

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT.

v.

SAN DIEGO UNIFIED SCHOOL  
DISTRICT

OAH CASE NO. 2012041051

**DECISION**

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on June 20, 21, 22, and 26, 2012, and July 3 2012, in San Diego, California, and on July 9, 2012, (telephonically) in Van Nuys, California.

Student's mother (Mother) represented Student. Student's father (Father) attended portions of the hearing.

Attorney and Deputy General Counsel Andra M. Donovan, represented the San Diego Unified School District (District). District representative, Amy Perez, resource teacher, attended the hearing in June, and District representative Sonia Picos attended the July 3, 2012, hearing. On July 9, 2012, Attorney and Assistant General Counsel Amy Bozone, represented the District.

Student filed her request for due process hearing (complaint) on April 24, 2012. On July 9, 2012, at the close of hearing testimony, the parties were granted permission to file written closing arguments by July 31, 2012. The ALJ considered all written closing arguments submitted, and on August 3, 2012, the record was closed and the matter submitted.<sup>1</sup>

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<sup>1</sup> Student offered as evidence an additional document with his closing brief, which was not admitted, or considered.

## ISSUES<sup>2</sup>

1) Did District deny Student a free and appropriate public education (FAPE) during the 2011-2012 school year by depriving Parents of their right to participate in the decision-making process by failing to:

(A) notify them when it utilized emergency intervention procedures to restrain Student on January 19, 2012, January 26, 2012 and February 8, 2012?; and

(B) provide them with Student's educational records, and staff resumes?

2) Did District deny Student a FAPE during the 2011-2012 school year, because the offered placement at the Stein Center nonpublic school (NPS), failed to address Student's unique needs in the following areas:

(A) maladaptive emotional and self-stimulatory behaviors, including behaviors which gave rise to District's use of emergency intervention;

(B) transitioning;

(C) toileting;

(D) sensory diet; and

(E) communication, specifically as Student's communication challenges required the utilization of an assistive augmentative communication (AAC) device, referred to as the SpringBoard Lite?

3) Did District deny Student a FAPE during the 2011-2012 school year by failing to have a certified classroom teacher participate in field trips?

## FACTUAL FINDINGS

### *Jurisdictional and Background Information*

1. Student was an 11-year-old boy who at all relevant times resided within the boundaries of District with his parents and several siblings. Father is in the armed forces requiring the family to move often. Student was made eligible for special education and related services in another school district under the primary eligibility category of autistic-

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<sup>2</sup> The ALJ clarified and organized Student's claims based upon the parties' prehearing conference and trial presentations, but did not amend the issues. Student's claim that District refused to reimburse Mother for transportation to ACES was deemed withdrawn when Mother confirmed that District had reimbursed her.

like behaviors, at an initial individual education program (IEP) team meeting on August 21, 2003. Student's last triennial assessment, prior to his enrollment in District, was conducted in April 2009.

2. Student had extensive challenges. He was nonverbal, resistant to transitions and non-preferred activities, and had a pattern of eloping without warning from any environment. Student exhibited maladaptive behaviors throughout his school day, which often escalated into self-injurious or aggressive and assaultive behaviors. Student was significantly delayed academically and functionally. Student required assistance for all academic and functional instruction, and leisure activities. Student was toilet trained at seven, but at school required assistance with his toileting and dressing routine. Student required one-on-one assistance throughout his school day, and on the bus.

#### *2010-2011 School Year*

3. Between 2008 and September 5, 2011, Student resided with his family within the boundaries of the Chula Vista Unified School District (CVUSD), except for a nine month period when the family moved to New York due to father's military service assignment.

4. With Mother's consent, in May 2010 Student was placed in a NPS, Autism Comprehensives Educational Services (ACES). ACES provided Student with instruction, as well as occupational therapy (OT) and speech and language (L&S) services, on a collaborative, push-in model, or on a consultation basis only, meaning that these special education related services, known as designated instructional services (DIS), were provided within, and as part of, the classroom program, and were not provided as direct one-on-one services. Mother did not approve of ACES collaborative DIS model, and CVUSD agreed to provide Student one-on-one direct L&S at home. ACES was located in an office building adjacent to a parking lot and a busy public street. ACES did not have an accessible and secure playground for its pupils. ACES used the playground of a church located across the street from ACES. Student could not use the church playground because it was not within a locked and gated enclosure. Given Student's elopement challenges, he could not be kept safe crossing the busy street and playing in the unlocked play yard. At ACES, Student remained indoors throughout the school day.

5. During the 2010-2011 school year, Student remained at ACES. ACES provided Student with a highly structured learning environment. Between one to two hours daily, Student received instruction from a one-on-one assistant in a separate classroom. He spent other portions of his school day in a classroom with no more than five pupils, each with one-on-one aides, engaged in a variety of activities, including music therapy, lunch, dog therapy, physical education and sensory activities. ACES also arranged for community outings with families. At all times, a one-on-one assistant accompanied Student.

6. ACES director was Layla Feldhaus. Ms. Feldhaus testified for Student as an expert on teaching practices and methodologies for autistic pupils, and as an individual knowledgeable about Student's program and progress at ACES. Ms. Feldhaus possessed the

necessary credentials for teaching and administering behavior programs to autistic pupils, and had extensive employment experience in developing educational and behavioral programs for autistic pupils. Ms. Feldhaus provided a clear description of Student's educational day at ACES, and the methodologies used to teach him and address his behaviors. She was familiar with Student, understood his program at ACES, and participated in IEP team meetings. Given her expertise and her percipient knowledge of Student, Ms. Feldhaus's testimony was given great weight in determining the appropriateness of Student's placement at Stein.

7. ACES utilized two widely-used and accepted research-based methodologies in Student's educational program. ACES relied upon the behavior methodology referred to as applied behavior analysis (ABA). ABA therapy is a teaching methodology which incorporates a system of skill development, including a method referred to as discrete trial training or DTT. ABA breaks each task into small specific steps with clear and measurable beginning and endings, systematic prompting and prompt fading to assist the pupil in completing the task, and reinforcement to encourage conduct necessary for success, or discourage conduct which would undermine success. ACES also utilized a related methodology referred to as the Treatment and Education of Autistic and Communications-Handicapped Children (TEACCH). TEACCH was developed by researchers at the University of North Carolina and incorporates ABA methods. With TEACCH methods, classroom instruction and the classroom design is highly structured, organized and predictable. TEACCH utilizes visual tools, like schedules, and work stations. The instruction is organized into discrete segments by utilizing schedules and work stations, which provide a visual classroom structure for pupils, consistent with maintaining a highly structured, organized and predictable educational environment. Both ABA and TEACCH are widely used and accepted research-based methodologies.

8. ACES's one-on-one aides were college graduates or college students, working under the supervision of a special education teacher and certified behavior intervention case manager (BICM). ACES developed an in-house training program designed to prepare its one-on-one aides to apply behavior intervention techniques, including ABA.

9. ACES provided Student with a sensory diet at regular intervals throughout his school day. Student's sensory diet included deep pressure to his body by having him lean against a large, specialized ball, or riding on an indoor swing.

10. Student was provided round trip transportation to ACES with one-on-one assistance. Student could only tolerate traveling on the bus for approximately 30 minutes. ACES was located within 30 minutes of Student's residence.

11. At ACES, Student engaged in daily noncompliant and disruptive behaviors which were a consequence of Student's limited ability to communicate, coupled by his desire to escape from an unwanted task. He was also intolerant of transitions between tasks or environments, primarily when transitioning from desired tasks to undesired tasks. Student customarily engaged in tantrum behavior such as dropping to the ground and refusing to

stand up, running away or eloping from the teacher or classroom, removing his socks and shoes, climbing furniture, crying, repeatedly rubbing his nose, and rocking and sitting in a corner.

12. Student's tantrums frequently turned assaultive toward his teacher or classroom aides, and typically included behaviors which often resulted in bruising or scratch injuries to ACES's staff, such as hitting staff repeatedly (with an open palm), pushing, grabbing, scratching, and biting attempts. Student also threw furniture.

13. ACES managed Student's assaultive behaviors by isolating Student from other pupils and, to the extent practicable, his one-on-one assistants. If Student became assaultive during his instruction from his one-on-one assistant in an isolated classroom, the assistant would generally stand back and place bean bags or other items around pupil and between the assistant and pupil until he calmed down. If Student became assaultive in a room with other pupils, the staff would clear the room of all pupils, and isolate Student until he calmed down.

14. ACES's staff closely monitored Student because he repeatedly attempted to elope. On two occasions, he managed to elope from ACES. One time he eloped from Mother's van to the street.

15. Because Student was nonverbal, he required a range of communication tools. These tools were designed to advance his ability to communicate, as well as to reduce his frustration and maladaptive behaviors, which largely resulted from his inability to communicate his needs. These communication tools consisted of limited sign language (primarily gestures), a picture exchange communication system (PECS), and an AAC device called SpringBoard Lite to select preferred items. The PECS system utilized fairly simple, individual, laminated picture cards.

16. Mother utilized private insurance to secure the SpringBoard Lite for home use and recommended the device to CVUSD and ACES. CVUSD purchased the SpringBoard Lite for Student's use at ACES. The SpringBoard Lite was more advanced than PECS. It was a computer-based picture system which could be programmed to offer a wider range of options than PECS for any given topic. For example, Student could select the basic picture symbol for food, after which a page of pictures showing a range of foods items would open, from which Student could make a selection. ACES staff met Student at the bus with the SpringBoard Lite and he worked with ACES staff throughout the day with the SpringBoard Lite.

17. Student advanced in his use of the SpringBoard Lite at ACES. Student was able to scroll, select from a category, and string multiple words together. Student did not resist using the SpringBoard Lite.

18. During the 2010-2011 school year, Mother also retained through private insurance at-home behavioral services from a nonpublic agency, Autism Spectrum Therapies (AST). AST developed a home program for Student to reduce Student's maladaptive

behaviors so that he could participate in outings in the community and with his siblings. AST rotated staff so that Student would adjust to new persons, which he did. AST primarily relied upon the same goals as ACES, but also developed additional goals. Student attempted to elope during his sessions with AST, and he did elope from the home on one occasion. Student attempted to elope during outings to the local park, and one time did manage to briefly get away from AST staff. To reduce the likelihood that Student would successfully elope during outings to the local park, Student was accompanied by two to three adults. Student exhibited the same aggressive behaviors at home with his AST staff that he exhibited at ACES. Student's assaults mainly consisted of scratching, and grabbing the collar of AST staff. AST staff would block Student as best they could, but often suffered scratches. AST staff chose to tolerate Student's assaults without further intervention.

19. Mother secured AST with ACES's assistance, and AST, with Mother's authorization, consulted with ACES about Student's school program. At hearing, Ms. Feldhaus confirmed that best practices included collaboration between providers in all settings in order to ensure consistency.

*March 23, 2011 IEP*

20. On March 23, 2011, CVUSD convened Student's annual IEP, where his unique needs, present levels of performance, and goals and objectives were reviewed, developed, and approved by all team members, including Mother. The IEP team also included a representative of ACES. The IEP team agreed that Student's unique needs were related to his autism, and its characteristic impairment in social interaction, communication, and repetitive or stereotypical behavior. Specifically, the team found that Student had limited spoken language, rocked his body, licked his fingers, lacked interest in others, and engaged in noncompliant and disruptive behaviors.

21. Data collected by the staff at ACES confirmed that Student's behaviors resulted in a significant impediment to learning for him and for others in his environment. Student displayed noncompliant behaviors, including dropping to the ground, refusing to transition, and minor undressing (e.g., removing socks and shoes), on average, four times daily, with a range of zero to 12 times daily. Student engaged in tantrums on average, less than once daily, with a range of zero to four times daily. Student engaged in assaultive behaviors on average, five times daily, with a range of zero to 20. Student attempted to elope, on average, two times daily, with a range of zero to seven.

22. The IEP team addressed Student's academic abilities. Student was developing pre-academic and functional skills equivalent to kindergarten-level skills. Student responded well when his learning environment was structured with visual guidance materials. He utilized visually structured work stations and materials to identify his schedule, as well as to complete visually structured tasks with the assistance of gestural cues. He worked on identifying his name in writing, and matching objects to objects, pictures to pictures.

23. The IEP team addressed Student's vocational and self-help skills. The IEP team agreed that Student responded well to visual structure to complete color matching tasks, inset puzzles, and shape sorters. Student could independently set a table with a cup, spoon, plate, fork and knife. He could retrieve preferred items like a ball and functional items like a backpack from their usual location with prompts. Student could also follow school routines with staff in close proximity, including putting his backpack at an assigned location upon arrival at school and getting his backpack upon departure from school, and walking down the stairs to the school bus. Student could transition to the bathroom. He could pull his pants and underwear down and back up when using the restroom. He could remove his socks and shoes independently, but required assistance to put them back on. He could complete a toileting routine, but required assistance with cleaning after a bowel movement. Student required assistance to thoroughly wash his hands, but he could turn on the water and put his hands under the water when prompted. Student could open his lunch bag, zip his backpack, make a snack, and pour juice with physical prompting, and wipe the table with gestural prompting. He could use a fork to eat, but preferred to eat with his fingers, and required gestural prompting to focus on eating instead of breaking up his foods in small pieces.

24. The IEP team addressed Student's fine motor abilities. Student exhibited strengths in his use of fine and gross motor skills with prompts by demonstrating good dexterity and functional use of both hands for opening containers, ripping paper, and putting items together; completing simple art projects, by holding a marker with a four fingered static grasp and tracing a horizontal line, and gluing paper to paper.

25. The IEP team addressed Student's gross motor abilities. Student's gross motor abilities were strong. Student preferred gross motor activities and with a visual structure to his routines, he initiated climbing on a swing, bouncing on a therapy ball, and bouncing basketballs. He exhibited a good range of motion, strength and endurance. He could complete projected action sequences like catching and throwing a ball at a target, and kicking a ball, although he infrequently oriented his body or visual gaze correctly for projected action sequences. Student was able to run four laps with a visual work system. He was able to hold a bat with two hands and hit a ball off a tee independently. He could kick a ball rolled to him. He could also utilize gross motor skills to paste two pieces of paper together.

26. The IEP team addressed Student's self-regulation challenges when engaging in sports. The IEP team agreed that Student required a staff escort at all times during gross motor sports activities due to high escape and elopement behaviors. With a staff escort, the IEP team agreed that Student required gross motor activities throughout his day to regulate his behavior and improve his attention.

27. The IEP team addressed Student's social behavior towards staff and peers and agreed that when he did not engage in noncompliant and escape behaviors with staff, Student enjoyed being around staff and peers, could waive to peers when cued, and could participate with assistance in group activities, remaining on task for five minutes.

28. The IEP team developed and agreed to 15 annual goals, effective March 25, 2011 through March 24, 2012, to address Student's unique needs in the areas of behavior, social-emotional functioning, independent living, self-help, communication, motor skills, and pre-vocational attention.

29. The IEP team developed and agreed to a behavior goal. The behavior goal was designed to advance Student's independent ability to communicate his request for a break, and to decrease his reliance on hand-over-hand selection of a break icon or to sign break. The goal required Student to choose a break icon from either a choice board, PECS book, or communication device, or by signing break when he showed sign of agitation (such as heavy breathing) in four of five trials over a two week period, as measured by teacher observations and data records. The goal was also designed to assist in the implementation of the behavior support plan (BSP), described below.

30. The IEP team developed and agreed to a social-emotional goal to address Student's deficits in attending to other persons during common tasks. The goal required Student to work successfully with a peer on a common project like moving or pushing objects, by understanding actions and nonverbal cues, with the assistance of gestural prompts on four of five trials over a two week data period, measured by teacher observations and data records.

31. The IEP team developed and agreed to an independent living skills goal to advance Student's ability to sort items into three categories from his current baseline of two categories. Student would be provided with various items to sort, such as clothing, or pictures of colors or animals and with gestural prompts, and would successfully sort eight of 10 trials across three consecutive data days as measured by teacher observations and data records.

32. The IEP team developed and agreed to a self-help goal to advance Student's ability to dress himself. The goal required Student to fully dress himself after toileting when given a pair of underwear, pants and shirt, with the assistance of gestural prompts on four of five trials across two consecutive data weeks, as measured by teacher observations and data records.

33. The IEP team developed and agreed to two fine motor goals to advance Student's independent writing beyond tracing a vertical line. One goal required Student to pick up a writing utensil such as a marker or crayon, and trace the letters of his first name, with arm prompts in eight of 10 trials across three consecutive data days as measured by teacher observations and data records. The other fine motor goal required Student to advance from using adaptive scissors with hand-over-hand prompts, to using adaptive scissors to cut along a straight line, with gesture prompts in four of five trials across two consecutive data weeks as measured by teacher observations and data records.

34. The IEP team developed and agreed to three communication goals. The first communication goal required Student to advance his responses to yes or no questions from

shaking his head “no” to responding to yes or no questions regarding highly preferred items or activities, such as swinging, by utilizing either head nods or shakes, an augmentative communication device, or by approximating the sounds of the words yes or no, in eight of 10 trials across three consecutive data days as measured by teacher observations and data records.

35. The second communication goal required Student to advance his use of his augmentative communication device from his use of the “I want” symbol to selecting a preferred item from a field of eight. The goal required Student to combine two to three word combinations on the device, such as “eat popcorn,” “go gym,” “give juice,” in eight to 10 trials across three consecutive data days as measured by teacher observation and data records.

36. The third communication goal was designed to advance Student’s receptive language skills. Student demonstrated that he could identify ball and glue, and the goal required Student to identify 12 objects, such as a pencil, book, glue, crayon, and marker, in a natural setting, by following one-step instructions, such as pick up the marker, in eight to ten trials across three consecutive data days, as measured by teacher observations and data records.

37. The IEP team developed and agreed to two pre-vocational attention goals. The first goal was designed to advance Student’s ability to follow simple one-step commands, such as stand or pick up, to following two-step commands. The goal required Student to follow seven, two-step commands, within his daily routine, with no more than one gestural prompts, in 80 percent of trials across three consecutive data days as measured by teacher observations and data records. The second attention goal was developed to reduce Student’s need for an average of six prompts to attend to and complete a six-step independent work sequence. The goal required Student to utilize a visual work system to attend to and complete a shredding project (collect papers, shred five pieces of paper, return shredding box) with no more than three gestural prompts in four of five trials across two consecutive data weeks, as measured by teacher observation and data records.

38. In addition to the goals and objectives, the IEP team agreed that Student required a range of positive behavior interventions. The IEP team agreed to positive behavior interventions such as visual supports, consistent routines, schedules and choices, transitional cues, and positive reinforcement.

39. The IEP team developed and agreed to a BSP to address noncompliant, tantrum and assaultive behaviors, and his elopement from adults in the school environment. The IEP team agreed that Student’s behaviors intruded on the available time for Student to focus and learn, disrupted his classmates, and reduced the teacher’s time devoted to teaching.

40. As part of the BSP, the IEP team agreed that Student required a highly structured learning environment with minimal distractions, and the use of visual strategies and visual structure, including a line drawing schedule to make his expectations and his

routine clear, and to aid in transitions. The IEP team agreed that as part of the BSP, Student should access sign language, and a PECS and/or a communication device to make requests for items and activities. The IEP team agreed that as part of the BSP, Student required a sensory diet integrated into his day to provide appropriate sensory input and physical activity, as well as a choice board to request sensory activities. The BSP required reinforcement of appropriate behavior with a reinforcer of Student's choosing, such as preferred food items, tickles, squeezes, ball play, etc. The BSP provided that Student's preferred reinforcers should be identified by survey prior to the initiation of any task. When escape behavior occurred, Student would be first directed to a designated "time out" area with a chair, or if extreme behavior occurs, bean bags and pillows would be used to help contain and calm him.

41. Mother consented to the March 23, 2011 IEP.

#### *Enrollment in District*

42. During summer 2011, Mother notified CVUSD and District that her family would be moving to District beginning the fall semester of the 2011-2012 school year. When Mother did not get a response from District, she requested that CVUSD hold a transition IEP. On August 24, 2012, the IEP team met at ACES and agreed to an IEP which reiterated, without amendment, the March 23, 2011, IEP.

43. On September 6, 2011, Student enrolled in District and CVUSD's obligations to provide Student a FAPE ended. On September 6, 2011, CVUSD terminated Student's services. ACES continued to provide services to Student after Student transferred to District, even though ACES was not being paid, as District had not yet held an IEP team meeting to confirm Student's placement at ACES. However, other IEP services directly provided by CVUSD ended on that date, including Student's direct, in-home, L&S services, and Student's round-trip bus transportation to ACES.

44. After September 6, 2011, Mother transported Student to ACES in the family automobile.

45. Due to administrative mishaps, District did not contact Mother until late September of 2011 to discuss Student's placement and services, and to schedule an IEP team meeting.

46. In late September 2011, Edward Baisley, District's NPS program case manager (NPS Case Manager), contacted Mother to discuss Student's placement at ACES. Mother expressed three main concerns: (1) that Student would run into the busy street at ACES; (2) that ACES' lack of a playground restricted Student's opportunity to engage in physical activity that he required and enjoyed; and (3) that ACES did not provide one-on-one direct L&S that Student required during the school day. Mother wanted direct L&S to be provided at school during the school day. Mother requested that

Mr. Baisley identify alternative placements for Student that were appropriate for Student given his needs, and that addressed her concerns.

47. Mr. Baisley reviewed Student's educational records, observed Student, and discussed Student's status with ACES personnel. With Mother's concerns in mind, Mr. Baisley reviewed possible placements for Student given his nonverbal status and severe maladaptive behaviors, requiring a high level of support. Mr. Baisley observed Student working in isolation with an aide. Mr. Baisley spoke to Student's teacher and Ms. Feldhaus about Mother's concerns, and received confirmation that ACES, due to its location, could not accommodate Mother's concerns for Student's safety, outdoor play, and due to its collaborative, rather than direct service model, could not incorporate one-on-one L&S services in his school day.

48. Mr. Baisley considered several placement options, including a public school setting. Mr. Baisley determined that the public school setting would not be appropriate, given Student's behaviors and his need for a small structured setting. Mr. Baisley rejected two NPS options after he learned from discussions with their administrators that they did not serve pupils, such as Student, with severe behaviors, and who required a high level of support to navigate through the school day. One of the two schools also had the same set-up and geographic challenge as ACES, as it was located in an office building fronting a busy street. Mr. Baisley identified two NPSs that did serve pupils, like Student, and which accommodated Mother's concerns: (1) Stein, which was within a 30-minute bus ride, and (2) another school in Oceanside, which required that Student spend close to three hours daily on a bus. Mr. Baisley concluded that Stein was the most appropriate option, as he understood from reading Student's CVUSD IEPs that Student could only tolerate a bus ride of 30 minutes duration.

49. Mother and Mr. Baisley discussed alternative NPS placements with Mother and Mr. Baisley recommended Stein. The majority of pupils served by Stein were autistic, one-third had intellectual disabilities, a smaller percentage had varied disabilities, but most had either communication or behavioral challenges that Student also faced. Mr. Baisley considered Stein to be appropriate for several additional reasons which were important to Mother. First, Stein met Mother's concern for safety and outdoor play. Stein was designed like a traditional elementary school. It was located on a quiet side street within a suburban neighborhood, and had a fenced-in school yard, requiring a code for entry and exit. Second, Stein also provided direct L&S required by Student's IEP. Third, Stein offered a one-on-one staff to pupil ratio, and a curriculum designed for functional academics and community skill building. Finally, Stein offered a higher level of integration with other pupils throughout Student's school day. Although Student would receive one-on-one academic instruction in a separate cubicle or "cubby" area, he would not be segregated from other pupils in a separate classroom.

50. Mr. Baisley testified at the hearing. As NPS Case Manager, he was responsible for planning and implementing special education services for District pupils at six NPS sites, acted as the liaison between District and NPS's, coordinated IEP meetings,

triennial assessments, and services for pupils enrolled in NPS's. Mr. Baisley began his tenure as NPS Case Manager in July 2011 following six years as an Autism Specialist for District. As an Autism Specialist, he consulted with school sites to provide training to staff, support to the IEP teams, implement strategies, manage monthly parent support group and parent trainings, and collaborate with community agencies. Prior, he worked at Stein for 18 years, first as a special education teacher, where he developed IEPs, conducted functional analysis assessments (FAAs), and developed behavior management plans, and then as a program manager, where he supervised and coordinated staff, and ensured site compliance with NPS state regulations. In addition, Mr. Baisley provided straightforward testimony based upon his uncontroverted recollection of events, and demonstrated that he clearly understood and agreed with the bases for Mother's request that Student's placement be changed from ACES.

51. Mr. Baisley was comfortable that Stein's staff was adequately trained to address the needs of Student. As District NPS Case Manager, he was not directly involved with the hiring of Stein's staff and relied upon the NPS's contracting with District to meet state requirements. From his employment at Stein, he understood that Student's classroom would have three levels of support: (1) a certified special education teacher; (2) a full-time teaching assistant, usually with decade-long classroom experience, and in the process of completing graduate-level work; and (3) one-on-one classroom aides as part-time employees. The classroom aides, though not required to have any specific degrees, were vetted through Stein's human resource department for education, experience, and interest. Classroom aides were also required to submit to a criminal background and fingerprint check. Mr. Baisley understood that Stein trained its staff in how to implement student's IEP's. Mr. Baisley demonstrated knowledge of Stein's emergency intervention training.

52. After Student enrolled in District, Mother never informed Mr. Baisley, or anyone else at the District, that Student had been receiving in-home services from AST. Mr. Baisley would have invited AST to Student's IEP team meetings to ensure that the IEP team was fully informed of Student's challenges and progress, and to make sure Student's program was consistent.

53. CVUSD did not supply the SpringBoard Lite to District, and District had to order a new device which was not delivered for a few weeks. District programmed the device, but requested that Mother bring in Student's home device so that District staff could program its device consistent with Student's home device. Mother never provided Student's home device to the District.

*November 8, 2011 Interim IEP*

54. District notified Mother to attend an IEP on October 26, 2011 to review Student's interim placement. Mother was not available that day so the meeting was rescheduled for November 8, 2011. There was no evidence that Student was denied a FAPE as a result of the delay. Student remained at ACES. Student did miss some sessions of home L&S because CVUSD terminated at-home direct L&S services as of September 6, 2011, but

District provided Student make-up sessions. CVUSD also terminated Student's bus transportation to ACES as of September 6, 2011, requiring Mother to provide round-trip transportation in her family vehicle. At the time of the hearing, District had reimbursed Mother for her personal transportation of Student to ACES.

55. On November 8, 2011, the IEP team met at ACES. All necessary members were present, including Mr. Baisley, Mother, Student's special education teacher, Ms. Feldhaus, and a District school psychologist. AST had not been invited because at the time, District was unaware that this agency provided privately-paid services to Student. The purpose of the meeting was to review Student's current placement and services, and District's placement and services.

56. ACES submitted a November 2011 report of Student's progress on his 15 annual goals and objectives. Student met four of 15 annual goals: sorting items into three categories (with visual cues); responding to meaningful yes or no questions about highly preferred items or activities by either head nods or shakes, approximating sounds, or using an AAC device; following two-step directions with no more than one gesture prompt 80 percent of trials; and using an AAC device, identifying five shapes with 80 percent accuracy.

57. Student met the third or final benchmark for his annual behavior goal requiring him to ask for a break with a break icon (from either a choice board, PECS book, or communication device) with only one gestural prompt. Benchmark three of Student's behavior goal required him, when given a verbal reminder and gestural prompt, to ask for a break by choosing a break icon, from a choice board, PECS book, or communication device, by signing for a break when showing signs of agitation (e.g., heavy breathing) in four of five trials across two consecutive data weeks, as measured by teacher observations and data records.

58. Student met the third and final benchmarks for three other annual goals: demonstrating the ability to work with an adult or peer to achieve a common goal; using an AAC to combine two to three words to request highly preferred objects and activities throughout his day; and receptively identifying 12 different objects in a natural setting following one-step instructions.

59. Student achieved the second benchmark on three of 15 annual goals: utilizing a visual work system to attend to and complete a shredding sequence with no more than three gesture prompts; using an AAC to identify numbers 1-10 with 80 percent accuracy; and matching object to picture for 10 animals with 80 percent accuracy.

60. Student met the first benchmark on two of 15 annual goals: picking up a writing utensil and tracing the letters of his name with arm prompts in eight of 20 trials; and with a verbal reminder in four of five trial, Student would locate and gain the attention of the right person to follow him, upon a command to go get that person.

61. Student's progress was slow on one of 15 annual goals. Student was still working on benchmark one of the goal to put on his underwear, shirts, and shorts or pants after using the restroom with gestural prompts in four of five trials.

62. At the IEP team, Mother presented a letter she wrote to the IEP team requesting that Student's placement be changed because ACES was unsafe due to its proximity to a busy street. At the IEP team meeting, Mother repeated her three objections to Student's continued placement at ACES: (1) Student's safety; (2) lack of a playground to run and exercise, and engage in preferred outdoor activities, like riding a bike, dribbling and shooting basketballs; and (3) providing direct L&S at the school site. The IEP team adopted the goals and objectives and collaborative OT and L&S services from the March 23, 2011, IEP, and the one-one-one direct L&S services. District offered an NPS, specifically Stein. Mother consented to the IEP.

63. At hearing, Ms. Feldhaus testified that she was familiar with Stein's program, its Director, and knew that Stein served the same moderate to severe population as ACES. Given Mother's concerns for a secure outside facility, and direct DIS services at the school site, she considered the placement appropriate.

64. The team developed a checklist of tasks that were required to complete the transition of placement and services to District, including securing a SpringBoard Lite which was currently being used by Student at ACES, but was the property of CVUSD.

65. At hearing, Ms. Feldhaus expressed pride in ACES's success in getting Student to access and utilize his SpringBoard Lite. She noted that regression was not unusual, and although Student may have progressed in a particular setting, it was not unusual for regression to occur without clear antecedent events.

66. Student's placement at Stein was not automatic. As an NPS, Stein had the option of selecting its pupils, and before Student could begin at Stein, Mother was required to apply. Mother also had the opportunity to meet with Stein's director and staff, and tour the facility, which she did.

67. Before Student was enrolled at Stein, Gloria Cordle, Stein's special education classroom teacher, reviewed Student's IEP and BSP, and visited ACES to observe Student and speak with staff, so that she could better understand his behaviors and needs. Ms. Cordle arrived at ACES during Student's time for one-on-one instruction with his aide in a separate classroom. Ms. Cordle had little time to observe Student's instruction before Student removed his socks and ran from the room. For the next forty-five minutes, Student's instructional aide chased Student throughout ACES' corridors.

68. Before Student's first day at Stein, Stein supplied Mother a referral packet which included a consent form for the administration of emergency behavior interventions, which alarmed Mother. During emergency interventions, at least two staff members would hold a pupil's arms and legs (or four limbs) to immobilize the pupil. The pupil may be held

prone with his face down. Mother had been trained in emergency interventions and witnessed them through her employment in the armed forces. She did not want Student to be subjected to them. Due to her concern about District's use of emergency interventions, on November 16, 2011, Mother withdrew her consent to District's November 8, 2011, IEP offer to transfer Student to Stein.

69. Mother met with Stein's then director, and Ms. Cordle, to discuss her concerns about Stein's usage of emergency interventions, specifically restraints. Stein's then director assured her that emergency interventions were not common and were used sparingly, but did not promise that they would never be used. Based upon her discussions with them Mother renewed her consent for District's November 8, 2011, IEP offer and agreed to transfer Student to Stein.

70. Stein's staff received the required training to apply emergency behavior interventions. The training was called Stein Training of Protective Procedures (STOPP). Stein is required to report emergency interventions to parents within 24 hours of their use, and prepare a written report for its files.

71. Stein had specific written policies in place for emergency interventions. Emergency interventions were not punishments. Emergency interventions were only appropriate where the behavior presented a clear and present danger of injury to the pupil or to others, or would result in serious property damage. Emergency interventions could be used only after efforts to use positive means of maintaining behavioral control were unsuccessful. Where emergency interventions were employed for pupils without a BIP, within two days, the administrator was required to schedule an IEP team meeting to review the report, and determine the necessity for an FAA and an interim BIP. Where emergency procedures were repeatedly employed, the IEP team could review the BIP and consider revising it.

72. Stein had specific written procedures in place for staff to use in the event pupils presented clear and present dangers of injury to themselves or others. Stein utilized two levels of emergency behavior interventions: time out and physical containment. Neither of these interventions required an emergency intervention report when the interventions were incorporated into the pupil's BIP. Staff first directed pupils to a safe "time out" area using verbal or minimal physical prompts. If the behavior did not cease, two or more Staff could escort the pupil to a time out room using STOPP, where the pupil would remain until calm.

73. Where the pupil could not be safely escorted to a time out room, or a time out room was not available, Staff employed STOPP restraint procedures. Restraint procedures physically limited the motion of two limbs, usually arms (two point restraint), or arms and legs (four point restraint). Two or more staff could be called to employ the restraints. The physical restraints were to be maintained until the pupil became calm.

74. On November 28, 2011, Mother completed the enrollment process for Student to attend Stein. With the exception of the emergency intervention form, Mother executed the

required forms, which included Student's medical information, developmental history, and information regarding other service providers. Mother responded to questions concerning Student's communication skills, disclosing, from a list of items, that Student communicated using sign language, gestures, pulling an adult to a desired object, and electronic devices. Of these communication tools, Mother disclosed that Student preferred to sign and pull someone to the object, and when he "really" wanted something, he would pull the individual toward the object and attempted to speak. In response to questions regarding Student's peer interactions, Mother advised that Student could play near another child without adult support, play with other children with adult support, and could be part of a group of two to four children without behavior problems with adult support.

75. Mother's responses to inquiries regarding Student's tantrums, aggression and behaviors tracked the information set forth in Student's most recent annual IEP. Mother stated that Student was "sometimes" aggressive, "possibly" when: near unfamiliar adults or children, when unable to have a desired object or activity, when asked to do something he doesn't like or understand, or during transitions from one activity to another. Mother reported that when Student has tantrums he may drop to the floor, and attempt to throw objects. Mother stated that Student's tantrums may lead to aggression. She did not know what caused the tantrums or aggression to end.

76. Mother did not fully disclose all the information requested on the forms. Mother denied that Student received regional center services, although, at the time, Mother received respite services from the regional center. Mother failed to respond to five "yes" or "no" questions regarding Student's toileting skills: bathroom independence; toilet training; daytime toileting "accidents;" and night-time diaper usage. At hearing, Mother explained that she did not disclose the respite services because they were unrelated to District's services. She claimed that she ignored the toileting questions, because the questions were not age-appropriate. Mother's stated reasons for not supplying the information regarding Student's toilet training were not consistent with Student's operative IEP, as one self-help goal addressed Student's ability to use the bathroom independently.

77. Mother consented to Student's participation in field trips. A permission form to allow Student to attend field trips was included in Stein's intake packet.

78. Student began attending Stein on November 28, 2012. Student was placed in a classroom with nine other pupils, one teacher, one full-time teaching assistant, and enough classroom aides so that Student received one-on-one assistance most times during his school day.

79. Student's classroom teacher, Ms. Cordle, had been a special education teacher at Stein since January 2002. For approximately nine years between 1989 and 1999, Ms. Cordle worked at Stein as a teaching assistant. She was credentialed to teach moderate and severe special education pupils, including pupils with autism. As part of her teaching responsibilities, she managed the classroom, including creating the master schedule for pupils and staff, developed the classroom program based upon each pupil's IEP goals and

objectives, supervised functional skills assistants and classroom aides, trained staff on Stein's policies and procedures, completed FAAs, and developed BIP's. Although Ms. Cordle performed FAA's and developed BIP's, she was not a behavior intervention case manager (BICM). A BICM was required to perform or supervise FAA's and develop BIP's. Stein had a BICM on staff that supervised and reviewed Ms. Cordle's FAA's and developed BIP's for her pupils.

80. Stein hired a teaching assistant and classroom aides that reported to Ms. Cordle. Ms. Cordle's full-time teaching assistant was not a credentialed school teacher, but worked as a teaching assistant for 10 years, eight years with Ms. Cordle. Classroom aides were designated as functional skills aides (functional aides). Functional aides were directly supervised by Ms. Cordle and were required to follow her instructions for implementing pupils' IEPs, and for recording data. Stein required only a high school degree, and did not require functional aides to be either college students or college graduates. Stein did not require but "preferred" its functional aides to have three months related experience at the time of employment. Stein did not require its aides to have any prior training in behavior interventions, including ABA.

81. Newly-hired functional aides were paired with, and shadowed, Ms. Cordle or her teaching assistant. Ms. Cordle or her teaching assistant worked directly with pupils assigned to newly-hired functional aides, trained the functional aides to read the daily schedule, and slowly incorporated the newly-hired functional aides into pupils' direct instruction. After functional aides started working directly with pupils, Ms. Cordle accompanied them until the functional aides were ready to work alone. During that time, Ms. Cordle or her teaching assistant intervened, as needed.

82. Under the direction of Ms. Cordle, Stein's functional aides were involved in all aspects of a pupil's school day. Functional aides were required to implement individual or group instructional programs, including correctly following verbal or written task instruction for pupils, and correctly recording each pupil's progress on data sheets she developed. Functional aides were responsible for implementing behavior modification programs, including BSP's and BIP's, and for correctly following current behavior programs for all classroom pupils in all settings. Functional aides were required to correctly use STOPP strategies. Functional aides were responsible for supervising pupils during community outings and field trips, and also for non-task time, including, loading and unloading buses, and playground coverage.

83. Ms. Cordle utilized ABA and TEACHH throughout the Student's school day. Ms. Cordle's classroom was organized so that the pupils could move to discrete activities. There was a floor area for group activities, a cubicle or "cubby" area for one-on-one academic/pre-academic instruction, and a play/rest area with a couch. There was also an office area for use by the teacher and teaching assistant.

84. After Student left the bus, he would put away his back pack, go the bathroom, and then make his daily schedule before participating in a morning group activity. As part of

his bathroom routine, Student would work on his self-help goal of dressing and undressing. Functional aides would work with Student in a private stall to assist him to fully clothe himself. Functional aides would also assist Student with hand-washing.

85. Ms. Cordle's classroom included approximately 19 individuals, including all staff and pupils. To maintain a structured and relatively quiet environment, activities were scheduled so that not all individuals were in the class at the same time, and not too many activities were occurring within the class at once. Despite Ms. Cordle's planning, given the number of pupils and aides, the classroom was generally bustling with activities and noise.

86. Student was never entirely segregated from other pupils, in a separate classroom, but received his one-on-one instruction in the cubicle or "cubby" area of Ms. Cordle's classroom while pupils were engaged in other classroom activities.

87. Ms. Cordle and her functional aides communicated with Student in a variety of ways. Ms. Cordle utilized a visual schedule to guide Student to his daily activities. Student utilized gestures, sign language (modified), and PECS.

88. Student did not have available the SpringBoard Lite AAC device in time for his first day of school. ACES had returned the SpringBoard Lite to CVUSD as requested. Mother did not share the SpringBoard Lite Student used at home with District. District obtained the SpringBoard Lite at the time of winter break, three weeks after Student's enrollment, on or about December 16, 2011. District offered to provide Mother the District's SpringBoard Lite for at home use, but Mother declined.

89. From the beginning, Student had difficulty transitioning in the morning from his home to Stein. Student did not want to go on the bus. Once at school, Student resisted leaving the bus. Once convinced to exit the bus, he would drop down on the ground and resist going into his classroom.

90. Mother discussed Student's resistance to traveling on the bus and his challenges on the bus with District. Mother also agreed to provide a bag of toys for Student and send it with him on the bus for the aide.

91. Consistent with Student's IEP, Student resisted major transitions throughout his day. Ms. Cordle observed that once Student made the transition to the classroom, he was able to participate. Student continued to be challenged by transitions between activities.

92. Stein did not implement a regularly scheduled sensory diet, but Student was very physically active and his classroom activities were regularly punctuated with breaks so that he could move and play. Student was given the opportunity to request preferred activities, such as the swing, or the adapted bicycle, which were activities that he greatly enjoyed. Student was often taken to Stein's occupational therapy room where he would run and climb on the adapted bicycle.

93. Student was provided with direct OT services, 30 minutes a week with an occupational therapist that Mother agreed was providing excellent services. In addition to his scheduled OT services, Student was provided with extra opportunities to work with the occupational therapist or occupational therapy staff to work on his sensory needs.

94. After Student began at Stein, he received direct L&S services of 30 minutes per week. District also arranged for Student to get additional L&S services to make up for the number of sessions missed from the time CVUSD discontinued Student's home-based direct L&S services.

95. Soon after Mother placed Student at Stein, she developed a communication log to exchange information with Ms. Cordle about Student's status. Mother would write notes to Ms. Cordle about Student's mood that morning, and Ms. Cordle would send home notes about Student's behavior at school. Ms. Cordle and Mother exchanged information almost daily, by the communication log, or by e-mail.

96. On December 14, 2011, just before winter break, Student ran out of the classroom to the play yard. Before staff caught up with him, Student ran into a tree, and suffered some minor bruising and stains to his shirt sleeve. Student was not upset, but acted "silly."

97. Mother attributed Student's resistance to bus travel, and his minor injury from the tree, to untrained functional aides. Mother requested resumes for all persons working with Student. Stein never complied with Mother's request.

98. Student attended Stein for three weeks prior to the winter break. Student returned to Stein the day it re-opened from break on January 3, 2012.

99. Mother continued to have difficulty transitioning Student in the morning from home to the school bus. At home, Student began having regular morning bowel accidents, three to four times weekly, which he had not had since he was toilet trained at seven years old. Mother did not note Student's morning accidents in the communication logs, or e-mails.

100. Consistent with his IEP, Student continued to exhibit behavior challenges at school, especially when it came to transitions. Student remained challenged with big transitions, including entering and exiting the bus, and returning from recess, or engaging in non-preferred activities.

101. Following his BSP and under the direction of Ms. Cordle, classroom staff addressed his challenges transitioning in the morning from the bus to the classroom, and from recess, by limiting the number of people engaging with him, assigning two people to walk with him to and from class, each holding a hand, if needed, and allowing for additional time to get from class to recess

102. Following his IEP and BSP, when Student's behaviors began to escalate, staff would first try to move Student to his work cubby, sometimes using an escort procedure where two staff persons walked with him, each holding an arm. If Student was already seated in a cubby, staff would try to keep Student there until he calmed down, by sometimes giving him familiar tasks that he could accomplish easily, such as sorting colors.

103. Where Student's behaviors escalated to aggression, Stein's classroom staff did not immediately utilize emergency intervention procedures, but first utilized measures noted in his BSP, particularly, time-out in his cubby.

104. On January 19, 2012, Stein's classroom staff instituted emergency intervention procedures. Student was resistant to participating in a classroom group art session, refusing to sit in the group. Staff tried to move him to the cubby area, but he refused to walk. He was escorted arm in arm by two people to the back of the classroom group area, but grabbed staff by the shirt, scratched staff and hit staff in the face and arms. He also slapped Ms. Cordle on the right neck, and shoulder. Student left multiple red scratch marks on Ms. Cordle and classroom staff, and broke through Ms. Cordle's skin. Ms. Cordle and classroom staff applied a four point prone restraint to Student for one minute, and Student immediately calmed down. Student was not physically injured. The incident occurred at 11:45 a.m. That same day, Stein's office staff notified Mother by telephone, as well as by a note written in Student's communication book, about the incident, and completed a behavioral emergency report.

*January 23, 2012 IEP team meeting*

105. On January 23, 2012, an IEP team meeting was held at Stein to review Student's placement and services, develop an assessment plan for Student's triennial assessment, and to discuss Student's placement during the extended school year (ESY). All necessary members of the IEP team were present. Mother again raised her concerns that Stein was not appropriate. She disclosed Student's toileting accidents at home.

106. The IEP team discussed the SpringBoard Lite. Mother expressed her concern that it had not been programmed adequately, or utilized. The day of the IEP, the SLP developed a simple program for the SpringBoard Lite that included a concrete request page and a link to academic tasks involving number and shape identification. Stein's speech and language pathologist (SLP) could not be assured that the device display was identical to Student's display on his SpringBoard Lite at home, or former ACES's device. The SLP could not obtain information from ACES about its programming of the device. The District again requested that Mother bring in the SpringBoard Lite she used at home for Student so that the District's device could be programmed to be consistent.

107. Ms. Cordle reported the schedule of Student's L&S and OT services, and assured Mother that Student was receiving extra L&S to make-up for missed sessions resulting from his transfer from CVUSD. Ms. Cordle also reported that the OT was providing Student with extra sessions, although not required, to get to know him better.

Mother was pleased with Student's OT services and was confident in the skills of Stein's occupational therapist.

108. Ms. Cordle reported on Student's transition from the bus to the classroom. She advised Mother that his morning arrival routine was limited to four staff, but his behavior was inconsistent. Some days he was calm and able to follow directions, while on other days he was hyperactive, ran around, removed his shoes and grabbed people.

109. The District presented Mother an assessment plan that encompassed all areas listed on the standard assessment plan form: academic achievement; health; intellectual development; L&S; motor skills and sensory motor development; social emotional behavior; and adaptive skills and self-help. Student's triennial assessment was due in April 2012. Mother consented to the triennial assessment.

110. An assessment plan for an FAA was not provided to Mother at the January 23, 2012, IEP team meeting.

111. Stein applied emergency intervention procedures one more time in January 2012. Student was absent on January 25, 2012. When he returned to school on January 26, 2012, Student appeared to be happy, and was engaged in leisure activities (beads) in his cubby, when he started to cry. He ran out of the cubby area, dropped to the ground, slapped staff, engaged in saliva play, ate paper towels, and attempted to bite and wipe saliva on the arms of staff. Staff first attempted to calm him by holding his hands and prompting him to sit and calm down. When he kept attacking staff, Stein's classroom staff applied emergency behavior intervention procedures. Student was taken to the couch where two staff persons sat on each side of him and restrained his limbs, an intervention referred to as a side-by-side. Once Student stopped crying, he returned to being playful and happy. Student was not physically injured. The incident occurred at 11:25 a.m. Ms. Cordle notified Mother by sending a note home that day. Stein prepared a behavior emergency report of the incident.

112. As a pupil in Ms. Cordle's class, Student had the opportunity to participate in field trips. Parents were not provided permission slips for each field trip, but their consent for all field trips was provided by their execution of the consent form included in the referral packet. Mother had signed the form so Ms. Cordle was not required to obtain Mother's consent prior to each field trip. On January 27, 2011, Student went on an outing to a local park with a couple of other pupils. Ms. Cordle devoted two functional aides to Student to ensure that he did not elope and to address any maladaptive behaviors.

113. On January 31, 2012, Student was treated for acute conjunctivitis from playing in the school sandbox and rubbing his eyes with sand. He was prescribed antibacterial eye cream.

114. On February 3, 2012, Student participated in a half-day field trip to the park. Student behaved well, except for grabbing at someone's snack, and showing some mild resistance to leaving the park.

115. Stein's classroom staff applied emergency interventions for the third time on February 8, 2012. Student had a very turbulent day. In the classroom, Student dug in the trash can for food, placed the food in his mouth, dropped to the floor, and then ran out of the classroom and away from classroom staff. At some point after classroom staff successfully apprehended him and returned him to the classroom, Student sat in his cubby and attempted to escape by barging past functional aides, and slapping and pinching them. Classroom staff completed a side-by-side restraint on the classroom couch of five minutes duration. The incident occurred on February 8, 2012, at 11:45 a.m. Ms. Cordle was absent on February 8, 2012, but notified Mother the next day, February 9, 2012, by note in Student's communication book, which was sent home with him. On February 9, 2012, Stein's staff also prepared an emergency report.

116. Sometime after the third emergency intervention, Mother filed a complaint with the California Department of Education (CDE), alleging that District failed to timely notify Mother within one school day when an emergency intervention was used, and failed to complete the required behavior intervention report and place it in Student's file.

117. Mother objected to Student's participation in field trips unaccompanied by the classroom teacher. Mother did not think the functional aides, given their employment status and training, were as committed as the classroom teacher to Student's safety. Mother approved of Ms. Cordle's teaching assistant, but only because she thought she was a certified classroom teacher like Ms. Cordle. The teaching assistant was not a certified classroom teacher.

118. On February 7, 2012, Mother was interviewed by District's school psychologist as part of Student's triennial psychoeducational assessment. Mother advised the school psychologist of what she considered important to Student's educational program: sensory input; a one-on-one aide; a multitude of immediate and positive reinforcement; patience; continuous activities with little downtime; providing Student task breaks by identifying when he is tired; and providing Student with constant reinforcements so he could maintain attention and on-task behavior.

119. Mother advised the school psychologist that she considered Stein to be an inappropriate placement. She advised that Student had been having regular early morning bowel accidents at home, which he had not had since he was toilet trained years ago, and had accidents on the school bus before exiting at school. Mother believed that something in the school environment was the cause of Student's recent bowel and toileting accidents. She reported that Student had trouble waiting to get off the school bus. She expressed concern with Stein's lack of success in getting Student to use his SpringBoard Lite. She was concerned with Student's safety because of his consistent attempts to flee. She considered his conduct symptomatic of poor staff control, also demonstrated by the number of staff required to retrieve him. She was concerned with Student's being bruised from running into a tree. She considered his classroom environment too distracting and over-stimulating, which prevented him from focusing. In her opinion, Student was not getting the immediate positive reinforcement he required.

120. On February 16, 2012, Student's functional aides accompanied Student off campus to visit the local supermarket and produce market.

121. During District's administration of its triennial assessment, it determined that Student required an FAA and District prepared an FAA assessment plan for Mother's signature. On February 22, 2012, Mother signed her consent to the assessment plan.

122. On February 22, 2012, Ms. Cordle was interviewed by the school psychologist as part of Student's triennial psychoeducational assessment. She shared her observations with the school psychologist. She reported that Student utilized signs effectively for obtaining or expressing his specific needs and wants. She observed that he could accomplish tasks, like shredding with specific verbal and gestural prompts, a combination of demonstration and modeling, and hand-over-hand supports. She reported that Student had good receptive language skills for simple instructions such as "bring your dish to the sink."

123. As of her February 22, 2012 interview with the school psychologist, Ms. Cordle also had a good grasp of Student's behavioral challenges. She observed Student to require movement, and confirmed that movement was incorporated into most aspects of his classroom activities. She observed that Student's behavior varied from calm to hyperactive without any known precursor or triggering event. Ms. Cordle reported that Student's hyperactivity, impulsivity, non-compliance, and difficulty with boundaries negatively impacted the frequency and duration of his learning opportunities. She reported that he required frequent prompts and redirections to help him attend to table top tasks. She confirmed Student's physical aggression. She reported that Student was provided one-on-one and two-on-one support, and was escorted during transitions for his and others' safety. She confirmed that positive reinforcements, were used, including edibles, and verbal praise.

124. As of February 22, 2012, Ms. Cordle concluded that Student was becoming more familiar and comfortable with his new educational environment. His adaptation to his new learning environment and lower anxiety was demonstrated by a reduction in grabbing and scratching behaviors.

125. Ms. Cordle reported that Student preferred open spaces to the classroom table-top exercise. She observed that Student required outside time to release energy and increase his constructive engagement with tasks and self-monitoring. Ms. Cordle did not accompany Student on field trips, but she reported from information obtained from her functional aides that Student enjoyed his community outings and was generally well behaved, occasionally leaving the group, but returned when verbally prompted to do so.

126. Student participated in two further field trips, accompanied by two functional aides, before Ms. Cordle terminated his further involvement in classroom excursions due to Mother's objections. On February 23, 2012, Student went to the zoo. He did start to walk away from his aides, but quickly returned when prompted. The next day he went to the park without incident.

127. On February 23, 2012, District notified Mother to attend an IEP meeting on March 22, 2012, to review the triennial assessment, the current placement and its appropriateness, and to complete the annual IEP. Mother acknowledged her receipt of the notice and her attendance.

128. By the end of February and early March, Student had two toileting accidents, one at school, and one on the bus ride to school. On February 27, 2012, Student accidentally urinated on his pants during his morning toileting routine. On March 1, 2012, Student had a urination accident on the bus. Stein always had extra clothes for its pupils, and like other pupils, Student was provided clean clothes.

129. After February, there were no emergency intervention procedures administered to Student.

130. On March 20, 2012, Student accidentally urinated on his pants during his bathroom routine, after a morning where he navigated calmly throughout his scheduled activities.

131. That same day, after recess, Student eloped from Stein. Student was very hyper, playful and noncompliant. Student was seated in the garden, which was connected to an adjacent park by a gate. After a few minutes, Student stood, and although Student's functional aide immediately reached for his hand, Student pushed it away and ran out the garden gate to the park. Several staff members ran and brought him back to safety.

132. Ms. Cordle reported to Mother the events of March 20, 2012, in an e-mail that day.

133. In the same e-mail of March 20, 2012, Ms. Cordle notified Mother that she was in the process of preparing proposed goals for the IEP team, and invited her input, supplying Mother with her telephone and e-mail contact information.

*March 22, 2012 IEP team meeting*

134. On March 22, 2012, the IEP team met to review Student's triennial assessment, including his FAA, and develop his annual IEP. All necessary members were present, including Mr. Baisley, Ms. Cordle, Stein's new Director, Mike Brown, Mother, Student's speech and language pathologist (SLP), Student's occupational therapist, District's school psychologist, District's occupational therapist, and District's speech and language pathologist, Deborah Clemm.

135. The IEP team reviewed Student's progress on his previous goals. Student was most accomplished at goals requiring sorting and matching shapes and animals. Student made insignificant progress on most of his goals since he started at Stein, because when he was agitated, he resisted the task or required more prompts than desired by the goals. For example, Student could not work with peers aided by gestures, but required physical prompts

60 percent of the time to complete group tasks. The other 40 percent of the time, Student was resistant to performing the task. Student resisted shredding 50 percent of the time, and required manual guidance, in addition to the stated visual work system to start the task. Once started, he could do more.

136. The IEP team reviewed the results of District's psychoeducational assessments, OT assessments, speech and language assessments, and speech report. The results of the assessments confirmed what was known previously about Student's unique needs as memorialized in his last annual IEP.

137. Student's sensory issues, self-stimulatory, and aggressive behaviors were a significant impediment to his progress. Student's SLP prepared a speech report which recorded her classroom, and direct one-on-one observations during therapy. Her report was consistent with Student's history, and reflected the observations of those who worked with Student on the Stein campus.

138. Student's SLP observed that Student engaged in a wide range of self-stimulatory behaviors that were difficult to interpret including hyperventilation, obsessive leaf chewing, smelling objects within reach, body flexing, self-imposed nipple pressure, and hand-over-hand requests for "head squeezes." If the head squeezes were provided, Student became aggressive, and continued to be aggressive, whether or not the head squeezes proceeded or stopped. Student would often throw items within reach. Student removed his shoes and socks and would also throw these items if given the opportunity. Student attempted to run without warning and had to be watched carefully at all times.

139. Student's SLP reviewed Student's use of AAC tools. Student enjoyed active physical activity, like the playground swings and running, but showed little interest in sedentary activities involving the computer. The SLP attempted to work with Student on cause and effect programs using a desk top computer and a tablet computer, but was not successful.

140. Student's SLP worked with Student on his SpringBoard Lite and another computer application, referred to as a TouchChat. Student was able to toggle between two pages on both devices to request something to eat. However, the SLP could not rely on Student to use his AAC devices, including the SpringBoard Lite, unassisted.

141. Student's SLP found that Student did not easily follow simple verbal directions without physical prompts, such as "stand up," "sit down," or "come here." The SLP also found that Student did not usually respond to simple greetings without multiple verbal and gestural prompts.

142. Student's SLP reported that Student's most effective form of communication involved the physical act of pulling a listener to a desired area and some basic signs. She also observed Student to gain attention with an open vowel vocalization and a "tap" when food items were involved. Student was spontaneous in signing "more," "eat" and "drink,"

and sometimes, “cookie.” When able to attend, Student demonstrated that he understood “yes” (by a head nod) and “no” (by pushing an item away).

143. Student’s SLP concluded that the most promising focus of speech therapy should be increasing Student’s use of functional sign language. Student should be provided with opportunities to use AAC throughout the school day, but based upon her observation, it was not the most effective form of communication due to Student’s need for multiple prompts to use the device, and his tendency to throw the device if it was left unattended within his reach.

144. Ms. Cordle also reported that Student preferred sign language, but the SpringBoard Lite was kept at his desk and taken to group activities, where Student showed a preference for using it. Ms. Cordle confirmed that Student required hand-over-hand prompts to navigate through the pages and could not do so unattended.

145. At hearing, District’s SLP, Ms. Clemm, testified about Student’s L&S needs. Ms. Clemm prepared the triennial L&S assessment. Ms. Clemm possessed all the necessary credentials required of a District SLP, was the SLP for District’s NPS program, and had two decades of experience as an SLP.<sup>3</sup> Ms. Clemm’s testimony was limited to the issue of whether Student’s L&S services were appropriate. Ms. Clemm spoke with Student’s SLP, and observed Student. Ms. Clemm confirmed that Student’s direct one-on-one speech at the school site was appropriate, as it allowed for collaboration between the SLP and Ms. Cordle in the school setting.

146. In addition to the assessments, Ms. Cordle prepared an FAA, and a BIP, under the supervision of Stein’s BICM. Ms. Cordle directed the functional aides to take data across all settings throughout the school day, in and outside the classroom, playground, during direct L&S services, and during OT. Ms. Cordle utilized data collection sheets specified by the BICM to record behavior episodes. In preparation for the FAA and BIP, Ms. Cordle prepared a summary sheet of the data collection sheets about Student’s behavioral episodes, for the period November 29, 2011 through February 29, 2012.

147. Ms. Cordle relied on the baseline prepared by ACES, which classified behaviors into three categories: tantrum and assaultive episodes (averaging six times daily), non-compliance (averaging four times daily) and running away (averaging two times daily). ACES staff collected data each day, and the results were calculated based upon consecutive data days. From the data sheets Ms. Cordle culled behavior episodes which were inclusive

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<sup>3</sup> Prior to hearing, Mother requested independent educational evaluations (IEE’s) at public expense for L&S, OT and psychoeducational needs. District granted the requests. At the time of the hearing, Mother had secured an L&S assessment. The L&S assessment was not proffered or admitted. Mother did not exchange the L&S IEE with the District prior to the hearing, and failed to make an offer of proof, as the ALJ requested, as to why the IEE was relevant, and why the time limit for exchanging the document should be excused, or extended such that it could be considered.

of both noncompliant and assaultive behaviors. In Ms. Cordle's experience, Student's noncompliant and running away behaviors were always accompanied by more aggressive behaviors, such as tantrums, and assaults. Instead of isolating Student's noncompliant behaviors from tantrums and assaultive behaviors, Ms. Cordle included as behavior episodes, all possible behaviors attributed to Student whether or not the behaviors included tantrums, assaults or noncompliant episodes. In Ms. Cordle's calculation, behavior episodes encompassed any refusal to comply with verbal directions (running away, dropping, climbing over furniture, taking shoes off) paired with crying, property destruction (ripping paper, clearing off work table) and/or repeated aggression (throwing objects at people, hitting, pushing, grabbing, scratching, and biting). Ms. Cordle's definitions excluded behaviors where Student's non-compliance with verbal instructions were not accompanied by other overt maladaptive behaviors.

148. Ms. Cordle relied on her functional assistants for data collection, but she admitted that her functional assistants were not consistent reporters, and sometimes omitted information on the required work sheets. Ms. Cordle did not measure Student's behaviors when he was not present, but only on days he was in school.

149. Based upon Ms. Cordle's definitions and data calculations, between November 28, 2011 and February 29, 2012, Student had an average of 2.06 behavior episodes daily of 20 minutes and 18 seconds duration.

150. Ms. Cordle also provided a severity rating for the behavior episodes. Behavior episodes were ranked on a scale of one to five, with one, the mildest, and five the most extreme. At level one, Student engaged in mild inappropriate or off-task behaviors, such as not following directions and dropping. Level one behaviors were not accounted for in Ms. Cordle's definition of behavior episodes and according to Ms. Cordle, did not occur. At level two, Student exhibited initial signs of escalation by cursing or engaging in brief self-injurious behaviors, such as biting his hand or hitting himself, or brief unsuccessful, but attempted assaults, such as raising hand to hit or punch, but stopping without any physical contact, when the person moved away. At level three, Student's behaviors escalated to crying, screaming, yelling, mild self-injurious actions, but mostly, silly behavior and brief non-painful physical contact with others such as squeezing hands, and grabbing clothes. At level 4, Student was assaultive, inflicting pain, with minor or no injuries, and engaged in intense self-injurious behaviors, and inappropriate sexual behaviors involving touching others, or exposing himself in public. At level five, Student posed a serious danger to self and others, by inflicting serious injury to himself and others, threatening serious property destruction. At level five, an emergency procedure was required.

151. According to Ms. Cordle's calculations, during January 2012, Student had 2.11 behavior episodes daily of 25 minutes, three seconds duration with a severity rating of 3-5. Ms. Cordle's data for January included Student's two emergency procedures. During February, Student had an average of 1.79 behavior episodes daily of 20 minutes, 40 second duration with a severity rating of 3-4. Ms. Cordle's February data included Student's one emergency procedure.

152. Ms. Cordle developed a separate data form for measuring Student's ability to progress on goals, many of which were also designed to increase his ability to make his needs known. She instructed her functional aides to use these forms to record their observations. Ms. Cordle tracked Student's ability to communicate his needs as measured by progress on his behavioral goal to request a break using a variety of break icons (i.e., choice board, PEC book, communication device, signing) when he exhibited signs of a agitation, or the start of a behavior episode (e.g., heaving breathing). Requesting a break was identified as a replacement behavior. Ms. Cordle compared ACES baseline data. At the time Student left ACES, Student had achieved the third benchmark of the behavioral goal and could request a break with prompting on 80 percent of occasions. During January and February, his first two full months at Stein, Student regressed on his replacement behavioral goal when measured by Ms. Cordle's definition of a behavior episode. According to Ms. Cordle, when Student was agitated, staff could not prompt him, and there were zero occasions where Student successfully made a request.

153. Ms. Cordle relied upon data collected from Student's functional aides to measure Student's progress on two communication goals which also addressed his behaviors: responses to yes or no questions by head signals, verbalizations or an AAC; and combining 2-3 words using an AAC, such as "eat popcorn," and "go to gym." Student met the goal of responding to yes or no questions on individual data days, but was not consistent for more than three data days. Student did not meet the goal of combining two words. He made progress and could combine two signs for food items, such as "more eat." However, Student could not be left alone with the AAC, the SpringBoard Lite, because he would throw it, so he did not progress on the goal with the AAC, because it could not be relied upon as his primary communication tool.

154. Under the supervision of Stein's BICM, Ms. Cordle prepared a BIP for the IEP team's approval. With the exception of the definition of behavior episode, Stein's BIP tracked the BSP. Specifically, the BIP noted the same behavioral predictors, such as, when denied access to desired items or activities, when required to perform non-preferred work activities, and where big transitions occurred (e.g., on-off bus, return from recess). The root causes for the behavior reported in the BIP were similar to those noted in the BSP, specifically, communication deficits most apparent in situations requiring verbal directions and cues, or inability to get personal needs met, e.g., requesting a break, or asking to go out and play, informing staff of need to use the bathroom.

155. Stein's BIP set forth tools to avoid the behaviors or introduce substitute behaviors, some of which existed in Student's BSP, but many which were specifically tailored for Student's environment at Stein. Like the BSP, the BIP included use of a visual schedule, specifically a "first-then" board, so Student could learn expectations, and what he could earn. The BIP also required staff to use a timer or complete a countdown paired with gestures so Student would know when an activity was ending.

156. The BIP required Student to access PECs, photos, and his AAC, to facilitate responses throughout the day. The BIP expressly required staff to honor Student's attempt to

communicate whenever possible. The BIP acknowledged that Student's use of alternative communication tools should be embedded throughout his school day, and that staff should provide opportunities to teach, practice, and improve his use of communication tools. The BIP did not require any particular communication tool, other than to require staff to teach Student to use a visual schedule and a first/then board to transition between activities.

157. The BIP included reinforcement strategies, or rewards, for completing tasks, or group activities, such as accumulating tokens, verbal praise, and participating in a favored activity.

158. The BIP included specific steps for addressing behavior episodes, such as: giving Student clear verbal direction paired with signs or gestures, or visual cues; and using a communication tool or first/then board, to tell Student to "come here." If Student refused, staff would attempt to work with Student to use his communication system to make a request. If Student resisted, or became aggressive, he would first be directed to sit away from the activity area for one minute with a quiet voice, legs crossed, and his hands to himself. Where Student persisted in repeated aggression, after these steps were followed, e.g., hitting, grabbing, scratching hard enough to break skin, he would be escorted to a work cubby. If Student refused to stay in cubby, he would be escorted to a timeout room where he would remain until he exhibited calm behavior (willing to put shoes on and keep them on, sitting without grabbing or scratching people, or completing a slow countdown).

159. To avoid or reduce the intensity of Student's behaviors, the BIP emphasized the use of visual schedules and consistent use of communication tools to help Student express his need for a break, physical activity, attention, sensory input, food or drink, and toileting. The BIP required consistent prompting of Student to access his communication tool whenever he exhibited initial signs of frustration (e.g, heavy breathing), tried to access a desired item, or needed to be told to terminate a desired activity.

160. To eliminate Student's propensity to engage in problem behaviors, the BIP required Student's schedule to alternate between high and low activities, and to include a sensory program, to be developed by the OT.

161. The BIP required consistent daily data collection using approved forms, and regularly scheduled reviews, including interdisciplinary team meetings every four to six weeks, and quarterly reports included as part of the Student's report cards.

162. Ms. Cordle and District IEP team members developed other goals for IEP team approval, which directly addressed Student's behavioral impediments to progress.

163. Mother had an opportunity to participate in the IEP team meeting. Mother repeated the concerns she presented to the school psychologist in her interview with him to the whole IEP team.

164. At the IEP team meeting, Mother expressed her concern about the qualifications of staff working with Student. She was concerned that Student required more than one staff person to assist him with his behaviors, and with getting on and off the bus. In her perception, the Stein staff lacked empathy. She wanted to know what internal protocols were in place to govern staff behavior toward pupils. She observed staff place a foot on a pupil's hands when he was lying in a prone position covering his face. She observed another Stein staff telling a pupil not to get too close when he was attempting to hug her. At the IEP team meeting, Mother also emphasized her concern that Stein was sending employees into the community with Student who were unknown to Mother.

165. At the IEP team meeting, Mother reported that Student's maladaptive behaviors became more pronounced at home and in the community since Student began attending Stein. In addition to his toileting issues, and known assaultive behaviors, she reported that Student now bit himself, and stole food from his siblings at home.

166. Mother requested a change of placement to ACES or another specified NPS placement. Mother stated that Stein was not appropriate due to Student's new maladaptive behavior.

167. District offered Student Stein with the revised goals and objectives, BIP, and OT and L&S services.

168. Mother did not consent to District's offer of Stein, its goals and objectives, or BIP. Mother consented only to District's continuation of DIS OT and L&S services.

169. On March 23, 2012, District sent Mother a prior written notice letter setting forth its reasons that it would not change Student's placement from Stein. District maintained that Stein provided the enclosed protected educational setting and playground that Student required, and which Mother requested. District considered Mother's recommended alternative NPS placement, but rejected it as an option because it did not service pupils as young as Student, or with Student's unique and severe behavioral and intensive academic challenges. Stein maintained that Student's triennial assessments confirmed that Student's placement at Stein addressed Student's unique needs for safety.

170. On or about April 15, 2012, Mother requested that District provide her with Student's educational records. On April 20, 2012, in response to Mother's request, District provided Mother with approximately 3000 pages of documents, from his cumulative education file, including his IEPs and assessments. Mr. Baisley was responsible for responding to Mother's request. Student's cumulative file contained records that followed Student throughout his educational placement, but did not contain e-mails about Student, or his data collection records from Stein, or any previous placement. The documents produced by District did not contain documents created by Student's classroom teacher at Stein, Ms. Cordle, or her functional aides, including the data sheets used to record Student's behavior episodes, and progress on his IEP goals. Ms. Cordle's records were not maintained in Student's cumulative file, and were not produced to Mother as part of her records request.

The data collection records were maintained by Ms. Cordle, and from the testimony it appeared that Ms. Cordle may have not just relied upon standardized forms similar to the forms attached to the FAA, but also created her own data sheets for her functional aides. The data records utilized in Ms. Cordle's class contained the observations of classroom staff, and Ms. Cordle's handwritten notes, that were not easily understandable.

*April 23, 2012 IEP*

171. On April 23, 2012, District and Mother agreed to convene an IEP team meeting to discuss Mother's concerns regarding Stein. Mother wanted each member of the IEP team, including the assessors, to weigh in whether they considered Stein an appropriate placement. At this meeting, the IEP team members present, Ms. Cordle, and the SLP, advised Mother that they were in agreement with the District's offer. The IEP team also reviewed Mother's concerns that Student's SpringBoard Lite was not being used more regularly, or programmed to his level of proficiency. Mother was scheduled to observe Student in class on April 27, 2012. The IEP team requested that Mother bring in the SpringBoard Lite used at home at that time and Mother agreed. The IEP team discussed Mother's educational records request. Mother informed the IEP team that she had not received all Student's educational records. She maintained that she should have received e-mails, and the data collection records of Student created by Ms. Cordle's functional aides.

172. On April 27, 2012, Mother observed Student in his classroom during academic lessons. That day, Mother made a written report of her classroom observation. Overall, her observations of Student's classroom performance were consistent with Ms. Cordle's observations, and did not depart from the assessment of his unique needs by the IEP team. When Mother arrived in the classroom, Student was seated next to a functional aide on the couch taking a break. Student accompanied the functional aide to a cubby and sat down without protest. Student worked on a variety of tasks related to his goals, including matching socks, animals, and crayons, making requests with his SpringBoard Lite, and cutting. At one point before his cutting exercise, the functional aide showed Student the SpringBoard Lite, and he pressed the fruit key. The aide told Student it was time to work, and Student first attempted to cut paper, but was not looking at it, so the functional aide assisted him by cutting the paper into smaller pieces and working with him hand-over-hand to cut it. When Student kept putting his palm to his face and rocking, the functional aide wrote that he was resistant. As he began to protest more, the functional aide told him that he was doing a good job. She also took out the SpringBoard Lite for him to select a preferred item. He pressed eat, and fruit. When the functional aide gave him an animal cracker he shook his head "no." When the functional aide provided Student with another task, he got up from the table, but sat down again when she directed him to do so. When the functional aide requested that Student write his name with the crayon she gave him, he threw it on the floor, began rocking rapidly. When he did this, the functional aide reached for the SpringBoard Lite and Student pressed swing. After one more task, the functional aide acknowledged his request for the swing by saying "o.k., let's go outside." Student smiled and accompanied the functional aide outside to the swing. On the swing he continued to smile.

173. Based on her observation, Mother perceived that Stein had high and rising levels of noise, both in and outside the classroom, including a scream from one pupil. She believed that Student's functional aide did not consistently take data, although she admitted that she might have missed something when she was distracted by the scream. In particular, she noted that the functional aide failed to take notes of Student's performance matching items, although she did observe her noting Student's resistance to cutting. She noted that the functional aide did not engage with Student while he was on the swing.

174. At hearing, Mother testified that she requested that Stein allow a representative of Student's at-home ABA provider, AST, to observe Student at Stein. Mother's testimony was not credible. The evidence established that during this time no one from District knew that Student had a home program from AST, and although Mother introduced as evidence numerous e-mail exchanges with Stein to arrange a classroom observation, not one of the exchanges mentioned AST.

175. At hearing, Mother acknowledged that she was permitted to review the data sheets created by Student's functional aides at Ms. Cordle's direction and maintained in Ms. Cordle's classroom files. Ms. Cordle's records consisted of the daily data sheets of Student's behaviors and performance on his goals and objectives, some which were standard, and some which she developed. The daily data sheets also contained Ms. Cordle's notes. As exemplified by the form data sheets attached to District's proposed BIP of March 22, 2012, Ms. Cordle's records identified Student, and included only his data, not data of any other pupil. District refused to produce Ms. Cordle's records as part of Mother's educational record request, but granted Mother permission to review them. At hearing, Ms. Cordle confirmed that it was not her practice to release the data sheets, as they were not understandable to a layperson.

176. When Mother reviewed Student's data records, she found instances of incomplete or contradictory data. At hearing, Mother's testimony was not contradicted by Ms. Cordle, as Ms. Cordle admitted that her functional aides sometimes omitted data days.

177. On May 7, 2012, Mother provided District a 10 business day notice of her intent to remove Student from Stein, place him in a private ABA program, and seek reimbursement from the District.

*May 16, 2012 IEP Team Meeting*

178. In response to Mother's 10 day notification, on May 11, 2012, District requested Mother attend an IEP meeting on May 16, 2012, to review Student's placement at Stein and its appropriateness. Mother agreed to attend.

179. On May 16, 2012, the required members of the IEP team met with Mother to review again District's IEP offer of March 22, 2012, and her decision to remove Student from Stein and place him in an ABA program. Stein and District IEP team members included Mr. Brown, Ms. Cordle, Mr. Baisley, Student's SLP, and District's SLP assessor.

The meeting ended without Mother changing the scope of her consent to the March 22, 2012, IEP.

180. May 18, 2012 was Student's last day at Stein. Student was having an uneventful day and was engaged in his activities. At the end of that day, Student had a bowel accident while fully clothed. Ms. Cordle and her staff were surprised by the bowel accident, a first for Student at school, but did not have an opportunity to assess it because Student did not return to school. In her experience, many pupils like Student prefer not to have bowel movements at school. Ms. Cordle provided Student with clean clothes.

181. Beginning on May 19, 2012, Mother kept Student at home, where he received one-on-one ABA services from AST on average of five hours a day, five days a week, an increase from the two hours of one-on-one ABA therapy he received throughout the school year. AST continued to use Student's March 2011 annual IEP, following the goals and objectives used at ACES.

182. Richie Plausch supervised AST's staff, and also worked directly with Student. Mr. Plausch has the necessary special education teaching credentials, and years of teaching experience in District, working with pupils who, like Student, are autistic. He was also a board certified behavior analyst (BCBA). Mr. Plausch testified as an expert, and a percipient witness. Given Mr. Plausch's educational background, work experience, and direct knowledge of Student, and his care in limiting the scope of his testimony to areas within his knowledge, his testimony was given deference in determining whether Stein was an appropriate placement.

183. Mr. Plausch confirmed what all the other professionals working with Student had observed. Student was significantly delayed. He had mastered matching, but was still working on identifying numbers, and otherwise, did not have any math skills. Student's behavioral challenges tempered his ability to progress.

184. After Mother withdrew Student from Stein, Student's daily behaviors escalated during his at home program with AST. Student regularly engaged in tantrums and aggressive behaviors during his home program, despite AST's utilization of the BSP developed by CVUSD with ACES. Student's aggression at home followed a similar pattern to his conduct at school. He would grab at the shirts or neck area of AST staff, and attempted to, and did, scratch their necks and rip their shirts. Like ACES, AST did not administer emergency behavior interventions, despite Student's physical attacks. Staff blocked Student's aggression with their arms and backed away, while attempting to prompt him to make a request.

185. Mr. Plausch did not offer an opinion about Stein's program because he never observed it. Mr. Plausch endorsed the integration of ABA principles and TEACCH into Student's educational and behavioral curriculum. He testified that it was his practice to collaborate with his clients' school placement, and attend IEP team meetings to share information and to ensure consistent practices. However, parental consent was required

before AST could communicate directly with the school district. There was no evidence that Mother provided AST with authorization to directly communicate with Stein at any time.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student has the burden of proof.

### *Issue One: Deprivation of Parents' Right to Participate*

2. As to Issue One, Student claimed that his parents were deprived of their right to participate in his educational decision-making. As to Issue One (A) Student claimed that District failed to notify them of Student's emergency interventions, within one school day of the intervention, as required. As to Issue One (B) Student claimed that District failed to provide his parents educational records, and staff resumes, by limiting its response to his parents' request to IEPs and assessments contained in the cumulative file, and not providing Student's classroom data sheets, e-mails, or other unspecified records.

3. As to Issue One, District maintained that Student failed to meet his burden of proof that it committed procedural violations that deprived his parents' of their right to participate in his educational decision-making. As to Issue One (A), District maintained that it met its statutory obligation to notify parents within one school day of emergency interventions. District further maintained that any deficits in its notification did not give rise to an action under the IDEA, as there was no evidence that parents suffered a deprivation of their rights by any minor delay. As to Issue One (B), District maintained that it provided the documents that were educational records, which were extensive, but limited to documents contained in Student's cumulative file. District further maintained that Student had not met its burden of proof that defects in District's document production deprived his parents of their right to participate in his educational decisions.

### *Applicable Law to Issue One*

4. California special education law and the IDEA provide that 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.) A FAPE consists of special education and related services that are available to the pupil at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the pupil's individual education program. (20 U.S.C. § 1401(9).) "Special education" is defined as "specially designed

instruction at no cost to the parents, to meet the unique needs of a child with a disability....” (20 U.S.C. § 1401(29).)

5. California law also 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.) “Related services” are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) DIS services may include OT, and L&S therapy. (Ed. Code, § 56363, subd. (a) & (b)(1).)

6. The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 205-206 [73 L.Ed.2d 690] (*Rowley*).) A procedural violation constitutes a denial of FAPE if it impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the pupil, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) If a procedural violation is found to have significantly impeded the parents’ opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 [school’s failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F.2d at pp.1485-1487 [when parent participation was limited by district’s pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

7. The parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings. (34 C.F.R. § 300.501(a) & (b)(2006)<sup>4</sup>; Ed. Code, §§ 56500.4, 56341, subd. (b), 56341.5, subds. (a) & (b).) “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan.” (*Amanda J., supra*, 267 F.3d at p. 882.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meeting, expresses disagreement regarding the IEP team’s conclusions, 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 (“*Fuhrmann*”) [parent who has an opportunity to discuss a proposed

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<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

8. A “behavioral emergency” is the demonstration of a serious behavior problem that has not been seen before, and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (c).) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the school district shall notify the pupil’s parent(s) within one school day whenever an emergency intervention is used or serious property damage occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(5).) After a “behavioral emergency,” a “Behavioral Emergency Report” must be completed that includes: 1) the name of the student; 2) the setting and location of the incident; 3) the name of the staff or other persons involved; 4) a description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and 5) details of any injuries sustained by anyone as a result of the incident. (*Ibid.*)

9. To guarantee parents the ability to make informed decisions about their child’s education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child’s “identification, evaluation and educational placement.” (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing, or resolution session. (See 34 C.F.R. §300.613(a)) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) Although federal regulations to implement the IDEA state that in no case shall educational records be provided more than 45 days after the request has been made, California law states parents have the right to receive copies of all school records within five business days after parents make a request. (34 C.F.R. § 300.613(a); Ed. Code, §56504.)

10. Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records include “records, files, documents, and other materials” containing information directly related to a student, other than directory information, which “are maintained by an educational agency or institution or by a person acting for such agency or institution.” (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those “recorded by handwriting, print, tapes, film, microfilm or other means.” (Ed. Code, §§ 49061, 56504.) Pupil or education records do not include “records of instructional, supervisory, and administrative personnel...which are in the sole possession of the maker

thereof and which are not accessible or revealed to any other person except a substitute.” (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

11. The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo*), after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of “education records.” Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to “maintain a record, kept with the education records of each student” (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that “list[s] those who have requested access to a student’s education records and their reasons for doing so.” (*Falvo, supra*, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, “Congress contemplated that education records would be kept in one place with a single record of access.” (*Id.*) The Court further concluded that “[b]y describing a ‘school official’ and ‘his assistants’ as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar...” (*Id.* at pp. 434-435.) The Court then found that individual assignments handled by many student graders in their separate classrooms were not student records. (*Id.*)

12. In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV*), when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the “scant” judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that “the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like.” (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, “which was not directly related to the private educational interests of the student,” was not an educational record, “as the report was not something regularly done in the normal course of business,” and “was not the type of report regularly maintained in a central location along with education records...in separate files for each student.” (*Id.* at p. 755.)

13. In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff’d. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that school district e-mails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the e-mails pupil requested had not been placed in his permanent file, and were therefore not “maintained” by the school district, the e-mails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

14. Parents are not entitled to inspect the resumes of staff implementing a pupil's IEP. An IEP is not required to set forth the training of personnel or providers. (*S.M. v. Hawaii Dept. of Educ.* (D. Hawaii 2011) 808 F. Supp. 2d 1269, 1273-1274; see 34 C.F.R. § 300.320.)

*Analysis of Issue One (A): Timely Notification of Emergency Intervention*

15. Student failed to prove by a preponderance of the evidence that District had not timely notified Mother of the emergency interventions of January 19, 2012, January 26, 2012, and February 8, 2012. Based upon the documentation provided to CDE, which included the required written report of the interventions, and credible testimony of Ms. Cordle, the evidence showed that Mother was provided with notification within one school day. On January 19, and January 26, 2012, the evidence showed that District notified Mother by telephone and by note on the same day of the interventions. The evidence also showed that although Ms. Cordle was absent February 8, 2012, when the final emergency intervention occurred, Ms. Cordle notified Mother on February 9, 2012, by note sent home in Student's communication book. The February 9, 2012, notification was sent within one school day of the February 8, 2012, incident. As such, District provided timely notification to Mother of all three incidents. Consequently, Student failed to meet his burden of proof that any IDEA procedures were violated. Given that the evidence showed Student was provided the required notice, his parents were not deprived of their right to participate, nor was Student deprived of a FAPE in any way on this ground. (Legal Conclusions 1-15; Factual Findings 1-185.)

*Analysis of Issue One (B): Failure to Provide Parents Student's Educational Records, and Staff Resumes*

16. As to Issue One (B), Student failed to prove by a preponderance of the evidence that District's production of educational records was deficient, or otherwise deprived his parents of their right to participate in his educational decision-making. Student claimed that District failed to provide e-mails and other communications, and Ms. Cordle's data records pertaining to his behaviors, and goals and objectives. The evidence showed that on or about April 15, 2012, Mother requested Student's educational records, and that on April 20, 2012, District timely responded to Mother's request by producing 3000 pages of documents from Student's cumulative file, consisting mainly of IEPs and assessments from the inception of his education. Student's cumulative educational file did not contain e-mails, or classroom records. On April 23, 2012, IEP team meeting, Mother complained that she did not receive e-mails or Student's classroom records, particularly Ms. Cordle's data records pertaining to Student's behaviors and goals and objectives.

17. As to e-mails and other communications, Student had not met his burden of proof that the failure to produce these documents was a procedural violation, as District was not obligated to produce e-mails referring to Student that were not ordinarily maintained in his cumulative file. Further, Student had not met his burden of proof that his parents were otherwise deprived of their right to participate in his decision-making by District's failure to

produce e-mails or other communications, because as was evident at the hearing, Mother was in possession of, and introduced as evidence, e-mails exchanged with Stein personnel, and communication logs containing her and Ms. Cordle's notes about Student.

18. As to Ms. Cordle's data records, Student failed to show that District was either obligated to produce the data records as part of her educational records request, or that its decision to allow Mother to inspect the data records, instead of copying them wholesale, deprived his parents of their right to participate in his educational decisions. As set forth in Legal Conclusion 9 above, to guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." However, as set forth in Legal Conclusions 10 through 13 above, relevant educational records are limited to documents ordinarily maintained in the centralized cumulative file of Student, by a central registrar, and do not include records created or maintained by classroom teachers. Ms. Cordle's data sheets regarding Student's behaviors or his performance on his goals and objectives, included forms spelled out in the FAA, but according to Ms. Cordle's testimony, also included forms she specially created for use by her functional aides and which contained her notes. To the extent Ms. Cordle's data sheets were of her own design and were used and accessible only to her and her functional aides, they were not educational records. As such, District was not obligated to maintain in Student's cumulative file data sheets created or utilized by Ms. Cordle, which were not accessible to Stein or District personnel and produce them in response to Mother's generic request for Student's educational records.

19. Student failed to prove by a preponderance of the evidence that his parents were deprived of their right to participate in Student's educational decision-making when District responded to Mother's express request for Ms. Cordle's data records by allowing her to inspect them in Ms. Cordle's classroom. To the extent Ms. Cordle's data sheets were utilized to measure Student's behavioral episodes, to prepare the FAA, and develop the BIP, the data sheets were not exclusive to Ms. Cordle, but were shared with the BICM responsible for supervising the FAA and the BIP. Although the BICM had access to the daily data records to develop the FAA and supervise the BIP, Ms. Cordle's daily data records were not the typical records maintained in a pupil's cumulative file by a central registrar in the normal course of business. As such, District was not responsible for producing Student's data records as part of Student's generic educational records request. As part of the IEP team, Mother was entitled to review the data records available to Stein's BICM, which formed the basis of District's FAA and offer of a BIP, notwithstanding Ms. Cordle's claim that the data sheets were not understandable to a layperson. Accordingly, although Ms. Cordle's data records, as with the data records generated at Student's previous placements, were not educational records, upon Mother's express request, District was required to make the data records accessible to her as a member of the IEP team, to review the data that formed the basis of District's offer. By Mother's own admission, she was allowed to inspect, and did inspect the data records. For this reason, Student had not met his burden of proof that his parents were deprived of their right to participate in his educational decision-making by any procedural violations committed by District.

20. Student had not met his burden of proof that his parents were deprived of their right to participate in his educational decision-making at the March 22, 2012, IEP where the FAA and the BIP were first discussed, or at the April 23, 2012, IEP team meeting where Student's placement was reviewed again, due to any procedural delay in Mother's inspection of Ms. Cordle's data sheets. From the evidence presented, Mother had not made her request for educational records until after the annual March 2012 IEP team meeting, at or about April 15, 2012. District timely produced documents from its cumulative file. On April 23, 2012, Mother first apprised District that she wanted to review Ms. Cordle's data sheets. Mother admitted to inspecting Ms. Cordle's data in her classroom, and from the evidence, it was likely that she did so on April 27, 2012, the one day she observed the class before she removed Student from Stein. Accordingly, based upon the timing of Mother's request, Mother was not deprived of her right to participate in any IEP as a result of District's response to her educational records request. Mother had an opportunity to contribute her concerns to the IEP team when it met again on May 16, 2012, and amend the IEP team with any new information at that time.

21. Overall Student failed to show that Ms. Cordle's data sheets provided any additional information not already known by Mother, or the IEP team. Significantly, the evidence showed that the raw behavioral data sheets did not depart from the observations which formed the basis of the FAA or the BIP. Although Mother credibly reported deficiencies in staff data collection, there was insufficient evidence that the errors in data collection distorted the IEP team's understanding of the severity of Student's behaviors, or his progress on his goals. As described by Ms. Cordle, she utilized data to ascertain the most severe behaviors because at Stein, Student's non-compliance was accompanied by more overt behaviors, including the most severe aggressive behaviors. There was no evidence that known antecedents to Student's more aggressive behaviors were not understood or reported inaccurately to the IEP team. In addition, District's triennial psychoeducational assessment, and the SLP's report, confirmed what was documented in data collection, and what was observed at Stein and by Mother. Not one member of Student's IEP teams, including Mother, disagreed with the scope and character of Student's behaviors, or the antecedents to these behaviors. On the contrary, the behaviors noted in the FAA and addressed in the BIP were long-standing, and were consistent with the behaviors noted in Student's previous IEPs, by Mother, and the service providers, ACES, and AST, that Mother trusted. At hearing, each witness acknowledged Student's maladaptive behaviors and described essentially the same pattern of aggression and escalating physicality, including shirt or collar grabbing, and scratching. Further, there was no evidence that the summary of Student's progress on his goals was inflated by inaccurate data. Ms. Cordle reported that Student's performance was hindered by his behaviors, and the data confirmed that he did not progress. Moreover, Student failed to provide any evidence that his parents were prejudiced at hearing by Mother's inspection (as opposed to copying) of Ms. Cordle's data sheets. Mother credibly testified about her review of the data, and capably cross-examined Ms. Cordle about the omissions in the data sheets she had the opportunity to review.<sup>5</sup>

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<sup>5</sup> At hearing, Ms. Cordle produced, for the first time, a summary sheet of behavior data sheets prepared by Student's functional aides, which she used to prepare the FAA and

22. As to Issue One (B), Student had not met his burden of proof that District committed a procedural violation when it refused to comply with Mother's request for staff resumes. As set forth in Legal Conclusion 14, District was not required to produce staff resumes in response to Mother's educational records request, as they were not educational records, or relevant to the IEP.

23. In sum, Student failed to prove by a preponderance of the evidence that District committed a procedural violation in its production of educational records, or staff resumes. Student was not denied a FAPE on these grounds. (Legal Conclusions 1-7, and 9-22; Factual Findings 1-185.)

*Issue Two: Inappropriateness of Student's Placement at Stein*

24. Student contended that District deprived Student of a FAPE by failing to change Student's placement from Stein NPS to ACES. In Issues Two (A) and Two (B) Student contends that his behaviors and transitioning challenges were exacerbated at Stein by poor classroom structure and teaching methodology, and at Stein, Student incubated additional maladaptive behaviors. In Issue Two (C), Student contended that his daily toilet accidents at home since he started Stein were a consequence of Student's inappropriate placement. In Issue Two (D), Student contends, that Stein failed to implement a regularly scheduled sensory diet as set forth in his March 2011 IEP, and which he required. In Issue Two (E), Student contended that District's failure to appropriately program and consistently utilize Student's Springboard Lite, rendered Stein an inappropriate placement.

25. District maintained that Stein met Student's unique needs and provided a FAPE at all times because it offered a safe, secure and structured classroom environment, outdoor play, and direct DIS services that Student required. Specifically as to Issue One (A) and (B), District maintained that Stein was appropriate, and that the behavior interventions it provided were appropriate given Student's established needs with behaviors relating to transitions between places or activities. As to Issue One (C), District further maintained that it appropriately addressed Student's school toileting issues and that the District was not responsible for Student's at-home behaviors, which were of unknown origin, and did not impact Student's education at school. As to Issue One (D), District disagreed, and maintained that the program at Stein met Student's sensory needs throughout the day. Finally, as to Issue One (E), District disagreed there was a denial of a FAPE because it maintained, programmed, and used the Springboard Lite, however, Student's behaviors,

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BIP. In a due process hearing, the ALJ may bar introduction of any documents or testimony not disclosed to the ALJ at least five business days prior to the hearing and bar introduction of any documents or testimony of any witnesses at the hearing not disclosed five business days prior to the hearing without the consent of the other party. (Ed Code, § 56505 subd. (e)(7).) Although the document was not exchanged five business days before trial, Mother had an opportunity to review the summary, ask Ms. Cordle questions, and did not object to its admission.

which were being addressed, reduced its use. To the extent Issue One (E) was based on failure to program the device like the one Student used at home, District maintained that it could not be faulted for Mother's failure to give it access to Student's home device.

### *Applicable Law for Issue Two*

26. Legal Conclusions 1, and 4-6, are incorporated herein by this reference.

27. In *Rowley, supra*, the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with disabilities to satisfy the substantive requirements of the IDEA. The IDEA does not require school districts to provide special education pupils with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the pupil. (*Id.* at p. 201.) *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

28. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) A school district is not required to place a pupil in a program preferred by a parent, even if that program will result in greater educational benefit to the pupil. (*Ibid.*) *Rowley* also made clear that IDEA does not provide for an "education...designed according to the parent's desires." (*Id.* at p. 207.) What the statute guarantees is an appropriate education, "not one that provides everything that might be thought desirable by loving parents." (*Tucker v. Bay Shore Union Free School Dist.* (2d Cir. 1989) 873 F.2d 564, 567 [citation omitted].)

29. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the pupil's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Rowley, supra*, 458 U.S. at pp. 200, 202-204.)

30. By definition, provision of a FAPE requires delivery of special education and related services "in conformity with" a student's IEP. (20 U.S.C. § 1401(9)(D).) Any material failure to deliver services required by an IEP is a substantive violation of the IDEA. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815, 822.) A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled pupil and the services required by the pupil's IEP. (*Ibid.*) The pupil need not show demonstrable educational harm in order to prevail. (*Ibid.*)

31. Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149. (*Adams*)). “An IEP is a snapshot, not a retrospective.” (*Ibid.*, citing *Fuhrmann, supra*, 93 F.2d at p. 1041.)

32. School districts are also required to provide each special education pupil with a program in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).)

33. The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

34. The methodology to implement an IEP, including IEP’s for pupils with autism, is left to the school district’s discretion so long as it meets a pupil’s needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) The Education Department has advised that “there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies.” (Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46665 (Aug. 14, 2006) (Comments on 2006 Regulations).)

35. In developing an IEP, the team must consider the following factors: (1) the strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the most recent evaluations of the child; and (4) the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3); 34 C.F.R. § 300.324(a); Ed. Code, § 56341.1, subd. (a).) In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

36. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) Behavior intervention is the implementation of procedures to produce lasting positive changes in the pupil’s behavior, and includes the design, evaluation, implementation, and modification of the student’s individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student’s behavior.

37. The regulations implementing the IDEA do not require that any particular methodology, strategy or technique be used to develop a behavior support or intervention plan for pupils. (71 Fed. Reg. 46683 (Aug. 14, 2006).)

38. The California Legislature intended that if behavior interventions were used for a special education student, that such interventions “ensure a pupil’s right to placement in the LRE.” (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).) California law defines behavioral interventions as the “systematic implementation of procedures that result in lasting positive changes in the individual’s behavior,” including the “design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual’s right to placement in the LRE as outlined in the individual’s IEP.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).)

39. Emergency interventions are not substitutes for BIP’s, but are authorized to control unpredictable, spontaneous behavior which poses clear and present danger of serious physical harm to the pupil and others, and which cannot be immediately prevented by a response less restrictive than temporary application of a technique used to contain the behavior. (Cal. Code Regs., tit. 5, § 3052 (i).) Emergency intervention procedures developed by the special education local planning area (SELPA) must be followed, and must be used only for the shortest time period needed to contain the behavior. (Cal. Code Regs., tit. 5, § 3052 (i).) Trained personnel can utilize prone containment. (Cal. Code Regs., tit. 5, § 3052 (i)(4)(B).) Emergency interventions cannot include locked seclusion, devices to immobilize four extremities, force excessive and unreasonable to the circumstances. (Cal. Code Regs., tit. 5, § 3052 (i)(4)(A-C).)

40. An FAA is required when a student develops a “serious behavior problem,” and the IEP team finds that the instructional/behavioral approaches specified in the student’s IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).) A serious behavior problem means the individual’s behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil’s IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

41. An FAA is conducted by, or under the supervision of a person with documented training in behavior analysis with an emphasis on positive behavior interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) An FAA must include a systematic observation of the occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).) It must also include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(B).) An FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the

behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).) As with any other assessment, an FAA must be completed within 60 days after parents sign the assessment plan. (Ed. Code, § 56302.1, subd. (a).)

42. An FAA must include an ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(D).) An FAA must include a review of records for health and medical factors that may influence behaviors. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(E).) An FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(F).)

43. Following an FAA, the school district must prepare a written report of the assessment, which must include the following: (1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms; ; (2) a description of the targeted behavior(s) that include baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs; (3) a description of the rate of alternative behaviors, their antecedents and consequences; and, (4) recommendations for consideration by the IEP team which may include a proposed behavioral intervention plan. (Cal. Code Regs., tit. 5, § 3052, subds. (b)(2)(A)-(D).)

44. A BIP is “a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual’s IEP.” (Cal. Code Regs., tit. 5, §§ 3052, subd. (a)(3), 3001, subd. (h).) Under California regulations, the following criteria apply to BIP’s: 1) they must be developed by the IEP team, which must include the Behavior Intervention Case Manager; 2) they must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) they must be based on an FAA, be in the IEP and used in a systematic manner; 4) emergency interventions shall not be a substitute for a BIP; 5) behavioral interventions cannot cause pain or trauma; and 6) to the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

45. The BIP must contain: 1) a summary of relevant and determinative information gathered from an FAA; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of the use of the interventions and the frequency of the

targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness, or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other non-educational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. (Cal. Code Regs., tit. 5, § 3052.)

46. As part of the IEP process, the IEP team must consider whether the child needs assistive technology devices and services. (34 C.F.R. § 300.324(a)(2)(v).) The school district is required to provide assistive technology and devices or services to a pupil with a disability if the IEP team determines that the child needs the device or service in order to receive a FAPE. (*Letter to Anonymous*, 24 IDELR 854 (OSEP 1996). “Assistive technology devices” are defined in the IDEA as any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain or improve the functional capabilities of a child with a disability. (34 C.F.R. § 300.5.) “Assistive technology services” are defined as any service that directly assists a child with a disability in the selection, acquisition or use of an assistive technology device. (34 C.F.R. § 300.6.)

*Analysis of Issues Two (A) and (B): Failure to Address Maladaptive Emotional and Self-Stimulatory Behaviors and Transitioning*

47. Student failed to prove by a preponderance of the evidence that District’s continued offer of placement at Stein was inappropriate because it failed to address Student’s problem behaviors and his transitioning needs.

48. The evidence showed that at the time of the November 8, 2011 IEP meeting, the team knew that Student’s operative IEP from CVUSD provided detailed information about Student’s behavioral, communication, and academic challenges, goals, and a BIP. Specifically, the operative IEP advised that Student’s tantrums and aggression occurred daily, often several times within the school day, that Student escaped from unwanted tasks, and would elope from the classroom, the building, and from Mother’s car. The IEP also advised that Student’s maladaptive behaviors included removing his shoes and socks, climbing furniture, crying, rocking or sitting in a corner. In addition, the IEP noted that Student had a problem with transitions, mainly from preferred to non-preferred tasks which were related to his tantrums and aggression, and that Student preferred physical activity, including climbing on a swing. District was also aware that at the time of Student’s enrollment in District, Mother had requested that District transfer Student from ACES to another NPS placement due to safety concerns, the absence of a play yard, and the lack of direct DIS services. With these factors in mind, District considered available NPS placements for Student. Specifically, the evidence clearly demonstrated that District’s NPS administrator Mr. Baisley carefully considered Student’s unique needs, including his behavioral and transitioning needs, and Mother’s concerns, independently confirmed Mother’s concerns, and after a review of available placements, including ACES,

recommended Stein. As Mother requested, Stein had a secure and safe play yard, and offered direct DIS L&S services. In addition, according to the credible testimony of Ms. Feldhaus, Stein could adequately address Student's behavioral and transition needs.

49. The evidence showed that the classroom structure at Stein could address Student's unique behavioral and transitioning needs by providing, consistent with Student's IEP and BSP from CVUSD, a structured classroom, with limited distractions, and one-on-one assistance throughout the school day. In addition, Ms. Cordle's classroom utilized the same teaching methodologies and classroom structure as ACES, ABA and TEACHH. Ms. Feldhaus, who Student presumably trusted due to her long association with ACES and management of Student's program, capably explained how these methodologies were compatible and utilized within the classroom and school setting. Mother and Ms. Cordle each described Student's classroom structure at Stein, consistent with Ms. Feldhaus's testimony. Stein utilized discrete work stations and areas, and visual schedules. In addition to the cubbies, Student's class had sections for group time, and breaks. Stein utilized one-on-one instruction utilizing ABA principles. Moreover, the evidence showed that Ms. Feldhaus understood Stein's program at the time of the November 2011 IEP team meeting and she had no reason to believe that Student's unique needs could not be served at that NPS.

50. The evidence showed that by the time of the January 23, 2012 IEP meeting, District's continued offer of placement at Stein continued to be appropriate, as a result of Student's documented, intense, and long-standing challenges with maladaptive behaviors and transitions. As Mother's communication with Ms. Cordle memorialized, shortly after Student began at Stein on November 28, 2011, his maladaptive behaviors, during transitions between activities, or environments, escalated. Between November 28, 2011, and the January 23, 2012, IEP team meeting, he was in school approximately six weeks, considering winter break. During that six week period, Student had intensive behavioral episodes related to transitions, including his entry and exit from the bus, and between activities, according to Ms. Cordle's report, and he resisted coming into class from the bus, including dropping down on the ground to avoid walking to the class.

51. The evidence showed that Stein could continue to address Student's behavioral issues through the techniques and methodologies set forth above. In addition, the evidence established that Stein had emergency intervention procedures designed to address problem behavior to ensure Student's safety and the safety of others. Notably, Student's educational history was replete with instances of Student's aggression which threatened his and his peers' safety, and which resulted in injury to his aides. While ACES and AST elected to tolerate Student's aggression without utilizing emergency intervention procedures, Stein was not required to do so. When Student's behaviors became assaultive at ACES, staff would either isolate Student in the room in which he had become assaultive, or evacuate his peers from the classroom, and AST staff who worked with Student in his home program elected to tolerate Student's attacks by blocking him with their arms, but implementing no emergency interventions. Despite Mother's argument to the contrary, Stein was not required to tolerate such behavior, as the BSP that District adopted from CVUSD did not require Stein to accommodate Student's assaultive behaviors by evacuating other pupils, or by isolating

Student in a separate room. Although having to resort to such methods is distressing to Mother, the evidence showed that Stein exercised care and only resorted to restraint on a few occasions for very brief time periods until Student became calm. There was no evidence to suggest restraint was implemented improperly or that Student was injured in any way. As such, Stein's use of emergency interventions did not deprive Student of an educational benefit.

52. The evidence showed that by the time of the March 22, 2012 IEP meeting, District's continued offer of placement at Stein continued to be appropriate. By the March 22, 2012, IEP team meeting, Student's behaviors, although constant, did not require emergency interventions. Student's last emergency intervention was in early February. Although Student continued to exhibit maladaptive behaviors, as noted in the assessors' and his SLP's reports, Ms Cordle observed that by the end of February, Student had adjusted to his new environment. In addition, Stein had conducted an FAA and developed a BIP in time for the March 22, 2012 IEP, and the Stein staff was capable of implementing it.

53. Student's claim that Student's new behaviors that also appeared in the home environment were evidence that Stein was inappropriate was unpersuasive. Student failed to show why these behaviors, when they appeared at school, could not be addressed at Stein, as part of the BIP. In addition, Student failed to establish that any purported new behaviors required a new placement, as Student's behaviors followed him throughout his educational history.

54. Despite Student's maladaptive behaviors and challenges with transitions, the evidence showed that at all times, District offered a placement that was reasonably calculated to provide some educational benefit because it met his transition and behavioral needs. In sum, as to Issues two (A) and (B) Student had not met his burden of proof. (Legal Conclusions 24-53; Factual Findings 1-185.)

#### *Analysis of Issue Two(C): Toileting*

55. Student failed to prove by a preponderance of the evidence that Stein was inappropriate because Student suffered daily toileting accidents at home. Student had been toilet-trained since age seven, but that did not establish that Student's toileting accidents at home could be attributed to Stein. Between November 28, 2011 and May 18, 2012, the last day that Student attended Stein, Student had one urination accident on the bus, and one minor urination accident at school during his toileting routine due to his problems managing his clothes. Student had one bowel accident at school, the afternoon of his last day of attendance, without an antecedent behavior. Student failed to show that these few accidents at school deprived Student of an educational benefit, or were somehow a result of deficits in the program offered by District. To the contrary, Student's IEP included a self-help goal for toileting hygiene, and a goal for dressing, demonstrating that these needs were being addressed in the school environment.

56. Further, although Student insisted that the recurring bowel accidents at home in the morning were proof of Stein's deficiencies, he failed to provide any supporting expert testimony of a causal connection between Stein and Student's morning bowel accidents. In addition, Mother did not disclose on her Stein intake form whether Student suffered toileting accidents at home at the time of his transition to Stein, and her omission of this information further affected the weight of her testimony, as the form would have established a baseline of behavior based upon Mother's knowledge at the time.

57. In sum, Student did not meet his burden of proof that Student's toileting challenges at home was a consequence of District's failure to provide a FAPE by offering placement at Stein. (Legal Conclusions 24-53, and 55-56; Factual Findings 1-185.)

*Analysis of Issue Two (D): Sensory Diet*

58. Student failed to prove by a preponderance of the evidence that Stein failed to provide a sensory diet to meet his needs, and as required by his IEP. Student claimed that District failed to implement a sensory diet in the same manner and frequency as ACES, and that its failure to do so, constituted a material failure to implement the operative IEP, and a denial of FAPE. Student did not present persuasive evidence that despite the absence of a regularly scheduled sensory diet, District failed to address Student's sensory needs. A sensory diet was specified in the BSP appended to the operative annual IEP which followed Student from CVUSD to District. The BSP required a sensory diet integrated into his day to provide appropriate sensory input and physical activity, and a choice board for Student to request sensory activities. ACES utilized classroom swings and activities which applied pressure to Student's body, like a large ball, but the BSP did not dictate or restrict the sensory tools. Although Stein did not implement or acknowledge that it had a regularly scheduled sensory diet incorporated into his classroom from the time Student arrived at Stein, the evidence showed that Stein's staff, including his functional aides, utilized sensory tools to provide Student breaks such as swinging on the outdoor swing, and going to the occupational therapy room to work on the bicycle, which were unique to Stein's setting, and for which Student showed a preference. As evidenced by the SLP's report, Stein also attempted to perform head squeezes, which Student found comforting, but found that the head squeezes could escalate into aggressive behaviors. While Stein did not implement a sensory diet in the manner that ACES did, Stein's approach was appropriate to meet Student's needs and did not constitute a material departure from the IEP based on the information it had at the time. To the contrary, the evidence showed that District's proposed BIP ultimately sought to include the sensory strategies for use in implementing the behavior strategies that were being recommended by March of 2012.

59. In sum, Student failed to meet his burden of proof that he was denied a FAPE because District failed to implement an appropriate sensory diet at Stein. (Legal Conclusions 24-53 and 58; Factual Findings 1-185.)

*Analysis of Issue Two (E): Communication / AAC Device*

60. Student failed to prove by a preponderance the evidence that he was denied a FAPE due to District's failure to appropriately program and utilize the SpringBoard Lite.

61. While Mother desired that Student utilize the SpringBoard Lite because it offered a more robust set of pictures and allowed Student to make more precise requests, consistent with Student's behavioral needs and communication preferences, the operative IEPs did not dictate specific AAC tools, but rather set forth a range of communication options, as part of Student's goals and objectives. As Ms. Feldhaus testified, Student made great progress at ACES, and was able to combine two words. There was no evidence that Stein staff opposed using the Springboard Lite, or avoided using it. Even Mother observed that Student's functional aides utilized his Springboard Lite at a desk for Student to choose a preferred activity. Consistent with the operative IEP, District used a variety of communication tools, such as a tablet computer, and functional sign language, which Student's SLP found to be most effective, as it did not require multiple prompts.

62. Student's complaint that District failed to effectively program the Springboard Lite resulting in a denial of FAPE is without foundation. Student never provided any evidence about the differences, if any, with the display or functions, or that the Springboard Lite at school did not provide Student with familiar choices. Absent evidence of an impact on Student's ability to access the curriculum, and where the evidence showed Student was communicating with a variety of methods, no denial of a FAPE occurred on this ground. Moreover, Mother never brought the home AAC device to Stein, as promised, for the SLP to review. District cannot be found to have deprived a FAPE because it did not coordinate its in-school use of an AAC device with Student's privately purchased home device, when parents provided no information about their home device.

63. In sum, Student had not met his burden of proof that Stein was an inappropriate placement because District failed to appropriately use or program the Springboard Lite. (Legal Conclusions 24-53, 60-62; Factual Finding 1-185.)

*Issue Three: Inadequately Trained Classroom Aides for Field Trips*

64. As to Issue Three, Student contended that he was denied a FAPE, because, as a practice, Stein did not send a certified special education teacher, like Ms. Cordle, on field trips with Student. Student contends that he was denied a FAPE because Student's functional aides were not adequately trained to accompany him on field trips, and based upon their employment status, did not possess the necessary commitment to Student's well-being and safety, as credentialed teachers did, like Ms. Cordle. District denied that Student was deprived of a FAPE because Ms. Cordle did not accompany Student off campus.

*Applicable Law to Issue Three*

65. Legal Conclusions 26-39 are incorporated by reference.

66. The lack of a teaching credential, or any other technical qualification, in and of itself, does not constitute a denial of FAPE. There is no private right of action on a claim that special education teachers are not “highly qualified.” (34 C.F.R. § 300.18(f)). The central issue with respect to teacher qualifications is whether the staff was capable of implementing the IEPs. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801-802.)

### *Analysis of Issue Three*

67. Student failed to prove by a preponderance of the evidence that the functional aides were unqualified to accompany Student on field trips. Notwithstanding this, Ms. Cordle had the necessary credentials and experience required of a special education teacher. In addition, the evidence showed, through the credible testimony of Ms. Cordle, that her teaching assistant had 10 years of experience working with pupils, like Student. Although Mother preferred the college-level aides of ACES, the educational-level of Student’s functional aides was not determinative of a FAPE. The evidence established that Ms. Cordle trained and supervised the functional aides in her class, and that they received the emergency intervention STOPP training.

68. More significantly, Student did not provide any competent evidence that the functional aides, or any staff, other than a certified special education teacher, like Ms. Cordle, were unqualified to address Student’s more severe maladaptive or elopement behaviors which could arise during the field trips, and endanger Student or his peers. On the contrary, the evidence established that Stein assigned two functional aides to accompany Student, and the aides capably managed Student’s behaviors on field trips. Student had a known pattern of elopement, even at Mother’s preferred placement, or with his preferred at-home ABA providers, AST. During Stein’s field trips, the incidents of elopement were minor, and included Student’s escape through Stein’s garden gate to the adjacent park, and the brief time where he walked away from his group at the zoo, only to quickly return on command.

69. In sum, as to Issue Three, Student had not met his burden of proof that Student was denied a FAPE because inadequately trained classroom functional aides, instead of a special education teacher, accompanied him on field trips. (Legal Conclusions 65-68; Factual Findings 1-185.)

