

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

SAN DIEGO UNIFIED SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008100578

DECISION

This hearing convened before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH) in San Diego, California, on January 5, 6, 7, and 9, 2009, and by telephone on January 13, 2009.

Attorney Dean T. Adams represented San Diego Unified School District (District). Phyllis Trombi, District diagnostic resource teacher, was present on behalf of the District.

Attorney Ellen Dowd represented Student and his parents. Student's mother (Mother) attended the hearing on his behalf.

On October 17, 2008, OAH received the District's due process hearing request. On November 5, 2008, OAH granted the parties' request to continue the hearing to January 5 through 9, 2009. During the hearing, both parties requested to deliver their closing arguments in writing. The ALJ determined that there was good cause for a continuance for the parties to submit written closing arguments and on January 26, 2009, OAH received the parties' written closing briefs. On that date, the record was closed and the matter submitted for decision.

## ISSUE

Did the District offer Student a free appropriate public education (FAPE) in the June 10, 2008 individualized education program (IEP)?

## CONTENTIONS

The District contended that it offered Student a FAPE at the June 10, 2008 IEP meeting. The District argued that it complied with all procedural requirements and that it offered a substantively appropriate educational program. The District argued that its offer of placement at the Successful Transitions Achieved with Responsive Supports (STARS) special day class (SDC) at the District's Taft Middle School (Taft), with a behavior support plan, extended school year (ESY), and related services of speech-language therapy and transportation was designed to meet Student's unique needs and allow him to receive educational benefit in the least restrictive environment. The District argued that the June 2008 IEP team could not have known the information contained in the January 2009 assessment report and testimony from Dr. Jill Weckerly, and that therefore the recommendations of Dr. Weckerly are not relevant to the hearing issue.

It is difficult to pinpoint Student's arguments for many aspects of this case. Student did not identify his specific disagreements with the June 2008 IEP prior to the hearing. During the hearing, Student refused the ALJ's request to identify all of his contentions or disagreements with the June 10, 2008 IEP. Nonetheless, this Decision attempts to address Student's contentions to the extent known.

Student contended that the STARS SDC at Taft was not an appropriate placement for him. Student also argued that he required one-to-one counseling as a related service

and a mental health referral pursuant to Assembly Bill 2726 (AB2726).<sup>1</sup> At one point in the middle of the hearing, Student raised the new contention that the two full-time teachers assigned to the STARS SDC lacked the proper California teaching credentials to teach a pupil with autism.<sup>2</sup> Student also raised the procedural claim that the IEP document did not contain a clear written offer of counseling services.

Student stipulated that all of the legally required participants attended the IEP meeting. Student also stipulated that the STARS SDC was the clear written placement offer, pursuant to the "formal written offer" requirement under *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526. Student further agreed that the IEP's eligibility category of autistic-like behaviors was correct.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is 13 years old and is in the seventh grade. During all times at issue in this case, Student has resided with his family within the boundaries of the District. He has been diagnosed with Asperger's disorder and is eligible for special education services under the category of autistic-like behaviors.

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<sup>1</sup> Chapter 26.5 of the Government Code, which includes Government Code section 7576, governs interagency responsibilities for mental health services. These legal provisions are commonly referred to as "AB 2726" or "AB 3632," in reference to the bills in the California Assembly which enacted these provisions into law in 1996 and 1984, respectively.

<sup>2</sup> Student did not raise this claim in his closing brief, and it is not clear whether he has abandoned this argument.

## FACTUAL BACKGROUND

2. Student attended a private school from kindergarten through second grade, and was home-schooled for third and fourth grades. At the end of Student's fourth-grade year, Mother requested that the District conduct a special education assessment.

3. For the 2006-2007 school year, Student attended fifth grade in a general education class at the District's Lindbergh Schweitzer Elementary School (Lindbergh Schweitzer). In September 2006, District staff conducted an initial assessment of Student in several areas, including academic achievement, cognitive ability, speech/language/communication, developmental/medical history, vision and hearing screening, visual-motor integration, and social/emotional/behavioral (including testing for Asperger's). Among the results of these assessments were findings that Student had cognitive ability in the high average range, had some academic weaknesses in areas such as writing, spelling, and math fluency, had some difficulty with conversation and pragmatics, had symptoms consistent with Asperger's, and had social and behavioral difficulties that appeared to impact his ability to function in a general education setting.

4. On October 4, 2006, Student's IEP team convened and agreed that he was eligible for special education under the category of autism. The team agreed to continue Student's placement in general education for 86.66 percent of his school day, but added resource specialist program services for 240 minutes per week, speech-language pathology services for eight hours per year, ESY, accommodations and modifications. He received those services for the remainder of his fifth-grade year.

5. In March 2007, Student's father met with some District staff, including Joan Evenson, Student's RSP teacher, for an IEP addendum meeting. The meeting participants agreed to an independent study contract to address some of Student's difficulties related to homework.

6. In May 2007, District staff proposed that Student's parents observe the

STARS SDC at Lindbergh Schweitzer, so that Parents could consider it as a possible placement for Student. Thereafter, Mother observed the STARS SDC at Lindbergh Schweitzer.

7. On June 12, 2007, the IEP team convened to discuss Student's educational program for the 2007-2008 school year. The District offered a program that included placement in the STARS SDC at Lindbergh Schweitzer. Parents did not agree with the District's proposed placement, and subsequently filed a special education due process complaint. In July 2007, the parties entered into a Compromise and Release Agreement to resolve that complaint. The Compromise and Release Agreement provided in part that Student would attend Balboa City School (Balboa), a non-public school (NPS), for the 2007-2008 school year, and the District would fund his tuition for that school year.

8. Student attended sixth grade at Balboa for the 2007-2008 school year. He did not receive counseling, speech-language therapy, or any other related services. On May 16, 2008, Ms. Evenson observed Student for a portion of the school day at Balboa. On June 3, 2008, District speech-language pathologists (SLPs) Susan McGrane and Patricia Barnett also observed Student at Balboa. In early June 2008, pursuant to a request from Ms. Evenson, Student's three teachers at Balboa prepared information about Student's present levels of performance for consideration by the IEP team.

#### JUNE 10, 2008 IEP TEAM MEETING

9. On June 10, 2008, the IEP team convened to discuss Student's placement for the 2008-2009 school year. Mother and Father attended the meeting accompanied by two advocates. Dr. Stephan Parker, the director of Balboa, and Jacqueline Kantor, Student's teacher at Balboa, also attended the meeting. Among the District staff at the meeting were Ms. Evenson, Ms. McGrane, Ms. Barnett, Ms. Trombi, and District autism specialist John

Baer.<sup>3</sup>

10. At this IEP meeting, the participants reviewed the information about Student's present levels of performance that had been provided by his teachers at Balboa. The team members developed a behavior support plan (BSP) that identified numerous strategies and accommodations, such as visual supports, group social skills training, and use of Social Stories. The team also developed a total of nine IEP goals. Due to some concerns about fine motor skills, the team referred Student for an occupational therapy (OT) assessment.

11. During this IEP meeting, the team discussed several placement options, including general education, RSP, SDC, and Balboa. Parents and Balboa staff indicated that they believed Balboa was the best placement for Student. District staff expressed why they believed Balboa was too restrictive a placement and not appropriate for Student. Thereafter, the District offered Student placement at the STARS SDC on the Taft campus, with related services of speech-language pathology for 16 hours a year, transportation, and ESY. The IEP offer also offered the BSP, several accommodations and modifications, and participation in general education for lunch, physical education, and school-wide activities (such as assemblies). District staff suggested ideas for how they could facilitate Student's transition into the SDC, such as having him begin attending the summer 2008 ESY for only part of the school day. Parents did not request any additional services, but also did not consent to the IEP. District staff indicated that they would be contacting Parents shortly to arrange for Parents to observe the STARS SDC at Taft.

12. On or about June 12, 2008, Mr. Baer telephoned Parents and left a voice

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<sup>3</sup> The IEP document identifies a total of seventeen individuals attending the meeting, including a general education teacher and the vice-principal of Lindbergh Schweitzer.

message proposing that Parents visit Taft to observe the STARS SDC the following day, June 13, which was the last day of the regular 2007-2008 school year. Parents did not respond to the message, and did not schedule an observation of the STARS SDC at Taft.

13. Student attended summer school at Balboa. On or about July 21, 2008, Mother wrote on the IEP document that she consented only to limited portions of the IEP. On one page, she wrote: "I agree to the school of attendance (BCS), but not to the rest of the I.E.P." On a different page, she marked and initialed her consent to Student's eligibility and the IEP goals.

#### 2008-2009 SCHOOL YEAR

14. Student's parents unilaterally placed him at Balboa for the 2008-2009 school year, and Student has continued to attend school there. On October 17, 2008, OAH received the District's due process complaint in this matter.<sup>4</sup> During this time period, Parents arranged to have Dr. Jill Weckerly, a licensed clinical psychologist, conduct an independent educational evaluation (IEE) of Student. In a letter dated November 18, 2008, District education specialist Robin Caldwell wrote to the Parents that the District would not fund a proposed IEE of Student, because Parents did not appear to object to any previous assessments conducted by the District. Ms. Caldwell proposed that, given Parents' interest in further assessment of Student, the District would conduct Student's triennial reassessment early. Attached to the letter was an assessment plan, dated November 20, 2008, proposing to assess Student in academic achievement, speech-language, intellectual development and processing, social/emotional/behavioral, motor development/OT, and health. In late December 2008, Mother signed the assessment plan and mailed it to the District.

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<sup>4</sup> The District's attorney served the complaint on October 16, 2008, but OAH did not receive it until after the close of business that day.

15. In November and December 2008, Dr. Weckerly conducted an IEE of Student. Dr. Weckerly's evaluation included a record review, interviews with Student, Mother and Student's case manager at Balboa, and administration of numerous standardized tests, including rating scales, in areas including academic achievement, cognition, language, visual processing, visual motor, fine motor social perception, emotional functioning, and behavior. Dr. Weckerly produced a written evaluation report dated January 2, 2009. Among Dr. Weckerly's findings was her determination that Student has a major depressive disorder.

#### PARENT PARTICIPATION IN IEP DECISION-MAKING PROCESS

16. In developing an educational program for a special education student, public school districts are required to comply with the procedures set forth in the Individuals with Disabilities in Education Improvement Act (IDEA). One of the key procedural components is the requirement that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A local educational agency (LEA) must fairly and honestly consider the views of parents expressed in an IEP meeting. An LEA that does not consider the parents' requests with an open mind has violated the parents' right to participate in the IEP process.

17. The evidence clearly established that Parents had a full opportunity to meaningfully participate in the June 10, 2008 IEP meeting, and Student does not argue otherwise. The IEP team developed and changed the IEP document's present levels of performance and IEP goals based upon information from Balboa staff presented during the meeting. The IEP team members discussed and considered several different placement options for Student, including placement at Balboa. There is no evidence that the District predetermined the placement offer.

## IEP GOALS

18. An annual IEP must contain a statement of measurable annual goals, including academic and functional goals, designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. The annual IEP must also include a description of the manner in which the progress of the pupil towards meeting the annual goals will be measured and when periodic reports on the progress the pupil is making toward meeting the annual goals will be provided to the parents.

19. The June 10, 2008 IEP contained a total of nine goals covering the areas of reading comprehension, writing, math, spelling, communication/social skills, and social/emotional functioning. The social/emotional goals were in the specific areas of organization, interpersonal skills, task completion, and management of emotions and feelings. The IEP specified when Student's progress on the goals would be measured. Each goal contained specific due dates for measurement of Student's progress on each benchmark/objective. Each of the goals contained clear standards for measuring Student's progress on each individual goal and each individual benchmark/objective, such as "70% accuracy in 4/5 trials as measured by student work samples." The IEP form stated that "[p]rogress towards goals will be reported to parents at each general education reporting period on a Goal Progress Report."

20. The evidence established, and there appears to be no dispute, that all of these goal areas were areas of need for Student. Credible testimony from Ms. Evenson and Ms. McGrane established that these goals were measurable, appropriate, and designed to address Student's unique needs based upon his then-present levels of performance. Ms. Kantor, Student's teacher at Balboa, testified that she did not have any disagreement with these goals. There is no witness testimony or other evidence establishing that Student

needed goals in any additional areas.<sup>5</sup> To the extent Student suggested that the goals were vague or not measurable, those arguments were not persuasive and not supported by the evidence. The IEP goals were clear on their face, and there was no evidence that District staff would have any confusion about how to implement or measure progress on the goals.

#### STARS SDC PLACEMENT OFFER

21. An educational program offered by an LEA must be designed to meet the unique needs of the student and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment (LRE). However, school districts are not required to offer instruction or services to maximize a student's abilities. In addition, an IEP cannot be judged in hindsight and must take into account what was, and what was not, objectively reasonable at the time the IEP was drafted.

22. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

23. There was no disagreement that, in June 2008, Student had particular needs in communication, pragmatic speech, social skills, and emotional/behavioral functioning. As reported by Balboa staff, Student "views his life from his own reality and perspective which is frequently not accurate." Student was shy and withdrawn, and struggled with relationships with peers. Academically, Student was reading at grade level, but had

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<sup>5</sup> It is not clear whether Student is arguing that the IEP should have contained additional goals. Student did not raise such an argument in his opening statement or closing brief.

weaknesses in reading comprehension, spelling, writing, and math. Student also had difficulties completing homework and other tasks.

24. In considering Student's needs, the IEP team relied in part on recent reports from Balboa staff, information from Parents, Student's educational records, and Student's previous assessment reports. There is no indication that the District should have reassessed Student as of June 2008; Student's triennial assessments were current, and neither Parents nor other IEP team members requested reassessment at that time.

25. The evidence established, and the parties generally agreed, that because of Student's social/emotional and academic needs, he required a small, structured classroom placement with a small staff-to-student ratio and on-site counseling. The STARS SDC at Taft has approximately 21 pupils, divided into two classrooms, so that each class has 10 to 12 students. The SDC has a full-time counselor, two full-time teachers, an additional lead teacher who works part-time, and five special education paraprofessionals. The class is designed for pupils who, like Student, have at least average cognitive ability and are on track to receive a regular high school diploma. The SDC staff are trained and experienced in working with pupils with Asperger's, and approximately half of the pupils in the class have diagnoses on the autism spectrum.

26. Mr. Baer, Ms. Evenson, Ms. Trombi, and STARS coordinator Sally Patton were all knowledgeable, credible witnesses who described how placement at the STARS SDC would have addressed Student's social/emotional and academic needs. They established that Student's BSP and IEP goals could all be implemented in the STARS SDC, and that the SDC placement would deliver the level of intensive support that Student needed. In short, their testimony established that, based on what the IEP team knew about Student's unique needs in June 2008, the STARS SDC was appropriate for Student.

27. Dr. Jill Weckerly, the licensed clinical psychologist who assessed Student in late 2008, testified that she has a positive impression of the STARS program, and that the

STARS SDC would be appropriate for Student if it was on a small campus. However, Dr. Weckerly explained that she believed that placement on a comprehensive general education middle school campus like Taft would pose problems for Student because of his social and emotional difficulties.

28. Dr. Weckerly was an excellent, credible witness with impressive qualifications. She was knowledgeable, candid, and clearly did not tailor her testimony to either side's position. However, the June 2008 IEP team did not have benefit of Dr. Weckerly's findings or opinions. It is not clear how Dr. Weckerly's recommendations would have affected the IEP team's recommendations.

29. Student appears to argue that the June 2008 IEP team members had access to some of the same records that Dr. Weckerly reviewed, and therefore the District members of the IEP team should have reached the same conclusions that Dr. Weckerly eventually did. That argument is unconvincing. First, Dr. Weckerly relied on information not reasonably available to the IEP team, including the results of the extensive testing and other assessment tools she utilized in her evaluation of Student. Second, Dr. Weckerly's opinions are entitled to significant weight due to several factors, including her significant expertise, independence, and objectivity.<sup>6</sup> The IEP team could not be expected to have taken the same information and reached the same conclusions; to find otherwise would presume that Dr. Weckerly's expertise and objectivity were unnecessary and meaningless. Third, there was no evidence that anyone at the June 2008 IEP team meeting ever expressed concern that Student could not handle a general education campus.

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<sup>6</sup> Dr. Weckerly's insight was particularly valuable because of her unique position relative to the parties. She conducted the IEE as part of her private practice. However, she also works part-time as a clinical psychologist for the District's Mental Health Resource Center.

30. The information reasonably available to the IEP team at the time of the June 2008 meeting supports the District's position that that placement at Taft was designed to address Student's unique needs and would allow him to receive educational benefit in the LRE. District staff believed that Student needed to be exposed to typically developing peers, and that an NPS was too restrictive a setting for him. Student had previously made academic and social gains on a general education campus in fifth grade. Moreover, the STARS SDC program utilizes a variety of tools and accommodations that could address Student's difficulties related to interacting with typically developing peers on a general education campus. For example, the social skills training includes practicing difficult social situations and learning how to respond to those situations. Furthermore, the STARS staff are particularly sensitive to bullying of their students, and take steps to prevent bullying from occurring, such as having staff accompany students to the school bus and other campus locations if appropriate for a particular student.

31. Ms. Evenson and other District staff members observed Student at Balboa and concluded that he had not made social or behavioral progress during his sixth grade year there. While Balboa staff and Parents expressed their opinions at the IEP meeting about why Balboa was better for Student and that he was doing well there, no one expressed to the IEP team the concern that Student could not handle a general education middle school campus.

32. In light of all of the above, the District's June 2008 offer of placement in the STARS SDC on the Taft campus fulfilled the District's obligation to offer an appropriate placement, based on information reasonably available at that time. Given the requirement that special education students be mainstreamed with typically developing peers to the maximum extent appropriate, District staff reasonably concluded that Student could make progress on a general education middle school campus with the supports available

through the STARS SDC program.<sup>7</sup> Because LEAs are required to offer placement in the LRE that addresses a pupil's unique needs, the District's offer of the STARS SDC complied with the legal requirements based on the information reasonably available to the IEP team at that time.

#### CREDENTIALS OF STARS SDC TEACHERS

33. In the middle of the hearing, Student questioned for the first time whether the two full-time teachers assigned to the STARS SDC at Taft for the 2008-2009 school year held the teaching credentials required to teach a pupil with Asperger's in a California public school. Student argued that both teachers held Education Specialist credentials, and that the California Commission on Teacher Credentialing (CCTC) website does not list autism as one of the eligibility categories that an Education Specialist credential holder is authorized to teach. The District contends that both teachers meet California's credentialing requirements to teach pupils with Asperger's and other diagnoses on the autism spectrum.

34. An LEA may assign a teacher who holds a level 1 education specialist credential, or a previously issued credential, that authorizes him or her to provide instruction to individuals with mild and moderate disabilities to provide instruction to pupils with autism, if the teacher consents to the assignment and the teacher either: (1) has provided full-time instruction for at least one year prior to September 1, 2007, in a special education program that serves pupils with autism pursuant to their IEPs and received a

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<sup>7</sup> However, this finding does not change the District's obligation to consider the results of Dr. Weckerly's IEE, and does not determine whether the District's placement offer should change as a result of Dr. Weckerly's recommendations.

favorable evaluation or recommendation to teach pupils with autism from the LEA or school, or (2) has completed a minimum of three semester units of coursework in the subject of autism offered by a regionally accredited institution of higher education.

35. Michael D'Elia holds teaching credentials issued by the CCTC, including a Level 1 Education Specialist Instruction Credential and a Level 2 Education Specialist Instruction Credential. Since 2001, Mr. D'Elia has been providing full-time instruction in the STARS SDC, which is a special education program that serves pupils with autism pursuant to their IEPs; approximately half of the pupils in the SDC have diagnoses of Asperger's or another diagnosis on the autism spectrum. Mr. D'Elia has received favorable evaluations from the District regarding his teaching of the STARS SDC, and he consented to his assignment to teach the STARS SDC. Thus, Mr. D'Elia possesses the required credentials to teach a pupil with autism.

36. Jerald Rice is the other full-time teacher at the STARS SDC at Taft. Documentary exhibits of CCTC's records establish that Mr. Rice holds California teaching credentials including a Level 1 Education Specialist Instruction Credential and a Level 2 Education Specialist Instruction Credential. The CCTC exhibits further indicate that CCTC issued Mr. Rice's Internship Education Specialist Instruction Credential on August 1, 2000, and issued his Preliminary Level 1 Education Specialist Instruction Credential on November 13, 2002.

37. The District made an offer of proof that Mr. Rice's testimony would establish that, like Mr. D'Elia, Mr. Rice meets the same legal requirements for a Level 1 Education

Specialist Instruction Credential holder to instruct pupils with autism.<sup>8</sup> There was no evidence to the contrary, and Student did not dispute that Mr. Rice's testimony would establish this. Thus, the evidence supports the District's position that Mr. Rice possesses the required credentials to teach a pupil with autism, and there is no evidence to the contrary.

#### CLEAR WRITTEN OFFER OF COUNSELING SERVICES

38. Student argued that the June 10, 2008 IEP did not contain a clear written offer of counseling services, because counseling services are not listed on the IEP's related services page and the IEP does not contain the word "counseling." The District argued that the IEP contained a clear written offer, and that any procedural violation did not result in a denial of FAPE.

39. One of IDEA's procedural requirements is that an LEA must make a formal, specific written offer of placement. A formal written offer alerts the parents to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to accept or appeal the offer.

40. Procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations will constitute a denial of FAPE only if the violations 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 child, or caused a deprivation of educational benefits to the child.

41. An IEP document must include a statement of the special education and

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<sup>8</sup> The District scheduled Mr. Rice to testify at the hearing. Student objected that, in light of Mr. D'Elia's testimony, Mr. Rice's testimony was unnecessary. The District also made an offer of proof that rebuttal testimony from Ms. Trombi would establish that Mr. Rice complied with this credentialing requirement.

related services and supplementary aids and services to be provided to the child or on behalf of the child. Counseling services are among the related services that a school district may be required to offer a pupil if such services may be required to assist the child in benefiting from special education. In the present case, the STARS SDC program included a credentialed counselor who works full-time at the SDC. Because the counseling was part of the classroom placement and not a separate service, counseling was not identified as a related service for Student.

42. The IEP document lists the STARS SDC at Taft as the proposed placement, but does not mention that the counseling component was part of that placement. However, District members of the IEP team described the counseling component and other aspects of the STARS SDC during the IEP meeting. District staff also strongly encouraged Parents to visit the proposed placement. Parents were aware that the STARS SDC program included a full-time counselor, and they do not contend otherwise. There is no evidence or argument that Parents did not understand what was being offered, nor that they requested greater specificity in the IEP.

43. Special education law offers no guidance regarding whether counseling services provided as an inherent part of a classroom placement must be separately listed in the IEP document as a related service. Notably, the main purposes of the “clear written offer” requirement are to fully inform the parents regarding what placement and services are being offered and create a clear record of what was offered. Given that that is what occurred in the present case, the failure to specify counseling services in the written document did not violate the “clear written offer” requirement.

44. Student suggests that the failure to specify the counseling component of the SDC constituted a procedural violation because, if he moved to another school district, the

new district would not know that he received counseling.<sup>9</sup> The same argument could be raised for any component of an SDC, yet there is no requirement that every aspect of an SDC be separately identified in the written IEP document. Given the obvious complexity and length of Student's IEP, any new educational agency reviewing the IEP would reasonably infer that Student's classroom placement contained multiple components and, as Mr. Baer described in his testimony, would likely call the previous school to find out what the SDC entailed.

45. In any event, whether a technical violation occurred is immaterial in this instance. Even if the failure to identify counseling in the IEP document constituted a procedural violation, it is clear that that the violation did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or cause a deprivation of educational benefits. As determined above, Parents knew about the counseling offered within the STARS SDC because District staff described that aspect of the SDC during the June 10, 2008 IEP meeting. Furthermore, Mother testified that she was familiar with the STARS SDC program from her observation of the program at Lindbergh Schweitzer. There was no evidence that Parents had any confusion or misunderstanding about what was being offered. Given that Parents understood the counseling component being offered, the absence of that information in the written IEP document had no effect on their opportunity to participate in the IEP decision-making process, and Student does not argue

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<sup>9</sup> This scenario appeared to be hypothetical. There was no evidence that Parents planned to move to a different school district, or had informed the District that they might be moving. Parents also never requested that the IEP document mention the counseling part of the SDC or otherwise contain a more specific description of the SDC.

otherwise. Thus, the IEP document's lack of written information about the placement's counseling component did not constitute a denial of FAPE.

#### SUBSTANTIVE OFFER REGARDING COUNSELING SERVICES AND MENTAL HEALTH REFERRAL

46. Student argues that the counseling available through the STARS SDC program was insufficient to meet his needs, and he needed additional one-to-one counseling and a referral to the county mental health agency for a mental health assessment and services pursuant to AB 2726. The District argues that Student did not require additional one-to-one counseling or an AB 2726 mental health referral, because the counseling through the STARS SDC was sufficient to address his needs. Neither Parents nor Balboa staff requested any additional counseling or mental health services in June 2008, and District staff reasonably recommended the program in the IEP based upon on the information available to them at that time.

47. As noted above, an educational program offered by a school district must be designed to meet the unique needs of the student and be reasonably calculated to provide the student with some educational benefit. A school district must offer a pupil related services if such services may be required to assist the child in benefiting from special education.

48. Based on the results of a pupil's special education assessments, an IEP team may refer a pupil who is eligible for special education, is suspected of needing mental health services, and meets all of the legal criteria, to a community mental health service for an AB 2726 mental health assessment. Among those criteria is the requirement that the pupil emotional or behavioral characteristics that are all of the following: (A) observed by qualified educational staff in educational and other settings, as appropriate; (B) impede the pupil from benefiting from educational services; (C) significant in their rates of occurrence and intensity; and (D) associated with a condition that cannot be described solely as a

social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling. Another criterion is that the LEA has provided counseling, psychological, or guidance services to the pupil, and the IEP team has determined that the services do not meet the pupil's educational needs, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the IEP team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

49. Student had significant social, emotional and behavioral needs, and he required counseling and other supports, such as a BSP, to address those needs. The STARS SDC program has a full-time, credentialed counselor whose office is located directly between the two STARS classrooms. The counselor delivers group social skills training to the STARS pupils, works directly with STARS pupils who need one-on-one counseling, and consults regularly with the STARS SDC staff. Student would have access to the counselor throughout the school day. Testimony from Mr. Baer established that the amount of counseling Student would receive in the STARS SDC would be sufficient to address Student's need for counseling.

50. Dr. Weckerly recommended that Student needed one-to-one counseling in addition to what was available in the STARS SDC program. Dr. Weckerly also recommended a referral to the AB2726 program. As determined above in Factual Findings 27 and 28, the June 2008 IEP team did not have benefit of Dr. Weckerly's findings or opinions, and it is not clear how Dr. Weckerly's recommendations would have affected the IEP team's recommendations in June 2008. Notably, there was no evidence presented regarding whether Student met all of the legal criteria for an AB 2726 mental health

referral.<sup>10</sup>

51. At the June 2008 meeting, the IEP team considered that Student had not received counseling during his sixth grade year at Balboa, yet had still received good grades that year, and Parents and Balboa staff reported that he had received educational benefit that year. Neither Parents nor Balboa staff nor any other IEP team members suggested that Student required additional one-to-one counseling or mental health services. In light of all facts, the information reasonably available to the IEP team in June 2008 indicated that the counseling services offered as part of the STARS SDC were sufficient to address Student's need for counseling. As a result, the District was not required to provide a referral for mental health services under AB 2726.

## LEGAL CONCLUSIONS

### APPLICABLE LAW

1. In an administrative hearing, the petitioner has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Here, the District has the burden of proof on its issue.

2. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," called DIS in California, means transportation and such developmental, corrective, and

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<sup>10</sup> While the District had the burden of proof, Student did not reveal until late in the hearing that he was alleging that the District should have made an AB 2726 referral.

supportive services as may be required to assist a child with a disability to benefit from special education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. In suits brought pursuant to the IDEA, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (Bd. of Educ. of the Hendrick Hudson Sch. Dist v. Rowley, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) However, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, 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.) Mere technical violations will not render an IEP invalid. (N.B. v. Hellgate Elementary School Dist. (9th Cir. 2008) 541 F.3d 1202, 1208; Amanda J. v. Clark County School District (9th Cir. 2001) 267 F.3d 877, 892.)

4. In W.G. v. Target Range, supra, 960 F.2d at 1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. When developing a pupil's IEP, the IEP team shall consider the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).) An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, and constitutes a procedural denial of FAPE. (Deal v. Hamilton County Bd. of Educ. (6th Cir. 2004) 392 F.3d 840, 858.)

5. An important aspect of the parents' right to participate in the IEP process is the LEA's obligation to make a formal written offer which clearly identifies the proposed program. (Union Sch. Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 1526.) The requirement of a formal, written offer creates a clear record that helps eliminate troublesome factual disputes years later, and alerts the parents to the need to consider seriously whether the

offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra*, 15 F.3d at 1526).)

6. In analyzing IDEA cases, the court must also assess whether the LEA's proposed program was substantively appropriate, in that it was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.) However, the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley, supra* at p. 201.)

7. In addition, the educational program must be in the LRE. (See *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398; cert. denied (1994) 512 U.S. 1207.) A special education student must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).)

8. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight ...

an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (Adams v. State of Oregon (9th Cir. 1999) 195 F.3d 1141, 1149 (citing Fuhrman v. East Hanover Bd. of Educ. (3d Cir. 1993) 993 F.2d 1031, 1041).)

9. An annual IEP shall contain a statement of the individual’s present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i).) An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual’s needs that result from the individual’s disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil’s other educational needs that result from the individual’s disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).) The IEP must also contain (1) a description of how an individual’s progress towards meeting his or her goals will be measured and (2) when periodic progress reports regarding goal attainment will be provided to the individual’s parents. (34 C.F.R. § 300.320(a)(3).)

10. An LEA may assign a teacher who holds a level 1 education specialist credential, or a previously issued credential, that authorizes him or her to provide instruction to individuals with mild and moderate disabilities to provide instruction to pupils with autism, if the teacher consents to the assignment and the teacher either: (1) has provided full-time instruction for at least one year prior to September 1, 2007, in a special education program that serves pupils with autism pursuant to their individualized education programs and received a favorable evaluation or recommendation to teach pupils with autism from the LEA or school, or (2) has completed a minimum of three semester units of coursework in the subject of autism offered by a regionally accredited institution of higher education. (Ed. Code, § 44265.1, subd. (b).) For purposes of analyzing

whether an LEA offered a FAPE, nothing in this Decision constitutes a determination that a teacher must necessarily meet the requirements of Education Code section 44265.1 in order to be qualified to deliver a FAPE to a pupil.<sup>11</sup>

11. Pursuant to the regulations implementing Chapter 26.5 of the Government Code, which governs AB 2726 mental health referrals, “mental health assessment” means “a service designed to provide formal, documented evaluation or analysis of the nature of the pupil’s emotional or behavioral disorder” that is conducted by qualified mental health professionals in conformity with Education Code sections 56320 through 56329. (Cal. Code Regs., tit. 2, § 60020, subd. (g).) An IEP team may initiate a referral to community mental health services for a special education student who is suspected of needing mental health services, if the pupil meets all of the criteria specified in Government Code section 7576, subdivision (b), and California Code of Regulations, title 2, section 60040, subdivision (a), including the following:

- (3) The pupil has emotional or behavioral characteristics that are all of the following:
  - (A) Are observed by qualified educational staff in educational and other settings, as appropriate.
  - (B) Impede the pupil from benefiting from educational services.
  - (C) Are significant as indicated by their rate of occurrence and intensity.
  - (D) Are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be resolved with short-term counseling.

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<sup>11</sup> Moreover, whether Student’s teachers met the “highly qualified” requirements of the No Child Left Behind Act (NCLB) is not at issue in this Decision. (34 C.F.R. §§ 300.18(f), 300.156(e).)

(5) The local educational agency . . . has provided appropriate counseling and guidance services, psychological services, parent counseling and training, or social work services to the pupil pursuant to Section 56363 of the Education Code, or behavioral intervention as specified in Section 56520 of the Education Code, as specified in the individualized education program and the individualized education program team has determined that the services do not meet the educational needs of the pupil, or, in cases where these services are clearly inadequate or inappropriate to meet the educational needs of the pupil, the individualized education program team has documented which of these services were considered and why they were determined to be inadequate or inappropriate.

(Gov. Code, § 7576, subd. (b); see also Cal. Code Regs., tit. 2, § 60040, subd. (a).)

#### DETERMINATION OF ISSUE

#### DID THE DISTRICT OFFER STUDENT A FAPE IN THE JUNE 10, 2008 IEP?

12. Pursuant to Factual Findings 1 to 20 and 38 to 45, and Legal Conclusions 1 to 5 and 8 to 9, the District complied with the procedural requirements for conducting the June 10, 2008 IEP meeting. Parents participated in the IEP team meeting, and the District did not predetermine what educational program would be offered to Student. The IEP document contained the required information, including Student's present levels of performance and measurable annual goals. The District made a clear, formal written offer of the educational program. In any event, any technical violation of that requirement did not impede Student's right to a FAPE, significantly impede Parents' opportunity to participate in the IEP decision-making process, or cause a deprivation of educational benefits.

13. Pursuant to Factual Findings 1 to 15, 18 to 37, and 46 to 51, and Legal

Conclusions 1 to 3 and 6 to 11, the District offered a substantively appropriate IEP, based on the information reasonably known to the IEP team members in June 2008. In June 2008, the District could not have known the information and recommendations later presented by Dr. Weckerly in January 2009. Based on the information available in June 2008, the District reasonably concluded that placement at the STARS SDC at Taft was designed to meet Student's unique needs and was reasonably calculated to allow him to receive educational benefit in the LRE. Because the information about Student's needs indicated that he could attend school on a general education campus with supports, the District's offer to place him at Taft complied with the LRE requirement. The District also reasonably concluded that the STARS SDC placement would have addressed Student's need for counseling through access to the full-time counselor assigned to the SDC. The IEP also contained measurable annual goals addressing his areas of educational need. In addition, the STARS SDC teachers had the California teaching credentials required to teach pupils with autism.

14. Thus, pursuant to Factual Findings 1 to 51 and Legal Conclusions 1 to 13, the District offered Student a FAPE at the June 10, 2008 IEP, based on the information reasonably available to the District at that time.<sup>12</sup>

## ORDER

The District offered Student a FAPE at the June 10, 2008 IEP.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing

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<sup>12</sup> Whether the District is required to change its IEP offer as the result of new information was not at issue, and therefore this Decision makes no finding on that question.

decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: The District prevailed on the sole issue.

## RIGHT TO APPEAL THIS DECISION

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

Dated: February 17, 2009

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SUZANNE B. BROWN

Administrative Law Judge

Office of Administrative Hearings