lunch and snack, the program offered approximately 45 minutes per day of free choice play time with peers, as well as additional self-directed time with materials such as books and computers, and directed play time. The class had visual aides and social skills lessons, and used ABA principles and methodologies. The class met Monday through Friday, but the special education children did not attend on Friday. Student attended the program from 8:45 a.m. through 12:45 pm., Monday through Thursday. After 12:45, the typical children participated in the CDC preschool program until 3:00. One of the special education students stayed past 12:45 as well.

87. Student had some difficulty transitioning to the program for the first week or two. He exhibited some physical aggression and did not understand personal boundaries. He was defiant and resistant to classroom routines and following directions. He had to be removed from the classroom occasionally. When he understood what was expected of him, he had fewer difficulties. His aggressive behaviors decreased during the semester, and by the end of the semester Ms. Emmert characterized his aggressive behaviors as "not too atypical" from that of the other preschoolers. At lunch, he was a picky eater, and did not want to eat all of his meal. At first, it took him 30-35 minutes to eat his lunch. At the time of the May 28, 2010, IEP meeting, described below, he was still taking longer than the other children to eat his lunch, but by the end of the semester he was eating within the time that the other students did.

88. Mother visited the classroom on five occasions. She testified that she observed several times when teachers did not address various behavioral incidents with Student. On two of her five visits, the special education teacher was not present in the classroom. Starting in April, and once or twice per week thereafter, Student advised Mother that other students were rejecting him, and some were acting aggressively towards him.

Mother reported this to the school, and was told it would be discussed at the 30-day IEP meeting.

89. Ms. Donahue testified regarding Student's OT skills in the Solana Beach placement. Based upon her knowledge of Student as his consulting OT, she did not think that Student had a fine motor deficit, rather she felt that his fine motor skills were rather strong, and he had no visual motor deficits. He could write his name with one verbal prompt, which she stated was not a typical skill for a four-year-old. He could cut, and he was excellent at coloring within the lines. She did not believe that he needed direct services, as he had the skills necessary to function in the classroom. She testified that she could understand and implement his goals, and he made significant progress on his goals.

*Observation of Solana Beach Placement by Mr. Deak*

90. Mr. Deak observed Student at his Solana Beach placement on May 26, 2010, for approximately 45 minutes. He wrote a report of his observation. He reported that Student and a small group of peers were involved in an organized activity, during which Student was able to accept teacher's redirection and interacting with his peers. He acted impulsively and had a need for control, but he seemed generally happy and stayed focused and on-task. He complied when his teacher directed Student and his peers to transition to the next activity. However, he obstructed another student who tried to pass him and get through the door first. No teacher noticed this event at the time. Mr. Deak considered it an example of Student's lack of flexibility and lack of self-regulation skills, as well as of Student's need to control outcomes.

91. During free choice time, Mr. Deak reported that Student needed more assistance with social skills. He did not appropriately initiate a peer interaction, and did not fully engage in or complete an activity. He participated primarily in parallel play, with little to no significant peer interaction. When free choice time was over, Student participated in cleaning up, and complied with teacher instructions and redirection.

92. At circle time, Student joined in at times, and complied with teacher directions, but he was distracted by glitter on the carpet. Mr. Deak reported that the teacher used picture prompts on the wall, and many verbal positive reinforcements. Student followed all instructions to line up for snack. Student went with his class to the table for snack. Mr. Deak reported that eating snack was optional, and Student did not eat snack, but rather rode a tricycle during snack time.

93. Mr. Deak reported that the structure, supports and positive reinforcement in the classroom were beneficial to Student, and Student seemed to be adapting to the routine. Mr. Deak reported that there may have been missed learning opportunities for Student to better initiate and manage peer interactions. Mr. Deak reported that Student's impulsivity and his need to control all outcomes should be addressed, along with strategies for self-regulation. At hearing, Mr. Deak testified that Student required a one-to-one aide to avoid

these missed learning opportunities. Student required immediate intervention, as later corrective efforts would not be effective for Student.

*May 28, 2010, IEP<sup>3</sup>*

94. On May 28, 2010, the District convened an IEP meeting as a 30-day review to discuss Student's progress and services in his Solana Beach placement. The team recommended that Student remain in the Solana Beach inclusion program. The goals remained unchanged from the previous IEPs. The team decided to develop a behavior support plan (BSP), and offered behavioral services of 2 hours per month of consultation from a behavior specialist to the classroom teachers and staff. The District also offered extended day services of two hours per day, 4 days per week (12:45 p.m. to 2:45 p.m.), either one-to-one or in a small group, for pre-teaching and learning of social play skills with peers. One hour per week of these extended day services would include a social play group led by the behavior specialist with consultation by the LAS specialist. The behavioral specialist would consult with mother for one hour per month to review progress and data. Related services would consist of a 30-minute OT consultation one time per month, and an OT reevaluation to determine present levels of performance in the areas of visual motor, fine motor, and sensory processing skills. The team notes reflect that Student's fine motor skills were discussed, and his classroom performance was very inconsistent. District would also perform a gross motor skills and an APE evaluation. LAS services would consist of a 30-minute consultation, at a frequency of one time per week. The team also recommended ESY services during the 20 days of ESY to address behavioral/social skills training.

95. The IEP reflected that Student made progress on all his goals, and had met the June 2010, objectives on Goals 3 and 4. The behavior specialist reported to the IEP team that Student seeks negative or positive attention from peers and adults, and required clear explanations when told not to do something. He sought control of situations, and unstructured times were more challenging for him. The IEP notes reflected that Student was physically aggressive at school, particularly during unstructured time, which discouraged typical peers from associating with him. The IEP team also noted that Student took the longest to eat his lunch. At the time of the hearing, the District was in the process of conducting an OT evaluation of Student.

*Expenses Incurred by Parents for Additional Services*

96. Mother paid for therapy from Dr. Baker-Ericzén from November 2009 to January 2010, in the amount of approximately \$3500. Mother transported Student to and from Dr. Baker-Ericzén's office, which was a round-trip of approximately 40 to 50 miles. Mother also paid for Pathways, a 12-week program at Rady's Autism Center, which was recommended by Dr. Barbieri-Welge. Pathways involved the services of a speech and

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<sup>3</sup> Whether the May 28, 2010, IEP offered a FAPE is not at issue in this action. The services offered in the IEP and various matters documented in the IEP, however, are relevant to the issues in this case.

language therapist, a behavioral specialist, and an OT, who addressed pragmatic language and behavioral needs. Pathways also included workshops for parents to educate them regarding their children's therapy. Student attended Pathways from January 2010, through April 2010, at a cost to Mother of approximately \$1300. He made progress in the program. Mother transported Student to and from Pathways, which was a round-trip of approximately 60 miles. Student continued to attend Del Mar Hills part-time through June 2010. He attended a preschool program at Ecke Family YMCA (Ecke) during the 2010 ESY period, in the afternoon and on Fridays, and then from 8:30-5:00 after ESY ended until the start of the 2010-2011 school year. Mother submitted invoices for this period, reflecting a total cost to Mother of \$420. This program was recommended by Dr. Baker-Ericzén, and provided Student the opportunity to play with typical peers. He currently attends the program from 3:00 p.m. to 5:30 p.m. from Tuesday through Thurs, and on Friday from 8:30 a.m. to 3:00 p.m. Mother picks him up there on Tuesday and Thursday, and on Friday she transports him there and home. The distance between Ecke and Student's home is approximately 4 miles, one-way.

97. Student attended Del Mar Hills until June 2010. From November 2009 through April 2010, Student attended Del Mar Hills part time, for which Mother paid approximately \$859 per month.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528].)

### *Issues 1A and 1B: Child Find and Student's Eligibility for Services in 2008-2009*

2. Student contends that the District violated its child find obligations during the 2008-2009 school year, and thereby failed to find Student eligible for special education during that time.

3. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) Similarly, California law defines special education as instruction

designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).) The list of DIS services set forth in the California Education Code contains examples, and is not all-inclusive. (Ed. Code, § 56363, subd. (b).)

4. Under the IDEA, a child who is three to five years of age is eligible for special education if the child needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, multiple disabilities, or specific learning disabilities, or is experiencing developmental delays. (20 U.S.C. § 1401(3)(A)(i) and (ii) and (3)(B)(i) and (2).)

5. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 111(a) (2006).)<sup>4</sup> California specifically obligates the SELPA to establish written policies and procedures for use by its constituent local agencies for a continuous child find policy. (Ed. Code § 56300, subd. (d)(1). The school district must actively and systematically seek out “all individuals with exceptional needs, from birth to 21 years of age,” including children not enrolled in public school programs, who reside in a school district or are under the jurisdiction of a SELPA. (Ed. Code, § 56300 et seq.) This duty is commonly referred to as “child find.” The IDEA and the California Education Code do not specify which activities are sufficient to meet a District’s child find obligation.

6. In this case, at all relevant times NCCSE (the SELPA) had written policies and procedures for a continuous child find policy. NCCSE, the District, and the San Diego Office of Education employed a variety of active and systematic, overlapping child find measures. These included SELPA-wide newspaper advertisements and meetings with private school providers, and the county-wide distribution of brochures and fliers local agencies, pediatric offices, and day care centers. The District maintained close contacts with local pre-schools and the local Head Start. The District also had a close relationship with the Regional Center, which advised the District when the children it served were approaching the age of three years. The District then met with the families of those children to describe how they could access preschool special education services. These child find activities constituted systematic and active attempts to directly and indirectly notify parents of the availability of special education services, pursuant to the IDEA and the California Education Code.

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<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version, unless otherwise indicated.

7. For unknown reasons, these child find efforts did not reach Parents from November 2008, when Student was two years old and they moved into the District, until October 2009, when Dr. Barbieri-Welge at Rady advised Parents to seek special education assessments and services from the District. Prior to that time, Parents did not receive notice, either directly by seeing a newspaper advertisement, or indirectly by notification from a Regional Center, doctor, or private preschool, of the availability of special education assessments and services from the District. Student presented no evidence that the Regional Center or any other entity or agency was unaware of the District's child find efforts, such that the District violated the Education Code and the IDEA by failing to actively and systematically seek out children with exceptional needs. Student contends that the District's contacts with the Regional Center regarding children under the age of three who received Regional Center services was not a sufficient child find activity, as those contacts were not directed at children such as Student, who was not found eligible for Regional Center services before age three. However, the evidence was uncontradicted that the Regional Center was aware of the District's special education programs and services, and frequently referred children to the District. Furthermore, the evidence was uncontradicted that the District received referrals from a variety of sources in addition to the Regional Center, including local preschools, pediatricians' offices, and other children's agencies, which indicates that the District's child find efforts were both sufficient and effective.

8. Under these circumstances, District complied with its child find obligations, and did not deny Student a FAPE by failing to actually locate Student and Parents through the child find efforts of the SELPA and the District between November 2008, when Mother and Student commenced residing in the District, and October 2009, when Mother first contacted the District seeking special education services for Student. (Findings of Fact 1-18, Legal Conclusions 1-7.)

9. Because the District met its child find obligations, it did not have any obligation to find Student eligible for special education during the 2008-2009 school year, and did not deny Student a FAPE during that time period. (Findings of Fact 1-18, Legal Conclusions 1-8.)

#### *Issue 2A: Appropriate Assessments*

10. Student contends that the District's OT assessment was insufficient as it did not include an assessment of Student's gross motor skills, and did not mention any assessment or observation Student's fine motor or visual motor skills. Further, the District did not conduct a Functional Analysis Assessment or Functional Behavioral Assessment of Student. District contends that the District's assessment met each of the requirements for an initial assessment in the California Education Code, and that Student did not require an FBA or additional standardized tests. Further, Dr. Patel's evaluation coupled with Ms. Sorg's observation constituted a comprehensive evaluation in the area of OT.

11. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2),(3); Ed. Code, § 56320, subds.(e) & (f).)

12. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (Ed. Code, §§ 56320, subd. (g), and 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324.) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(2),(3); Ed. Code, § 56320, subds. (a) & (b).)

13. In conducting the assessment, the school district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent that may assist in determining whether the student is a child with a disability. (20 U.S.C. §1414(b)(2)(A)(i).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B).) The school district must use technically sound instruments to assess the relative contribution of cognitive and behavioral factors, as well as physical or developmental factors. (20 U.S.C. § 1414(b)(2)(C).)

14. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025 at 1031-1033.) States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc.* (9th Cir. 1992) 960 F.2d 1479, 1483.) Citing *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*), the court also recognized the importance of adherence to the procedural requirements of the IDEA, but indicated that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both

of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

15. The issue of whether a school district has offered a FAPE has substantive aspects in addition to the procedural components. In *Rowley, supra*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at 201.) In *County of San Diego v. California Special Education Hearing Office, et al.* (1996) 93 F.3d 1458, 1467 (*County of San Diego*), the court specified that educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.

16. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code § 56031.)

*Issue 2A (i): OT Assessment*

17. Dr. Patel's clinical OT evaluation of Student specifically recommended that Student be evaluated by a school-based OT in two areas: fine motor skills, and visual motor skills, on both of which he demonstrated delays. In particular, he demonstrated an immature grasp on a marker. As Dr. Patel's OT assessment had occurred only approximately two

months prior to the District's OT assessment, the District's OT assessment was necessarily limited. District was unable to administer the same assessment instruments as did Dr. Patel, so as to avoid a "practice effect." The District's assessment only involved observation, however, even that was limited as Student did not entirely cooperate with Ms. Sorg, the District OT. There was no specific indication in the District's report of the assessment that Ms. Sorg observed Student's grasp, or assessed Student's visual motor skills. Ms. Sorg testified that she did so.

18. Student also contends that District did not assess Student's gross motor skills. However, the District assessors observed Student at both Flora Vista and at his private preschool, and reflect that they saw him engage in gross motor activities, such as running, and pushing a tricycle. Ms. Sorg testified, without contradiction, that she observed Student participate in gross motor activities. The District's assessment report does not reflect that any assessor observed any impairments in Student's gross motor skills. Student presented no evidence that Student's gross motor skills affected his educational needs.

19. Student has not met his burden of demonstrating that the District's OT assessment was inappropriate because the District did not formally assess Student's gross motor skills. Student has not demonstrated that District's failure to assess Student in this area affected his educational needs, and therefore this failure did not impeded Student's right to a FAPE, deprived him of an educational opportunity, or deprived Parents of the opportunity to participate in the IEP process. Nor has Student met his burden of demonstrating that the District's OT assessment was inappropriate with respect to Ms. Sorg's assessment of Student's fine motor and visual motor skills. Student presented no qualified occupational therapist to testify in support of Student's position. Ms. Sorg and Ms. Donahue, both qualified occupational therapists, testified credibly that the assessment was appropriate. Ms. Donahue's testimony was particularly credible, as she was Student's consulting occupational therapist at Solana Beach, and she was aware of Student's actual performance in the classroom. In this regard, she credibly testified that Student had the fine motor and visual motor skills necessary to function in the classroom.

20. Under these circumstances, the OT assessment was appropriate. Ms. Sorg's conclusion in her OT assessment that Student did not require OT services in the areas of fine motor and visual motor skills did not impair Student's right to a FAPE, impair the ability of Parents to participate in the process, or deprive Student of an educational benefit. (Findings of Fact 1-3, 5-16, and 18-89, Legal Conclusions 1, 3-4, and 10-19.)

*Issue 2A (ii): Behavioral Assessment*

21. California law and the IDEA require that an IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address behavior when a student's behaviors impede his learning or that of others. (Ed. Code, § 56341.1, subd. (b)(1); 34 C.F.R § 300.324(a)(2)(i).) Under the IDEA, the Department of Education recommends that school districts be proactive and perform a functional behavioral assessment (FBA), when a child engages in behaviors which interfere with learning.

Following the FBA, a school district develops a document called a behavioral intervention plan or behavioral support plan.<sup>5</sup> (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46721 (August 14, 2006.))

22. At the time Student enrolled in the District, District was aware of Student's aggressive behaviors in preschool, as documented by Ms. Trump in her letter of October 9, 2009, Mother's Report, and the Rady Developmental Evaluation. Student's BASC-2 scores, as reported in the District's assessment report, reflected Student's aggressive behaviors, which the report described as "Critical Items." At the January 7, 2010, IEP meeting, the team specifically determined that Student's behavior impeded his learning or that of others. The team noted that Student was easily frustrated and had difficulty with compliance, rigidity, self-regulation, social negotiation, aggression, and coping skills. Some of these behaviors, including aggression, were also noted in the May 28, 2010, IEP. Indeed, the May 28, 2010, IEP reflected Student's perception that he was being rejected on the playground due to his maladaptive behaviors, and that his perception was shared by his classroom teacher. In view of the broad definition of educational benefit as including social and emotional needs that affect school behavior and socialization, Student's rejection by his peers due to his behaviors was impeding his learning. This situation is not ameliorated by the fact that Student had made progress on the behavioral goals in his IEP because, as is further discussed below with respect to Issue 2C, these goals did not sufficiently address Student's aggressive behaviors and social skills deficits. Nor is this situation ameliorated by Ms. Emmert's testimony that, by the end of the semester, Student's aggressive behaviors were "not too atypical" from those of the other preschoolers. Ms. Emmert's characterization of Student's behavior is vague and unmeasurable, and therefore not entirely reliable. A more reliable measure of a decline in Student's aggressive behaviors would likely have been available if the Student's IEP contained a goal regarding aggression, as then his aggressive behaviors could have been more objectively and accurately tracked, but there was no such goal. Furthermore, there was no evidence that, by the end of the semester, Student's behaviors had improved to the degree that he was no longer being rejected by his peers.

23. Dr. Baker-Ericzén, the Student's psychologist, testified at hearing that Student required an FBA, so that the functions of Student's behaviors could be determined and so that his behaviors could be appropriately managed pursuant to established ABA principles. Dr. Baker-Ericzén only treated Student on six or seven occasions, and did not have a large

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<sup>5</sup>In California, the behavioral intervention plan that is generated after an FBA is commonly called a behavioral support plan (BSP), to differentiate it from the behavioral intervention plan that must be generated after a rigorous, systematic and prescriptive assessment referred to as a Functional Analysis Assessment (FAA.) (Cal. Code Regs., tit. 5, § 3052.) An FAA is administered only after certain prerequisites have been met, including after the IEP team has determined that the behavioral approaches specified in the student's IEP have been ineffective. (*Id.*, § 3052(a)(6)(b).) An FAA would not have been an appropriate assessment in this case, as that prerequisite was not met as of the time of the series of meetings that constituted the initial IEP.

amount of experience with him, but her description at hearing of his behaviors was consistent with all other evidence presented by both parties at hearing, and her opinion that District should have performed an FBA was credible.

24. Indeed, Dr. Baker-Ericzén's testimony in this regard was not substantially disputed by District. The District believed, however, that with the ABA environment and the services and interventions in the IEP, Student would have made progress in the District's offered placements. If he did not, the District would have called Parents and offered an FBA assessment plan. However, Student met his burden of demonstrating that his behaviors should have been more thoroughly assessed. They interfered with his learning, and pursuant to the Department of Education recommendations, District should have performed an FBA. The District's failure to do so impaired Student's right to a FAPE, and deprived him of an educational opportunity. (Findings of Fact 1-16, 18-95, Legal Conclusions 1, 3-4, and 10-23.)

#### *Issue 2B: Predetermination of Placement*

25. Student contends that the District predetermined its offers of placement in the IEPs of January 7, 2010, and February 12, 2010. With respect to the January 7, 2010, IEP, Student contends that parental input was not meaningfully sought during the meeting, and there was no discussion regarding placing Student in any placement other than the SDC in Flora Vista. With respect to the February 12, 2010, IEP meeting, Student contends that the only placement offered was the placement in the inclusion program in Solana Beach, and there was no discussion of the District's offer to place Student in the program. District contends that Parents were able to, and did, provide comment and express their disagreement with the placement offered at each of the meetings.

26. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances in which placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.23 840, 858-859.) [Court found predetermination as the District had an unofficial policy of not providing an intensive, one-to-one, ABA program, regardless of the evidence of Student's needs for such services.] One or both of the student's parents are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1).) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [A parent who had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d

1115, 1131.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

27. As was stated in Legal Conclusion 14, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits.

28. District did not predetermine placement at either the January 7, 2010, IEP meeting, or the February 12, 2010, IEP meeting so as to deny Student a FAPE. At the conclusion of the January 7, 2010, IEP meeting, the District offered placement in the afternoon session of the preschool SDC at Flora Vista. This offer was made after the team discussed Student's assessments, identified areas of need, developed present levels of performance, and goals and objectives. While performing all of these tasks, the evidence demonstrated that the IEP team considered the information presented by Mother to the District. For example, the District assessment report demonstrates that the assessors considered the information Mother provided to the District. These included the OT, LAS, and developmental assessments performed by Rady, the report submitted by Ms. Trump of Student's behavior at Del Mar Hills, and Mother's report of Student's challenges. The assessment also considered the information Mother provided to the assessors through the ratings scales she was requested to complete. The IEP notes demonstrate that this information was also considered by the IEP team as a whole in developing the present levels of performance and areas of need.

29. Mother, Ms. Trump, and Dr. Baker-Ericzen testified at hearing that the District members of the IEP team did not consider their concerns, which they expressed at the meeting, that the proposed placement did not include a one-to-one aide, and interfered with Student's nap and lunchtime. Instead, the District personnel responded that Student would adjust to the lack of a nap, and would adjust to a different time for eating lunch. The District also asserted at the meeting that a one-to-one aide was not necessary and could even be detrimental, as Student would become dependent upon a one-to-one aide. Student contends that Ms. Dawson's private statement to Mother at one of the assessment sessions that the District did not use one-to-one aides because students become aide-dependent constitutes evidence of predetermination. However, this single comment, by one person, during an informal conversation, and which was not testified to by any person other than Mother, cannot be interpreted as expressing a District policy that the District would not provide one-to-one aides regardless of a child's needs. Student did not prove that the District had a policy of not using one-to-one aides. These factors differentiate this case from *Deal, supra*, in which the court determined that the school district had an unofficial policy of refusing to provide services regardless of the evidence presented by the parents. Rather, as Mother admitted, the District members of the IEP team initially considered only offering the Flora Vista preschool placement for two days per week. After discussion, they offered the Flora Vista placement for four days per week.

30. In summary, the evidence reflects that the District incorporated Parents' input into their decisions as to Student's IEP, and, in particular, listened to and responded to the Parents' concerns about the proposed placement at Flora Vista. Parents did not agree with the placement and services offered, but the District, as it was required to do, offered placement and services after these discussions. The IEP meeting was not a "take it or leave it" situation. Parents had the opportunity to express their concerns, and the District members of the IEP team considered their concerns. Under these circumstances, the Parents participated in the January 7, 2010, IEP meeting in a meaningful way, even though the District did not offer the placement and services that Parents preferred.

31. There was also no predetermination of placement with respect to the February 12, 2010, IEP meeting, at which time the District offered placement in the inclusion classroom at Solana Beach. The February 12, 2010, meeting was a continuation of the January 7, 2010, and January 26, 2010, meetings, at both of which the District had offered placement in the SDC at Flora Vista, with the addition, as expressed at the January 26, 2010, IEP meeting, of transition into a YMCA general education preschool program two days per week that also met at Flora Vista. Parents had rejected these placement offers. District continued to search for an appropriate placement for Student that would address Parents' concerns, and, in early February, found that a SELPA inclusion program in Solana Beach had openings. Mother had the opportunity to visit the proposed placement, and, during the visit, she discussed the proposed placement with Ms. Nest, the Program Specialist for the Solana Beach School District. District then contacted Mother to schedule an IEP meeting, and advised her that the purpose of the meeting was to discuss a preschool placement in Solana Beach. District then scheduled and convened the meeting. No other substantive matters were discussed at this meeting, as there was no new information to change the present levels of performance or the goals and objectives that were developed when the team met on January 7, 2010. Placed in context, the District's focus on the proposed Solana Beach placement at the February 12, 2010, meeting was not an attempt to cut-off any discussion with Parents, or to project a "take it or leave it" position. Rather, the District was attempting to be responsive to Parents' concerns, and to pro-actively attempt to obtain the Parents' consent to the IEP so that the District could begin educating Student. Under these circumstances, to consider the District's efforts which culminated in the offer of placement at the February 12, 2010, meeting (an offer that the Parents ultimately, if tentatively, accepted) as an improper predetermination of placement would be inimical to the policy that supports districts and parents working collaboratively to provide Students with a FAPE.

32. Ms. Snider's email of February 9, 2010, stating, "We will place him in the inclusion class. . . ." does not change this conclusion. Ms. Snider was not an employee of the District at any relevant time, and her statement was based upon the incorrect assumption that the entire IEP team had already agreed to the placement at Solana Beach. There was no evidence as to how she arrived at that assumption, but the incorrect assumption renders the statement meaningless. Second, as explained above, given that this was the third session of the IEP meeting, that the express purpose of this particular session was to discuss the possible placement of Student at Solana Beach, that Parent had already refused two prior placement offers, that Parent had, during the various continuances of the IEP meetings,

visited and observed several placements, the policies underlying the impropriety of predetermination are not applicable to the situation. The evidence demonstrated that, at the time of Ms. Snider's email, District and Mother were focused on seeking placements that met Student's needs, that had an opening for Student, and of which Parents would approve. This was not a "take it or leave it" situation which is one of the hallmarks of predetermination. Rather, this was a situation where both District and Parents were working together to find a suitable and acceptable educational placement for Student.

33. Student did not meet his burden of proving that District predetermined Student's placement. District did not deny Student a FAPE on this ground. (Findings of Fact 1-85, Legal Conclusions 1, 3-4, 15-16, and 25-32.)

*Issue 2C: Goals*

34. Student contends that the January 7, 2010, IEP, the January 26, 2010, IEP, and the February 12, 2010, IEP do not contain appropriate and measurable goals that address all of Student's needs in the areas of fine motor skills, visual motor skills, sensory processing, behavior, and nutrition. District contends that the goals were appropriate and measurable, and addressed all of Student's needs.

35. The IEP must include a statement of measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and a description of how the child's progress toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§300.346, 300.347.) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. Furthermore, the contents of an IEP are evaluated pursuant to the "snapshot rule," or in light of information that was available to the IEP team at the time it was developed. The IEP is a "snapshot" and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams, supra*, 195 F.3d at p. 1149.)

36. As was stated in Legal Conclusion 14, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits. As was stated in Legal Conclusion 15, in *County of San Diego, supra*, the court specified that educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization.

37. The goals developed in the January 7, 2010, IEP meeting were not changed during the January 26, 2010, and February 12, 2010, IEP meetings. Goals 1 and 2 were directed at Student's needs in pragmatics/social language skills. Goal 3 was directed at Student's social/behavior skills, and Goal 4 was directed at Student's compliance/behavior skills. Goals 3 and 4, in particular, were directed at Student's sensory processing needs. Each of these goals was appropriately directed at needs of the Student, as determined by the

IEP team. Each of these goals was measurable. The evidence was uncontradicted that Student's teachers and service providers were able to interpret these goals, work with Student on these goals, and measure Student's progress on these goals.

38. Student contends that the goals did not address Student's sensory needs, including sensitivities to touch, taste, and noise. Student's IEP, however, sufficiently addressed his sensory needs. First, Student's sensory needs were addressed in Goals 3 and 4, for which the OT was responsible, as well as in the behavioral supports section of the IEP, which called for preferential seating, a designated "safe" place, sensory supports, clear/consistent expectations and predictable routines, and social stories. Secondly, one of the stated purposes of the one hour per month of OT consultation was so that the OT could assist in the development of sensory strategies. Finally, Student presented no evidence that Student's sensitivities in the areas of touch, taste, and noise affected Student's education and therefore were required to be addressed through additional goals in the IEP. Therefore, Student did not require additional goals regarding his sensory needs to receive a FAPE. (Findings of Fact 1, 3-71, Legal Conclusions 1, 3-4, 15-16, and 34-37.)

39. The goals also did not address Student's fine motor and visual motor skills. As was described above in Legal Conclusion 19, the District's OT assessment did not find these as areas of need for Student. Furthermore, District witnesses Ms. Sorg and Ms. Donahue credibly testified that fine motor and visual motor skills are normal aspects of the preschool curriculum. Dr. Baker-Ericzén testified that Student had needs in these areas, but her opinion was not persuasive as she is not an occupational therapist. Student did not meet his burden of showing that the District's failure to establish goals in these areas was a procedural violation of the IDEA and the Education Code. (Findings of Fact 1, and 3-71, and 89, Legal Conclusions 1, 3-4, 15-16, and 34-37.)

40. There was no goal to address nutrition, or, more precisely, Student's unwillingness to eat at snack time or lunch time. The IEP team knew of Student's disinclination to eat at school at the time of the IEP meeting, as it was reported in Ms. Trump's letter, and in Mother's Report. The IEP dated May 28, 2010, also reflects that Student was dawdling over his lunch. However, there was no specific evidence that Student's failure to eat his lunch in a timely manner at Solana Beach affected his education. Furthermore, there was evidence that by the end of the semester, Student was eating his lunch within the time that the other students ate their lunch. Under these circumstances, Student did not meet his burden of showing that the District's failure to establish a goal in this area was a procedural violation of the IDEA and the Education Code. (Findings of Fact 1-71, and 83-95, Legal Conclusions 1, 3-4, 15-16, and 34-37.)

41. However, the goals do not address all of Student's behavioral needs, as reflected in the assessments and by the information available to the IEP team. The behavior goals address Student's compliance with the term "no," Student's ability to wait for desired items, Student's compliance during transitions, and Student's abilities to follow directions and participate in class activities, but they do not directly address Student's aggression towards others, or his need for social skills instruction. Student's aggression and social skills

deficits were known to the District at the time of the IEP meeting through a variety of sources, including the letter from Ms. Trump, Mother's Report, the Rady developmental assessment, and the District's own assessment. District contends that the behavioral goals were developed to reduce aggressive behavior by addressing Student's behavior during times when aggressive behavior was likely to occur, such as transition time. This contention is not persuasive, for several reasons. First, the IEP does not state that the purpose of any of the goals was to address Student's aggression. Rather, Goal 3 is directed to Student's agitated, defiant, and tantrum behaviors during a transition or a non-preferred activity. Goal 4 is directed at Student's unwillingness to follow the class routine. Second, there was no evidence that, when Father mentioned at the IEP meeting that the goals did not address aggression, anybody from the District addressed his concern at all, let alone by an explanation that the goals did, in fact, address aggression. Third, there was no evidence that the personnel who were to implement the goals understood them as goals to diminish aggression.

42. The failure of the IEP to include goals in the areas of aggression and social skills constituted procedural violations of the IDEA and the California Education Code. These failures impeded Student's right to a FAPE and deprived him of educational benefits. Student required goals to help him control his aggression and promote positive social interactions, as his behaviors were adversely affecting his socialization with his peers, which is an important part of his education. (Findings of Fact 1, and 3-95; Legal Conclusions 1, 3-4, 15-16, 34-37, and 41.)

#### *Issue 2D: Offer of Specific Placement*

43. Student contends that the offer of placement at the January 26, 2010, IEP meeting was not sufficiently specific, as it did not specify when Student would begin to attend the YMCA program. District contends that the offer was sufficiently specific, and that Mother did not express any lack of understanding of the offer.

44. The IDEA requires a District to make a formal, written offer of placement. (*Union School Dist. v. Smith* (9th cir. 1994), 15 F.3d 1519, 1526 (*Union*).) In *Union*, the District failed to formally offer a placement that the District deemed appropriate because the parents in that case had expressed unwillingness to accept that placement. In determining that the District had thereby committed a procedural violation of the IDEA, the *Union* court noted that a formal written offer of placement provides a clear record of what was offered, and greatly assists parents in presenting due process hearing complaints. (*Id.*)

45. As was stated in Legal Conclusion 14, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits.

46. Unlike the District in *Union*, the District in this case made a formal, written offer of placement in the January 26, 2010, IEP, which was sufficiently specific so as not to

violate the IDEA. The District offered placement at the Flora Vista preschool SDC four days per week, with Student to participate in the YMCA general education preschool program at Flora Vista on two of those days. The team was to meet within 30 days to discuss Student's transition to the YMCA program on those two days. The only part of the District's offer that was left to be determined was the team's development of a transition plan to the YMCA program. The team was required to leave this portion of the offer unspecified. Student had never been enrolled in the District for preschool, and District had no knowledge as to how he would adjust to either the placement at Flora Vista, or the placement in the YMCA program. Under the circumstances, it was prudent for the District to allow the IEP team time to determine how to introduce Student to the YMCA program. Student contends that Parents did not understand the YMCA portion of the offer, but there was no evidence that Parents asked any questions about the offer, either at the IEP meeting or thereafter. There was no evidence that, had Parents asked questions to clarify the offer, the District would have ignored or evaded the questions. Under these circumstances, the offer was not unspecified to the degree that it denied Student a FAPE. (Findings of Fact 1, and 51-80, Legal Conclusions 1, 3-4, 15-16, and 43-46.)

*Issue 2E: No General Education Teacher at February 12, 2010, IEP Meeting*

47. Student contends that he was denied a FAPE, because there was no general education teacher at the February 12, 2010, IEP meeting who could discuss the inclusion placement. District contends that Student was not denied a FAPE because of the absence of a general education teacher at that meeting. District contends that the February 12, meeting was a continuation of the January 7, and January 26, 2010, meetings, and that a general education was present during both of those meetings, when mainstreaming was discussed. District also contends that the placement offered at the February 12, 2010, IEP meeting was not different from the placement offered at the January 7, and January 26, 2010, meetings. District further contends that the other District and SELPA personnel at the February 12, 2010, meeting was able to provide information about the proposed inclusion placement and answer Mother's questions.

48. The IDEA regulations specify that an IEP team must include: the parents, a regular education teacher if the child is, or may be, participating in the regular education environment; one special education teacher of the child, a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency; and an individual who can interpret evaluation results. At the discretion of the parent or of the school district, the team may include other individuals who have knowledge or special expertise regarding the child, including related services personnel, and, when appropriate, the child. (34 C.F.R. 300.321.) Additionally, as was stated in Legal Conclusion 14, procedural violations only constitute a denial of a FAPE if they (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits.

49. The absence of a general education teacher at the February 12, 2010, meeting constituted a procedural violation of the IDEA and the Education Code. However, that absence did not deprive Student of a FAPE. The meeting on February 12, 2010, was the third session of the Student's initial IEP meeting, and a general education teacher had been available at each of the prior sessions. The general education issues pertaining to Student had been discussed at the prior sessions of the IEP meeting.

50. Contrary to the District's contention, the placement offered at the February 12, 2010, meeting was not equivalent to the placement offered at the January 7, and January 26, 2010, meetings. At the latter meetings, the District offered placement in an SDC at Flora Vista. At the January 26, 2010, meeting, this offer was supplemented by an offer of placement two days per week in a YMCA pre-school program. The offer at the February 12, 2010, IEP meeting was for a preschool inclusion program at Solana Beach: a different type of program at a different campus. However, the February 12, 2010, IEP meeting included the special education teacher who taught in the inclusion class, and the notes reflect that she described the program. Furthermore, there was no evidence that Mother had any questions or concerns about the program, or about general education issues, that a general education teacher would be required to answer, that were not answered. For example, she was concerned about Student's transition into the program, which was a concern she had at the previous two meetings as well, when a general education teacher was present. Mother's concerns about this particular program involved whether the program was experimental and whether it would be continued at the end of the semester. There was no evidence that the presence of a general education teacher at the meeting would have alleviated those concerns.

51. Under these circumstances, the absence of a general education teacher at the February 12, 2010, IEP meeting did not impede Student's right to a FAPE; (2) significantly impede Mother's opportunity to participate in the decision-making process; or (3) cause a deprivation of educational benefits. (Findings of Fact 1, 51-85; Legal Conclusions 1, 3-4, 15-16 and 47-50.)

*Issues 2F, 2G, and 2H: Placement Offers in the LRE*

52. Student contends that the placement offers at each of the IEP meetings were not reasonably calculated to enable Student to receive educational benefit. Student contends that all three of the offered placements were not lengthy enough during the day to address Student's needs, were offered during his nap time, were only offered for four days per week, and did not give Student the opportunities for facilitated play that he required, including the assistance of a one-to-one aide.<sup>6</sup> Student further contends that the placement offers were not in the LRE.

53. District contends that all of the placement offers were appropriate. Both the Flora Vista and Solana Beach classrooms had instructional supports, such as sensory and

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<sup>6</sup> Student's contentions regarding his need for a one-to-one aide are discussed below, with respect to Issue I (i).

visual aids, and the use of centers, to teach students transition skills in preparation for kindergarten. Both classes were based on principles of applied behavior analysis. Both settings offered proximity to general education students and high-functioning students who had special needs. Student made progress on his goals in the Solana Beach placement, even though he had only been in the placement for approximately six weeks.

54. As was stated in Legal Conclusion 14, an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon, supra*, 195 F.3d at p. 1149.)

55. As was stated in Legal Conclusion 16, to determine whether a school district's program offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District, supra*, 811 F.2d 1307, 1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. However, to meet the level of educational benefit contemplated by *Rowley* and the IDEA, the school district's program must result in more than minimal academic advancement. (*Amanda J. v. Clark County School Dist., et al., supra*, 267 F.3d at p.890.)

56. The California Education Code provides that special education group preschool programs need not exceed four hours per day, unless determined otherwise by the IEP team. (Cal. Ed. Code, § 56441.3.)

57. School districts are also required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.) California law requires that a continuum of program options be available to meet the needs of children in special education, which range from regular education programs (the least restrictive environments) through resource specialist programs, special day classes, non-public schools, and home, hospital, or other institutional instruction (the most restrictive environments). (Ed. Code, § 56361.)

58. In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic

benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento Unified School District v. Holland (Rachel H.)* (9th Cir. 1994) 14 F.3d 1398, 1403.) (*Holland.*)

*Issue 2F: January 7, 2010, IEP Placement Offer*

59. At the January 7, 2010, IEP meeting, the District offered a placement in the afternoon preschool SDC at Flora Vista, for approximately three hours per day, for four days per week. Student did not establish that this schedule was of such insufficient length that it was not reasonably calculated to provide him with some educational benefit. At the time of this IEP meeting, the District knew that Student was in a half-day program at Del Mar Hills, and also knew that Student's behavior had improved when he was shifted to a half-day program from a longer school day. Dr. Baker-Ericzén's testimony that research had demonstrated that young children with autism, such as Student, required more hours and a longer school day, including two hours of free play time, is not persuasive on this point. Dr. Baker-Ericzen admitted that her testimony was not based upon the requirements of a FAPE, which are the requirements that govern the District's offerings. Nor was there any evidence that the research upon which Dr. Baker-Ericzén relied was based upon the requirements of a FAPE, such that, to receive a FAPE, the research requirements must be followed for each child with autism. In this regard, Dr. Baker-Ericzén provided no basis to support an opinion that Student must receive all of his free play time, or the entire 25-hour program that she recommended, in a District placement. Under *Rowley*, District need not provide Student with the best education, but only with an education that provides him with meaningful educational benefit. Applying the "snapshot" rule, given what the District knew about Student at the time of the January 7, 2010, IEP, and given that the District was not legally required to provide a program longer than four hours per day, the weekly amount of hours of the Flora Vista SDC was reasonably calculated to provide Student with some educational benefit.

60. However, the Flora Vista SDC program was not a placement in the LRE. An SDC is a more restrictive placement than a general education classroom. (Education Code § 56361) Applying the *Holland* factors, this placement was not in the LRE for Student, based upon the information that the IEP team had at the January 7, 2010, IEP meeting. First, the District's psychoeducational assessment revealed that Student was intelligent and his preacademic skills were at or above grade level expectations. He was academically capable of participating in a general education classroom, with appropriate structure and behavioral, LAS, and OT supports. The evidence showed that Student would have some, but limited exposure to typical peers from neighboring classrooms at Flora Vista, but the Flora Vista SDC would not provide Student with the same academic environment as a general education classroom. Second, Student would obtain non-academic benefits from interacting with the typical children in a general education environment, as they would serve as role models for him, and he was deficient in pragmatic language and social skills. Further, he had demonstrated that he wanted to socialize with other children. Third, there was no evidence

that Student's presence in the classroom would adversely affect the other children in the classroom, especially if Student had appropriate behavioral support. At the time of this IEP meeting, he was attending a general education private preschool part-time, whose staff felt that he could continue to attend there. There was no evidence regarding the cost of educating Student in a general education environment, so this factor cannot be considered in this Decision.

61. The restrictive nature of the SDC classroom offered at the January 7, 2010, IEP meeting was inappropriate for Student, and therefore the offer of placement in the January 7, 2010, IEP was not an offer of a FAPE in the LRE. (Findings of Fact 1-73, Legal Conclusions 1, 3-4, 15-16 and 52-60.)

*Issue 2G: January 26, 2010, IEP Placement Offer*

62. At the January 26, 2010, IEP, the District offered placement in the Flora Vista SDC in the afternoon, for four days per week, with two of those four days involving participation in the YMCA program from 9:00 a.m. to 2:00 p.m. The number of weekly hours in this placement offer, like the placement offer on January 7, 2010, did not deny Student a FAPE, as was discussed above in Legal Conclusion 59. This placement was also an appropriate placement in the LRE, based upon the information the IEP team had at the time. The placement offered at the January 26, 2010, IEP, provided Student with two days a week in the general education setting, for five hours each day. It provided Student with more exposure to a general education classroom and to typical children than did the Flora Vista SDC. The *Holland* factors militate in favor of this placement. Considering the factor of academic benefits, Student was cognitively capable of handling the academic content in the general education classroom, with appropriate supports. Considering the factor of non-academic benefits, Student would have improved his social and pragmatics language skills with the typical children in the YMCA environment. Considering the factor of the effect of Student's presence in the classroom on the other students and the teacher, there was no evidence that the children or teachers in the YMCA program would have suffered detriment by virtue of Student's presence in the classroom. There was no evidence regarding the cost of educating Student in this environment, and thus that factor will not be considered in this decision. Therefore, the *Holland* factors weigh favor of the placement of two days per week in the SDC, and two-days per week in the YMCA program.

63. The classroom offered in the January 26, 2010, IEP was an appropriate classroom placement for Student. (Findings of Fact 1-79, Legal Conclusions 1, 3-4, 15-16, 52-58, and 62.)

*Issue 2H: February 12, 2010, IEP Placement Offer*

64. At the February 12, 2010, IEP meeting, the District offered placement in an inclusion preschool class in Solana Beach from 8:45 a.m. to 12:45 p.m., Monday through Thursday.

65. Student contends that this placement was inappropriate, because it did not provide sufficient hours to meet Student's needs, and because it did not provide sufficient free play time, as recommended by Dr. Baker-Ericzén. Student also contends that he required a one-to-one aide.<sup>7</sup>

66. For the reasons discussed in Legal Conclusion 59, the lengths of the school day, the school week, and free play time, did not deprive Student of a FAPE.

67. The evidence demonstrated that the Solana Beach classroom provided appropriate structure for Student, as well as visual aides and positive reinforcement. Except for the lack of a one-to-one aide to assist Student with his behaviors and in his social interactions, which is further addressed below, Mr. Deak did not criticize this placement. Applying the "snapshot" rule, based upon all of the information the District had, Student did not meet its burden of demonstrating that placement in this program was not reasonably calculated to provide Student with an educational benefit. Moreover, the evidence was undisputed that Student had obtained a meaningful educational benefit, as he had made progress on his goals by the May 27, 2010, IEP meeting, although he had only been in the program since April.

68. The placement in the Solana Beach inclusion program was also a placement in the LRE, for the same reasons as stated above. Based upon the information that the IEP team had at the time of the February 12, 2010, IEP meeting, Student was cognitively capable of handling the academic content in the inclusion classroom, with appropriate supports, and he would have benefitted from the interactions with the children in that environment. There was no evidence that the children or teachers in the inclusion program would have suffered any detriment by virtue of Student's presence in the classroom. There was no evidence regarding the cost of educating Student in this environment, and therefore, that factor is not considered in this Decision. On balance, the *Holland* factors weigh in favor of the placement in the Solana Beach inclusion program.<sup>8</sup>

69. The Solana Beach inclusion classroom offered in the February 12, 2010, IEP, was an appropriate classroom placement for Student. (Findings of Fact 1-95, and Legal Conclusions 1, 3-4, 15-16, 54-58, and 65-68.)

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<sup>7</sup>Student's contentions regarding his need for a one-to-one aide are addressed below, in the discussion of Issue 2I (i).

<sup>8</sup>In his closing brief Student raises, briefly and for the first time, the issue that Ms. Emmert was not a special education teacher, although she served as a substitute special education teacher in the Solana Beach inclusion class. Student contends that he did not become aware of this issue until shortly before the commencement of the due process hearing. This issue was not raised in the Complaint, and therefore will not be resolved in this Decision. (Ed. Code, § 56502, subd. (i).)

*Issue 2I: Related Services and Supports of One-to-One Aide, Behavioral Services, and OT*

70. Student contends that the IEPs of January 7, and 26, 2010, and February 12, 2010, failed to offer Student a FAPE as they did not include a one-to-one aide, behavioral services, or appropriate OT services. District contends that it offered appropriate related services, and that Student did not need additional OT services or a one-to-one aide.

71. Each of the subject IEPs contained the same offers of services. They did not offer a one-to-one aide or behavioral services. They offered one hour per month of consultative OT services, to address Goals 3 and 4, and to assist in developing sensory strategies.

72. As was stated in Legal Conclusions 15 and 16, to determine whether a school district's program offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, and an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. Related services include services as may be required to assist a child to benefit from special education. If a child's behavior impedes the child's own learning or that of other children, the IEP team shall consider positive behavior interventions, strategies, and supports to address the behavior. If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student's IEP, then the school district provided a FAPE, even if the student's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit.

*Issue 2I (i): One-to-One Aide*

73. Mother, Ms. Trump, Mr. Deak, and Dr. Baker-Ericzén, all testified that Student required a one-to-one aide, due to his behaviors. This testimony was not entirely persuasive. First, at the time of the January 7, 2010, IEP meeting, Student's behaviors at preschool at Del Mar Hills were improving, even without a one-to-one aide, due to behavioral training of the staff, intervention provided by Tim Deak, and by a shortened preschool day. Ms. Trump testified that Student needed a one-to-aide in her preschool, regardless of the progress he had already made there. Ms. Trump's testimony was unpersuasive regarding Student's need for a one-to-one aide in a District preschool, because her frame of reference was her preschool, and not a public school placement. Ms. Trump's testimony was not based upon any knowledge of any of the public preschool classrooms offered to Student, all of which had a variety of specialized services and supports, including trained staff. Mr. Deak, Dr. Baker-Ericzén, and Mother believed that Student needed a one-to-one shadow aide primarily to offer correction immediately instead of later. Mother contended that Student would not become dependent on the aide, as Student had a strong desire to be independent. District was concerned that a one-to-one aide would unnecessarily make Student's school environment more restrictive, and that Student would be likely to become dependent upon an aide.

74. Student failed to meet his burden that a one-to-one aide was necessary for Student to receive a FAPE in the placements offered by the District. The Student's IEPs were deficient in several respects, as described in this Decision, but, under the "snapshot" rule, the IEP team appropriately determined that an IEP that did not include a one-to-one aide was reasonably calculated to provide the Student with some educational benefit. First, there was no evidence that Student would not receive an educational benefit even if there was nobody at his side to offer immediate corrections with respect to his behavior and social interactions. Rather, the evidence demonstrated that Student independently moved around the classroom, and generally complied with teacher demands. Second, Student made progress on his goals without a one-to-one aide, and his behaviors were generally and gradually improving. He still has behavioral and social difficulties, but, as described below, those can be addressed through further services, which would be less restrictive than a one-to-one aide. Third, the District's concern regarding potential aide-dependency is well-taken. Mother testified that Student does not have the personality to become "aide-dependent," since he wanted to be independent, however, that militates in favor of capitalizing on Student's desires and giving Student the opportunity to be as independent as possible now. District did not deny Student a FAPE by not offering a one-to-one aide. (Findings of Fact 1-95, Legal Conclusions 1, 3-4, 15-16, and 71-73.)

*Issue 2I (ii): OT Services*

75. Student contended that he required additional OT services to address his visual motor and fine motor deficits. Student offered testimony from Dr. Baker-Ericzén in support of this contention, but no testimony from an occupational therapist to support this contention. Moreover, Tim Deak noted no OT issues in his report of his observation of Student in his placement at Solana Beach.

76. Student relied on Dr. Patel's report, which stated that "occupational therapy in the school setting would address [Student's] fine motor and visual motor delays," but, taken in context, that statement does not constitute a recommendation for school-based OT services. Dr. Patel also stated in the report that Student's delays in those areas "may" impact his academic performance, and recommended that Mother obtain an OT evaluation from the District "to assess *whether* his delays are impacting his ability to access his educational curriculum." (Emphasis added.) There was no evidence that Dr. Patel had any experience in providing OT in a preschool classroom, or in an educational setting. In contrast, Ms. Sorg, the qualified occupational therapist who assessed Student on behalf of the District, and Ms. Donahue, the qualified District occupational therapist who provided the OT consultations pursuant to Student's IEP, credibly testified that Student did not need OT in those areas to access his curriculum. Rather, these areas were addressed in the preschool curriculum. Furthermore, Student made progress in those areas while attending the Solana Beach placement. Under these circumstances, Student failed to meet his burden of proof that he required additional OT services to receive a FAPE. (Findings of Fact 1 and 3-95, Legal Conclusions 1, 3-4, 71-72, and 76.)

*Issue 2I (iii): Behavioral Services*

77. As was discussed above with respect to Issue 2C, Student's IEPs should have included goals regarding his aggressive behaviors and social skills. District should have provided additional behavioral services to address these areas of need. Additionally, as was discussed above with respect to Issue 2A (ii) District should have performed an FBA and developed a BSP. The District's failures in this regard, which constituted a denial of a FAPE, also constituted a denial of sufficient behavioral services. (Findings of Fact 1-16, 18-95, Legal Conclusions 1, 3-4, 10-16, 21-24 and 71-72.)

*Issue 2J: Transition Services*

78. Student contends that the proposed placements in the January 7, and 26, 2010, IEPs and the February 12, 2010, IEP, denied him a FAPE, because they offered no transition services to assist him in transferring from Del Mar Hills, his private pre-school, into those placements. District contends that the law pertaining to transition services does not apply to the transfer of a preschool child from a private preschool to a public preschool program. Moreover, District contends that Student progressed in the Solana Beach placement without transition services, and therefore he did not require transition services. District contends that the placements offered were, in themselves, transition plans between preschool and kindergarten.

79. California Education Code section 56345(b)(4), requires that the IEP include a transition plan when a student transfers from a nonpublic school into a regular class program in a public school. This statute, by its terms, does not apply to this situation, when Student was transitioning between a private preschool and a public school preschool inclusion program. However, there is no law that prohibits a District from providing transition services when a Student needs them to provide a FAPE. In this regard, the IDEA and the Education Code define "related services" very broadly, to include, but not be limited to a range of "developmental" and "supportive" services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363. In this case, as explained below, transition services fall into the category of related services.

80. As was stated in Legal Conclusion 16, to determine whether a school district's program offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, and an IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight.

81. Student has met his burden of demonstrating that the failure to include transition services in the offered placements deprived Student of a FAPE. There was no evidence that the District discussed or considered such services at the subject IEP meetings, except to permit Parents to visit the proposed placements. However, at the time of the IEPs in question, District was aware that Student had difficulty transitioning to his private preschool in August 2009. District therefore had grounds for anticipating that Student would have similar difficulties transitioning to a District preschool. Thus, an educational program

would only be reasonably calculated to provide an educational benefit to Student, and therefore provide a FAPE, if it included more transition services than giving Parents the opportunity to visit the proposed placements.

82. District is correct that Student successfully transitioned to the Solana Beach program without additional transition services in his IEP, but this argument neglects that Mother herself provided transition services to her son. The evidence demonstrated that Mother had the idea to ask for pictures of the staff and classroom at the Solana Beach placement. When Mother received these pictures, she showed them to Student and developed a social story to prepare him for his new preschool. She packed lunches for herself and Student and took Student to the Solana Beach facility where they sat and ate them together. She talked to Student about the various features of the pre-school environment, including the nearby train station, to familiarize him with the preschool and the location. Student met his burden of demonstrating that he successfully transitioned to Solana Beach because of Mother's creativity, foresight, and intensive efforts. District cannot escape responsibility for providing necessary transition services by placing that burden on Mother. Under these circumstances, District's failure to provide transition services deprived Student of a FAPE. (Findings of Fact 1-16, and 18-95, Legal Conclusions 1, 3-4, 15-16, and 78-81.)

### *Remedies*

83. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*)). School authorities may also be ordered to reimburse parents for their expenditures on private special education for a child if the school authorities did not offer the child a FAPE and if the unilateral private placement chosen by the parents is appropriate under the IDEA. (*Id.* at p. 369.) However, the placement chosen by the parents does not have to offer a FAPE, as long as it offers an appropriate educational program. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 12-13 [114 S.Ct. 361] (*Florence County*)).

84. 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. Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Id.* at p. 1497.) An award of compensatory education need not provide a "day-for-day compensation." (*Ibid.*) An independent educational evaluation (IEE) at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. *Los Angeles Unified School District v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-823.)

85. Based upon Legal Conclusions 59-63, District denied Student an appropriate classroom in the LRE from the time of the January 7, 2010, IEP to the time of the January 26, 2010, IEP meeting. Del Mar Hills, where Student attended preschool during this time period, did not provide special education services, and was not as structured an environment as that which District provided. According to *Florence County, supra*, however, Del Mar Hills need not meet the requirements of a FAPE. Since Del Mar Hills provided a typical preschool environment for Student, and since Student was cognitively capable of benefiting from that environment, it was an appropriate placement for Student. Student is entitled to reimbursement for his attendance at Del Mar Hills preschool from January 7, 2010, through January 26, 2010, and for two weeks thereafter, until February 9, 2010, to encompass the transition services that Mother provided. Mother did not know how much time her transition services took, but the evidence showed that Student had at least a two-week transition period upon entering Del Mar Hills. From January 7, 2010 to February 9, 2010, is 33 days. Del Mar Hills cost approximately \$859.00 per month during that time period, or approximately \$28.22 per day, for a total reimbursement to Student of \$931.26.<sup>9</sup> Since Student did not present evidence as to how many times Mother transported Student to and from Del Mar Hills, Student did not meet his burden of demonstrating the cost of his transportation.

86. As discussed in Legal Conclusions 24, 41-42, and 77, above, District did not offer Student appropriate behavioral services, including social skills services, from January 7, 2010, through May 7, 2010, the date of filing the Complaint. Student received some of these services at Pathways, which he attended from January 2010, to April 2010. Student is therefore entitled to reimbursement for his attendance at Pathways from January 2010, to April 2010, in the amount of \$1,300. Student is not entitled to compensatory education for the failure of the District to provide him with behavioral services and social skills instruction, for several reasons. First, an award of reimbursement for the Pathways program and an award of compensatory education would constitute a double recovery. Second, Student did not provide sufficient evidence upon which an award of compensatory education could be calculated. Student is also not entitled to an award of reimbursement for his transportation to and from the Pathways program. Student presented no evidence as to how many times Mother transported Student to and from the Pathways program. Student did not meet his burden of demonstrating the cost of his transportation.

87. Student is not entitled to reimbursement for his private therapy from Dr. Mary Baker-Ericzén, for three reasons. First, her services were largely provided prior to the January 7, 2010, IEP meeting, when District first became obligated to provide Student a FAPE. Secondly, there was no evidence as to how many times those services were delivered during the month of January, 2010, and how much those services cost. Third, there was no evidence that Student required those services for any educational reason.

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<sup>9</sup>The daily rate was calculated by dividing \$859 by 30.44. The number 30.44 was selected as the number of days in a month, to account for the facts that all months do not have 30 days.

88. Student is not entitled to reimbursement for the Ecke program. Student did not demonstrate how Student's attendance in the Ecke program was relevant to the District's failure to provide Student a FAPE as determined by this Decision. Further, Student did not demonstrate that the purpose of his attendance at that program provided him with any specific educational benefit.

89. Student contends that an independent FBA, at public expense, is an appropriate remedy. There was no evidence that Student had specifically requested an FBA prior to filing his Complaint, and the District had not performed an FBA with which the Student disagreed. Under these circumstances, the equities weigh in favor of an order that the District perform the FBA. If the Student disagrees with the District's FBA, the Student retains all of his rights to challenge the FBA and to seek an independent FBA and all other remedies that may be appropriate.

### ORDER

1. Student to be reimbursed for attendance at Del Mar Hills in the amount of \$931.26.
2. Student to be reimbursed for the Pathways program in the amount of \$1300.
3. District to conduct an FBA within 30 days of this Decision;
4. District to hold a timely IEP meeting after the FBA to develop a BSP and appropriate behavioral goals, including at least one goal to address Student's aggressive behaviors. This IEP should also include at least one goal to address Student's social skills.<sup>10</sup>
5. All of the remaining claims of Student are denied.

### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issue 2A (ii), part of Issue 2C, and Issues 2F, 2I (iii), and 2J. District prevailed on Issues 1A and 1B, 2A (i), 2B, part of Issue 2C, Issues 2D, 2E, 2G, 2H, and 2I(i) and 2I(ii.)

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<sup>10</sup> The notes from the May 28, 2010, IEP reflect that Student has been offered a BSP and participation in a social skills group, and that Student's goals remained unchanged from his previous IEPs. There was no evidence as to whether any IEPs were developed subsequent to the May 28, 2010, IEP. If a current IEP for Student contains a goal to address Student's aggression, and a goal to address Student's social skills, this Order does not require the District to include additional goals in these areas.

