

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009110441

DECISION

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter on February 22, March 4, and March 9, 2010, in Los Angeles, California.

Student was represented by Jennifer Guze Campbell, Attorney at Law, of the Special Education Law Firm. J. Wiley Campbell, an advocate at the Special Education Law Firm, was present at hearing on February 22, 2010, and Jim Campbell, an advocate at the Special Education Law Firm, was present at hearing on March 4, and March 9, 2010. Mother was present on all hearing days.

Los Angeles Unified School District (District) was represented by Susan Park, Attorney at Law, of Fagen Friedman & Fulfroft LLP. Patrick Balucan, Attorney at Law, Assistant General Counsel for the District, was present on February 22, 2010. Michelle Ahkuoi, Due Process Specialist for the District, appeared as the District representative on all hearing days. Christine N. Wood, paralegal for the District's Office of General Counsel was present on February 22, 2010, and Sue Talesnick, Coordinating Specialist, Due Process, for the District, was present on March 9, 2010.

Student filed her first amended request for due process hearing (Amended Complaint) on December 28, 2009.¹ Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file written closing briefs by no later than 5:00 p.m. on March 30, 2010. The parties timely filed their written closing briefs on March 30, 2010, at which time the record was closed and the matter was submitted.

ISSUES

Whether the District denied Student a free appropriate public education (FAPE) in the fall of 2009 by failing to provide the following services as required by Student's individualized education program (IEP):

- (a) Resource (RSP) services;
- (b) Speech (LAS) services;
- (c) Occupational therapy (OT) services; and
- (d) Behavioral services.²

¹ The First Amended Complaint also named the Los Angeles Unified School District SELPA as a respondent. The SELPA was dismissed in the Order Following Pre-Hearing Conference.

² At hearing, or in her closing brief, Student attempted to expand the issues to include whether the IEP of April 16, 2009, offered sufficient related services so as to provide a FAPE, and whether the District denied Student a FAPE by reason of its failure to stop the bullying and teasing of Student by other students. Following the granting of two Notices of Insufficiency, however, the only remaining issue alleged in the Amended Complaint was: "Petitioner alleges that Respondents denied a FAPE to [Student] in the fall of 2009: Respondents failed to provide [Student] the services required by [Student's]

REMEDIES REQUESTED

Student requested remedies to include (1) an independent educational evaluation (IEE) to evaluate Student in all areas of suspected disability; (2) a new IEP be developed after the IEE; and (3) placement at a non-public school (NPS) that is acceptable to Mother.

FINDINGS OF FACT

GENERAL BACKGROUND AND JURISDICTIONAL MATTERS

1. Student is a six-year-old girl who resides in the District with her Mother. Student attends first grade at 9th Street Elementary School in the District. She was first found eligible for special education during the 2008-2009 school year, while she was in kindergarten at Esperanza Elementary School (Esperanza), also in the District. At the time of the hearing, Student was eligible for special education as a student with autism.

IEP MEETING OF APRIL 16, 2009

2. The District convened an IEP meeting on April 16, 2009, when Student was five years old and in kindergarten at Esperanza. The meeting was convened following a reevaluation conducted by Manuel Pumphrey, the RSP teacher at Esperanza. The reevaluation was generated, at least in part, by Mother's request that Student's eligibility category be changed to autism. The IEP team included Mother, Mr. Pumphrey, a school psychologist, a District administrator, Student's general education teacher, Neil Murray

IEP plan; [Student] is not receiving educational benefit." The Order Following Pre-Hearing Conference, which is based upon a discussion with the parties, also states this issue as the only issue in this proceeding. Pursuant to Education Code section 56502, this is the only issue to be determined by this Decision.

(Student's LAS therapist), Mirma Davis (Student's occupational therapist), and a school nurse.

3. The IEP team considered Mr. Pumphrey's assessment report, and previous, still valid, assessments. The IEP team recorded Student's present levels of performance in the areas of General Ability/Cognition, Social/Emotional, Reading, Writing, Math, LAS, and Motor Skills. In the area of General Ability/Cognition, the team found that Student had weaknesses in auditory comprehension and visual perceptual skills. With respect to the Social/Emotional area, the team found that that Student had many behavior problems in the classroom, including yelling, screaming, and throwing herself on the floor. These problems usually occurred during transition time or when the classroom schedule changed. She had difficulty getting along with her peers.

4. In the area of LAS, the team noted that Student's articulation skills were deficient, in that she had a very nasal voice with distortions of some developmental sounds. In the area of Motor Skills, the team found that Student had needs in visual motor skills, visual perceptual skills, and sensory modulation. With respect to visual motor and visual perceptual skills, Student had difficulty imitating the pre-writing shapes necessary to write letters and numbers. Student also had difficulty cutting zigzag lines and simple shapes. She also had difficulty with figure ground skills, spatial concepts, and copying activities. Student had difficulty attending during independent unstructured classroom activities, and transitioning from a preferred activity to a non-preferred activity. She also had difficulty sitting close to her peers, saying that they annoyed her.

5. The team acknowledged that several standardized assessments supported the presence of autism. Student's autistic-like behaviors included avoiding eye contact, rocking back and forth, repeating (echoing) words, and repeating words out of context. The team found that Student's autistic-like behaviors and speech impairment impacted

Student's academic skills, including her ability to discriminate among symbols, to draw shapes, to write letters, words, and numbers, and to respond to how, why, and cause-and-effect questions.

6. The IEP team developed goals and objectives to address Student's needs in the areas of Reading, Writing, Math, LAS, Behavior, and OT motor skills and sensory modulation skills. The reading goal required Student to read a short passage of grade-level text and answer five questions about the passage. The writing goal involved Student writing her name, drawing simple shapes from a model, and selecting words from a word bank to write a simple sentence to describe her pictures and thoughts, with correct letter formation and spacing. The math goal involved Student identifying the operation symbol to add and subtract independently, when given a set of 10 operations involving two-digit addition and subtraction, without regrouping. The LAS goal involved Student producing correct sounds while answering questions related to a familiar story or classroom activity. The behavior goal involved Student attempting to calm herself if she became angry during transitions or schedule changes in the classroom. One of the OT goals involved Student writing her first and last name independently, with good letter formation and letter placement within parallel lines. The other OT goal focused on Student's sensory modulation by requiring her to attend to classroom independent work centers with minimal assistance, using strategies such as movement breaks, fidgets, and other strategies as needed.

7. The IEP team decided that Student would be placed in a general education class, with accommodations to include consistent routines, modeling, repetition, visual and aural aides to help her remember sound/symbol correspondence and blending, and prompting to discriminate the different object or symbol in a set. She was expected to meet grade-level standards.

8. The team also developed a Behavior Support Plan (BSP), as Student's autistic-like behaviors and speech deficits required such support. The team found that the behaviors impeding Student's learning were outbursts/rage/explosive reactions, which included yelling, crying and lying on the floor, which occurred one time per week for 20 minutes. The team found that a variety of factors contributed to the behavior, including a lack of transition skills and conflict-resolution skills, a lack of a communication system, lack of scheduling and task structuring, lack of social skills instruction, and consequences not being clear to Student. The team determined that a variety of supports and structures could remove the likelihood of the behavior, including signaling transitions, providing a break, giving cues, modeling, praise, and the use of specific supportive and calm, de-escalating language. The team agreed that strategies would be put in place to provide these supports, including teaching Student to request breaks, teaching new social skills, following schedules and routines, using a communication system and teaching better communication skills, and providing structured choices. If the behavior occurred, the IEP team recommended a reactive strategy consisting of redirecting Student using a calming, de-escalating voice, giving Student choices using the "break" or "work" cards, and continuing to read a social story to Student. The team developed a behavioral goal which involved Student attempting to calm herself down by counting to 10, or approaching the teacher to request a break.

9. The team agreed that Student would participate in the regular physical education class, and regular state and district assessments, with directions for test administration to be simplified or clarified.

10. The IEP provided the following services: (1) Counseling, one session per month, for 30 minutes each time; (2) LAS, one time per week, for 30 minutes each time; (3) OT one session per week, for 30 minutes each session; (4) RSP Math, two times per month, for 60 minutes each month; and (5) RSP Reading, one-to-five times per week, for

60 minutes each month.³ The RSP Reading also included work in writing, such that the District characterized these RSP services as RSP Language Arts. The IEP team specified that RSP services were to be provided on a mixed consultative/pull-out basis; that OT services were to be provided in direct one-to-one, small group instruction; and/or teacher collaboration/consultation; and that the counseling services would be provided on a direct/consultative model as needed. The IEP did not specify whether the LAS services would be provided in a small group or individually.⁴ Student had been receiving small group LAS services from the time of her initial IEP, which occurred in October 2008.

³ At hearing, Mr. Pumphrey, Student's RSP teacher during the 2008-2009 school year, who was a member of the April 16, 2009 IEP team, testified that the level of RSP Math services was erroneously stated in the IEP. Mr. Pumphrey testified that the IEP team had agreed that Student was to receive RSP Math for two times per week, for 60 minutes each week, instead of two times per month, for 60 minutes each month, as set forth in the IEP. Mother and Brenda Lewis (Student's current RSP teacher), however, testified that the level of RSP Math services Student was to receive was as set forth in the IEP. Consequently, the weight of the evidence supports that Student was to receive the Math RSP services at a frequency of two times per month, for 60 minutes each month, as set forth in the IEP.

⁴ The issue of whether the LAS, RSP, and counseling services in the IEP were to be delivered individually, in a small group, or otherwise, was not specified in the Amended Complaint. However, both parties presented evidence and argument regarding this issue, and it can be considered as related to the issue alleged in the Amended Complaint regarding the implementation of the IEP. Consequently, the delivery method of services to be rendered is addressed in this Decision.

11. During the IEP meeting, the District members of the IEP team explained the contents of the IEP to Mother. Mr. Pumphrey, Ms. Davis (the occupational therapist), and Mr. Murray (the LAS therapist), described the services they would provide. Mr. Pumphrey specifically explained to Mother that the RSP services would be given on a one-to-one basis if he was assisting Student in her general education classroom, but that, unless the material she was learning was such that Student had a particular need for individual assistance during pull-out RSP services, her pull-out services would generally be delivered in a small group setting. Mr. Murray conveyed that LAS services were given in a small group, in part by relating an anecdote to Mother about the protective attitude another child had towards Student as they rode in the elevator with Mr. Murray and other children on their way to LAS therapy. Throughout the IEP meeting, the District members of the IEP team repeatedly asked for Mother's input, and asked whether she had any questions. Mother repeatedly advised them that she understood their comments and had no questions. At the meeting, Mother did not question or criticize the assessments the District had performed. Mother signed her consent to the IEP. Mother is dyslexic, but there was no evidence that the District knew of Mother's disability during any time period relevant to this matter.

IMPLEMENTATION OF APRIL 16, 2009, IEP IN FALL OF 2009

12. Based on conversations with Student during the fall of 2009, Mother believed that Student was not receiving related services in the areas of RSP, LAS, behavior, and OT, as offered in the IEP.

Student's Behaviors and Peer Relationships

13. Student enrolled in 9th Street Elementary School for first grade in September 2009, at the beginning of the school year. Her general education teacher was Claudette Prince. During the first week of school, Stacy Weiss, the school psychologist,

met Mother, explained to her that she would be consulting with Ms. Prince regarding Student, and asked for Mother's input on Student's previous behaviors and what strategies had worked.

14. Student's behavioral services were provided during the 2009-2010 school year by Ms. Prince and Ms. Weiss. Ms. Weiss recorded the services she received on computerized Provider Monthly Notes (service logs). Ms. Weiss's service logs did not reflect that she rendered services in September 2009, but they did list 30 minutes per month of services given in October, November, and December 2009. Ms. Weiss testified that she provided consultative services in September 2009, but her service log did not reflect her entries for September 2009, due to a computer error. Ms. Weiss's testimony that she provided services in September was undisputed, and was supported by Ms. Prince, who testified that she met with Ms. Weiss two to three times per week. Ms. Weiss's service logs also erroneously indicated that the services were individual, and not consultative.

15. During September 2009, at the beginning of the school year, Student had difficulty with transitions. She found it difficult to transition to class in the morning, and after recess and lunch. At the end of the school day, she had difficulty transitioning from the classroom to the school bus. She also had difficulty transitioning between subjects in the classroom. Sometimes she would verbalize her dislike of transitioning. Sometimes she would cry and scream during transitions. One time she threw herself off of a chair and onto the ground during a transition. On another occasion she started to throw herself off of her chair to protest a transition, but she managed to regain control of her behavior. Ms. Prince would attempt to assist her in transitions by using a visual schedule and privately giving Student advance notice of transitions and schedule changes. Ms. Prince also told Student that, if needed, she could ask to take a break, and, if she needed to cry, she could do so. Ms. Prince instructed the class, including Student, in the

Second Step Program, which was designed to help students verbalize their needs, handle their emotions, and resolve conflicts. After September, Student's difficulty with transitions greatly diminished, as had her negative behaviors. Student asked for breaks, and cried, as had other of her classmates, but her crying happened rarely. She worked well during "independent workshop time," when the students in the class worked independently among different study centers.

16. Student reported to Mother that she was teased and bullied at school by other students. In particular, Student reported to Mother that the other students called her "stupid," "ugly," and "dirty." At hearing, Mother did not specify when these conversations occurred, or provide any details regarding these conversations. Mother believed that the teasing and bullying was a consequence of Student's speech difficulties, and that the teasing and bullying contributed to Student's poor performance at school and prevented Student from receiving the benefit of her education. There was no evidence that Mother reported to the District any episodes of teasing or bullying of Student prior to filing the original Complaint.

17. Mother's testimony was the only evidence that anyone at school had called Student "stupid," "ugly," or "dirty." However, there was some evidence that Student had difficulty with peers, including one incident of teasing relating to Student's speech. In September 2009, Student told Celia Barajas, a school paraprofessional who worked on the school yard with the students and assisted Brenda Lewis, Student's RSP teacher, that other students had said that Student talked "weird." Ms. Barajas reported the teasing to Ms. Prince and Ms. Lewis. Ms. Prince talked about the incident with the class, referring to the subject matter that the children had been learning in the Second Step program as well as the Health and Wellness program, which also covered emotions and behavior. She advised the class that such conduct would not be tolerated. Ms. Prince also talked to Student about the teasing. Ms. Prince told Student that Student

had a beautiful voice and attempted to encourage her. Ms. Prince advised Student to report to Ms. Prince any problems she had with other students. Subsequently, Ms. Prince would occasionally ask Student whether everything was all right, and whether anyone had teased her.

18. Student reported no other incidents to Ms. Prince of teasing regarding her speech. Student complained to Ms. Prince and Ms. Barajas that other students were "bothering her." Ms. Prince and Ms. Barajas independently observed the situations and thought that the other students were only trying to engage with her or help her. Ms. Prince and Ms. Barajas explained this to Student, and the problem resolved.

19. With the exception of the foregoing events, there was no specific evidence of any other particular incident when Student was, or perceived that she was, the victim of teasing or bullying. Ms. Prince, Ms. Barajas, Ms. Lewis, and Ms. Weiss were not aware of any other such incidents. Student reported to school personnel no additional incidents. Neither Ms. Zalak (Student's LAS therapist during fall of 2009), nor Ms. Davis, were aware of any incidents of Student being bullied or teased at school.

20. Student's peer interactions improved during the fall of 2009. By the time of the hearing, Student interacted well with her peers and worked well with her partner in class. Student made progress on her behavioral goal throughout the fall of 2009, and met the goal in January or February 2010.

RSP Services During the Fall of 2009

21. Ms. Lewis, the RSP teacher, and Ms. Barajas, the special education assistant whom Ms. Lewis supervised, provided Student's RSP services during the 2009-2010 school year. Ms. Lewis prepared computerized service logs regarding the date that Student received RSP services, and the amount of time of the services. She prepared the logs either at the end of the particular RSP session, or on a weekly basis. The service logs erroneously stated that the services were individual. The service logs also showed

that Student received RSP services in Language Arts and Math during fall 2009 in greater amounts than were required by Student's IEP. Student's IEP provided that Student was to receive RSP services in Language Arts twice per week, for a total of 60 minutes per week. In fact, the service logs reflected that Student received such services for 30 minutes per day, at least 3 days per week, and sometimes more. With respect to RSP Math services, the service logs reflected that Student received approximately as much RSP Math services as she did in Language Arts. Her IEP, however, stated that she was to receive RSP Math services twice a month for 60 minutes per month, which was substantially less frequently than the amount of RSP Language Arts services provided for by her IEP. Ms. Lewis explained that Student was working on the Open Court reading anthology, Voyager (another reading program), and a math program (Touch Math), which required her to receive more RSP services than provided for in the IEP.

22. Ms. Prince, Ms. Lewis, and Ms. Barajas worked on Student's reading and writing goals. The evidence demonstrated that Student had made progress on the reading goal. There was conflicting evidence as to whether Student had met the goal, but there was no dispute but that Student had made progress on the goal. Ms. Prince testified that Student had met the goal with respect to responding to questions, but was only reading at more than 80 percent accuracy. Ms. Lewis and Ms. Barajas testified that Student had met the reading goal. Ms. Lewis further testified that Student had met the goal in January or February 2010, and that Student could read short passages and answer questions about them. Furthermore, Student had met all of her Open Court reading program benchmarks. The evidence was undisputed that Student had met the writing goal in January or February 2010. Student knew all shapes, her letter formation had improved, and Student could write complete sentences. Ms. Lewis and Ms. Barajas worked on Student's math goal, and the evidence was undisputed that Student had met

the goal in January or February 2010. At the time of the hearing, Student was able to add and subtract two-digit numbers.

LAS Services During the Fall of 2009

23. Student's LAS therapist from September 2009 through January 2010 was District speech and language therapist (SLP) Anne Zalak. The IEP provided that Student was to receive LAS services for 30 minutes, once per week. During the sessions, Ms. Zalak worked on Student's LAS goal. In particular, Ms. Zalak worked on Student's articulation of the letter "R," and her ability to respond to questions appropriately. Ms. Zalak provided services in a small group of up to five children, including Student. Ms. Zalak testified that she did not provide individual LAS therapy unless the IEP specified it, or there was a specific circumstance that required it, such as the particular student not getting along well with the others in the group. No such special circumstance applied to Student, who interacted well with the other students in the group. Student made progress in articulating the "R" sound. She began to say it more often and more clearly. As of December 2009, Student was speaking in longer sentences and her vocabulary had improved. This evidence of Student's progress was undisputed.

24. Ms. Zalak's service logs reflected that Student missed approximately seven regularly scheduled LAS sessions, out of approximately 14 weekly sessions. One of these missed sessions was due to Student's absence from school. One of these missed sessions was due to Ms. Zalak's inability to attend the session. Two of the missed sessions were due to Student not being present in her classroom, but elsewhere on campus. Ms. Zalak made special trips to school on two days to attempt to make up missed sessions. Student had an unexpected schedule change on one such day and was unable to attend the make-up session, and Ms. Zalak had to attend an IEP on the other day and was unable to convene the anticipated make-up session.

25. Ms. Zalak retired from District employment in early February 2010. Since Ms. Zalak retired, Dimitrios Chamizidis, another District SLP, has been providing LAS services to Student. Mr. Chamizidis has not only been providing Student her 30 minutes per week of LAS services, but was also instructed by Ms. Barry, the principal of 9th Street Elementary School, to provide 240 minutes of make-up sessions. Mr. Chamizidis was accomplishing this by adding 60 minutes of LAS services after Student's 30-minute weekly LAS session, using a combination of individual and group therapy. As of the time of the hearing, Mr. Chamizidis had provided 120 minutes of make-up sessions, and planned to complete the remaining sessions by the time of Student's next annual IEP in April 2010. Student tolerated the additional LAS time well, and was benefiting from it.

26. By the time of the hearing, Student had met both incremental objectives to her LAS goal, and occasionally, but not consistently, met the goal. She was on track to meet the goal by the time of her next annual IEP. This evidence of Student's progress on her LAS goal was not disputed. Indeed, Ms. Prince, Ms. Weiss, Ms. Lewis, and Ms. Barajas all testified that they consistently understood Student's speech.

OT Services During the Fall of 2009

27. Student's OT services were provided during the 2009-2010 school year by Mirma Davis, a licensed California Occupational Therapist who has been employed as an OT by the District since 2007, and by Tanya Miller, a certified OT assistant who provided services to various students under Ms. Davis's supervision. Ms. Davis planned the treatment rendered by Ms. Miller. Ms. Davis's supervision of Ms. Miller included observing her twice a week and discussing cases with her twice a week, as well as supervising her documentation. Ms. Davis performed an OT assessment of Student in October 2008, and has been providing services to Student since the time she attended Esperanza.

28. Pursuant to her April 16, 2009 IEP, Student was to receive OT services at the rate of 30 minutes per week. The OT service logs reflected that Student received OT services at the rate of 30 minutes per week from September 22, 2009, through December 8, 2009. Services were not provided on three occasions: on November 3, 2009, due to Student's absence; on December 1, 2009, due to Ms. Miller's absence; and on December 15, 2009, due to school-wide testing. District did not make up these sessions.

29. During fall 2009, Student made progress on her OT goal in the area of visual motor skills and visual perceptual skills, which required her to consistently write her first and last name independently, with good letter formation and letter placement in four out of five trials. By the time of the due process hearing, Student had met and surpassed this goal. Additionally, Student was able to copy, write legibly, draw, and cut. Student's IEP also contained a second OT goal, designated in the IEP as Goal Number 8. The goal provided that Student would attend to independent work centers with minimal adult assistance, using sensory aids as needed, such as movement breaks, fidget toys, a weighted vest, verbal preparation, movement breaks, and slow exposure. Ms. Davis developed Goal Number 8 to address the concerns of Student's teacher in the 2008-2009 academic year that Student was having difficulty with transitions and attention. Ms. Davis considered that these difficulties may be manifestations of sensory-motor issues, but when she began to provide the sensory aids included in Goal Number 8, Ms. Davis determined that they were not effective. She then realized that Student's difficulties with transitions and attention were not sensory-motor issues but behavioral issues, and they were being successfully addressed by the behavioral strategies in the IEP. Therefore, Ms. Davis stopped providing the OT strategies and worked with Student's teacher during the 2008-2009 academic year on behavioral strategies instead. Those were effective.

Student continued to make progress with attention and transitions through the fall of 2009, and worked well during independent workshop time.

30. Mother occasionally sent notes to Student's classroom teacher, Ms. Prince, regarding Student's diet and absences from school. Mother never sent Ms. Prince any notes regarding Student's IEP or its implementation. There was no evidence that Mother complained about Student's IEP or its implementation to any school or District personnel prior to filing the Complaint.

STUDENT'S GRADES DURING THE FALL OF 2009

31. Student's report card reflected Student's grades during the period from September 9, 2009, through December 4, 2009. Ms. Prince prepared the report card, with input from Ms. Lewis, Student's RSP teacher. Student's grades for achievement and effort were all "3"s and "4"s, on a scale in which '3' signified Proficient and '4' signified Advanced. Such grades meant that Student met grade-level standards. Specifically, Student received achievement grades of '3' in Reading, Speaking, and Mathematics, and an achievement grade of '4' in Writing, Science, and Health Education. The Reading and Writing grades were based on Student's scores on the Open Court program assessments. Student's grades of '4' in Science and Health Education were based on state standards. In the teacher comments sections, the comments included that Student needed to learn basic math facts, and needed to improve in writing. The statement with respect to math facts referred to Student's need to learn addition and subtraction of numbers by rote memory, instead of by calculation, such as by counting lines. The comment regarding Student's need to improve in writing referred to her need to improve her penmanship, not the writing content. The comment correlated to the Student's score of '2' in Work and Study Habits, indicating that Student did not consistently produce neat and careful work. Student's grades on this report card were higher than those she had received on her report cards at Esperanza.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

WHETHER DISTRICT DENIED STUDENT A FAPE BY FAILING TO PROVIDE BEHAVIORAL, RSP, LAS, AND OT SERVICES AS REQUIRED BY THE IEP.

2. Student contends that District failed to provide Student the Behavioral, RSP, LAS, and OT services required by the IEP of April 16, 2009. In particular, Student contends that the IEP misstated the amount of RSP Math services that Student was to receive, and that the RSP service logs were not accurate, and wrongfully included time spent on Response to Intervention (RTI) programs. Additionally, Student contends that the IEP improperly failed to designate that the LAS services were small-group services and not individual services, and that Mother had been led to believe that the RSP and Counseling services would also be delivered on an individual basis. Student further contends that the District's failure to provide OT services resulted in the District's unilateral abandonment of an IEP goal. As a result of the District's failure to provide services, Student contends that she failed to make progress, particularly with respect to speech and language, which made her a target of bullying and teasing by her schoolmates. Student also contends that the bullying and teasing harmed Student's self-esteem, and contributed to Student's poor performance at school.

3. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and

independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) A FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) The IDEA defines specially defined instruction as "appropriately adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction." (34 C.F.R. § 300.39(b)(3) (2006).⁵

4. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

5. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 106 [102 S. Ct. 3034] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200; *J.G., et al. v. Douglas County School District* (9th Cir. 2008) 552 F.3d 786, 793.) The Court stated that school

⁵ All references to the Code of Federal Regulations are to the 2006 version, unless otherwise stated.

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.)

6. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include a statement of the special education and related services to be provided to the child, and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(7).)

7. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Id.* at p. 822.) This standard does not require that the child suffer demonstrable educational harm for there to be a finding of a material failure. (*Id.*) However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. (*Id.*)

Behavioral Services

8. Student contends that she did not receive the behavioral services as set forth in the April 16, 2009, IEP, because the service log did not list services for September. Further, she believed that services would be rendered on an individual basis, not on a consultative basis. Based on Legal Conclusions Numbers 1 and 7, Student had the burden of demonstrating that any failure of the District to implement the IEP was material. A material failure to implement the IEP can be demonstrated if the Student failed to progress on her goals, or otherwise failed to make educational progress. Student’s April 16, 2009, IEP, provided that she would receive counseling services on a

consultative basis of one time per month for 30 minutes each time. The IEP also contained a BSP, which contained one goal directed at Student's ability to self-regulate. The evidence was uncontradicted that Student received those services, pursuant to the IEP, and that her BSP was implemented, although the service log did not document the 30 minutes of services that Student received in September. Furthermore, the Student made progress on her behavioral goal during fall 2009. She improved in her ability to transition, and in her peer relationships. Under these circumstances, there was no material failure to implement the IEP with respect to behavioral services. There was no denial of a FAPE. Based upon Findings of Fact Numbers 1 through 20, and 30 through 31, and Legal Conclusions 1 through 7, District materially implemented the IEP with respect to behavioral services, and did not deny Student a FAPE with respect to these services.

RSP Language Arts Services

9. Student contends that she did not receive the RSP Language Arts (Reading and Writing) services as set forth in the April 16, 2009, IEP, because the services included RTI services. Further, she believed that services would be rendered on an individual basis, not on a small-group basis. Based upon Legal Conclusions 1 and 7, Student had the burden of demonstrating that any failure of the District to implement the IEP was material. A material failure to implement the IEP can be demonstrated if the Student failed to progress on her goals, or otherwise failed to make educational progress. The April 16, 2009, IEP provided that Student was to receive a total of 60 minutes per week of RSP services in Reading and Writing, on a consultative, pull-out basis, delivered over the course of one to five sessions. At the IEP meeting, Student's RSP teacher at the time, Mr. Pumphrey, explained that the services would be delivered in a small group or individually, depending upon the setting and Student's needs. There was nothing in the IEP that indicated that the RSP services would be provided solely on a one-to-one basis,

and Mother presented no specific evidence to support her belief that the District would deliver the services on a one-to-one basis. Student received in excess of 60 minutes per week of RSP services in Reading and Writing during the fall of 2009. On its face, this demonstrates that Student received far more RSP services than she was entitled to under the IEP. Student contends that these services improperly included RTI services, because they included time that Ms. Barajas and Ms. Lewis spent with Student working on the Voyager program. However, there was no evidence that Voyager was an RTI program, and there was no evidence that the District could not use Voyager to deliver RSP services. In any event, there was no evidence regarding how many of the multiple hours Student spent with Ms. Lewis and Ms. Barajas in the RSP program were devoted to RTI to the exclusion of RSP. Nor was there any specific evidence that the service logs which documented the amount of RSP Language Arts services Student received were incorrect. (Findings of Fact 1 through 12, and 21.)

10. Furthermore, based upon Findings of Fact 1 through 12, 22, and 31, any failure of the District to provide RSP services to Student was not material, because Student made progress in Reading and Writing during fall 2009. Her report card grades in Reading and Writing demonstrated that her abilities were at grade level in those subjects by December 4, 2009, the end of the grading period. The comment on the report card that Student needed to improve in writing, which referred to Student's penmanship, does not diminish her Writing grade. At hearing, Mother contended that Student's grades on her report card did not reflect Student's true ability. However, Student presented no samples of Student's work, or any other evidence that Student's grades were inflated. Furthermore, the evidence was uncontradicted that Student had made progress on her reading goal in her IEP, and that she had met her writing goal in her IEP. Student provided no specific evidence that she could not perform the tasks required by these goals. The evidence was also uncontradicted that Student had met her

benchmarks in the Open Court reading program. Under these circumstances, and based upon Findings of Fact 1 through 12, 21, 22, 30 and 31, and Legal Conclusions 1 through 7, there was no failure to materially implement the IEP. There was no denial of a FAPE on this ground.

RSP Math Services

11. Student contends that she did not receive the RSP Math services as set forth in the April 16, 2009, IEP, because the services included RTI services. Further, she believed that services would be rendered on an individual basis, not on a small-group basis.

12. Based upon Legal Conclusions 1 and 7, Student had the burden of demonstrating that any failure of the District to implement the IEP was material. A material failure to implement the IEP can be demonstrated if the Student failed to progress on her goals, or otherwise failed to make educational progress. The April 16, 2009, IEP provided that Student was to receive RSP Math services twice a month, for a total of 60 minutes per month. At the IEP meeting, Student's RSP teacher at the time, Mr. Pumphrey, explained that the services would be delivered in a small group or individually, depending upon the material. There was nothing in the IEP that indicated that the RSP services would be provided solely on a one-to-one basis, and Mother provided no specific evidence to support her belief that the District would deliver the services on a one-to-one basis. Student received far more than 60 minutes a month of RSP services in Math during the fall of 2009. On its face, this demonstrates that Student received far more RSP services than she was entitled to under the IEP. Student contends that these services improperly included RTI services, because they included time that Ms. Barajas and Ms. Lewis spent with Student working on the Touch Math program. However, there was no evidence that Touch Math was an RTI program, and there was no evidence that, if Touch Math constituted RTI, the District could not also use the Touch

Math program to deliver RSP services. In any event, there was no evidence regarding how many of the numerous hours Student spent with Ms. Lewis and Ms. Barajas working on RSP Math were devoted to RTI to the exclusion of RSP. Nor was there any specific evidence that the service logs which documented the amount of RSP Math services Student received were incorrect. (Findings of Fact 1 through 12, and 21.)

13. Furthermore, based upon Findings of Fact 1 through 12, 22, and 31, any failure of the District to provide RSP services to Student was not material, because Student made progress in Math during fall 2009. Her report card grade in Math demonstrated that her abilities were at grade level in that subject by December 4, 2009, the end of the grading period. Ms. Prince's comment on Student's report card regarding Student's need to learn math facts does not contradict or diminish her grade. At hearing, Student contended that Student's grades on her report cards did not reflect Student's true ability, and implied that Student's teachers may have inflated her grades because her due process complaint was pending during the fall semester. However, Student presented no samples of Student's work, or any other evidence that Student's grades were inflated. Furthermore, the evidence was uncontradicted that Student had met her math goal in her IEP. Student offered no specific evidence that she could not perform the tasks required by the math goal. These facts militate against a finding that there was any material failure to implement the IEP with respect to the delivery of RSP Math services. Consequently, based upon Findings of Fact 1 through 12, 21, 22, 30 and 31, and Legal Conclusions 1 through 7, District did not deny Student a FAPE on this ground.

LAS Services

14. Student contends that she did not receive the LAS services as set forth in the April 16, 2009, IEP, as Ms. Zalak, Student's LAS provider, missed many of the LAS sessions. Further, Student believed that services would be rendered individually, and not

in a small group. Student also contends that she was teased and bullied due to her speech deficiencies, and thereby lost educational benefits. Student contends that the District's attempts to make up the sessions by providing the services in a block of time after Student's regular LAS sessions, did not enable Student to obtain the full benefit of these sessions. Based upon Legal Conclusions 1 and 7, Student had the burden of demonstrating that any failure of the District to implement the IEP was material. A material failure to implement the IEP can be demonstrated if the Student failed to progress on her goals, or otherwise failed to make educational progress. Student's April 16, 2009, IEP provided that Student would receive 30 minutes of LAS services, one time per week, to address Student's difficulty with articulation. The services were discussed at the IEP meeting, and Mother had no questions or comments about them, but the IEP did not specifically state that these services would be individual or group. There was no evidence that Student required individual services to receive a FAPE, and there was no evidence as to the basis for Mother's belief that the LAS services, which Student had been receiving in a small group since the 2008-2009 school year, were to be delivered individually. (Findings of Fact 1 through 12, and 30.)

15. Based on Findings of Fact 1 through 12, 16 through 20, 23 through 26, and 30 through 31, and Legal Conclusions 1 through 7, Student was not deprived of a FAPE due to the failure of the District to materially implement the IEP with respect to LAS services. Student did not receive seven of the 30-minute weekly sessions of LAS during fall 2009, despite Ms. Zalak's attempts to make them up. Mr. Chamizidis has been providing make-up sessions. As of the completion of the hearing, Student had made up 120 minutes, or four of the seven missed sessions. Student provided no specific evidence that Student has not benefited from the make-up sessions, rather, the evidence showed that Student was on track to meet her speech goal before her next annual IEP. The evidence was uncontradicted that Student made progress on her speech

goal during fall 2009, and her report card reflected that she was at grade level with respect to speech. All of Student's teachers and current service providers who testified about the subject testified that they could understand Student's speech. Except for one incident in which another student labeled Student's speech as "weird," there was no direct evidence that Student was teased or bullied because of her speech or for any other reason. Under these circumstances, there has been no material failure to implement Student's IEP with respect to LAS services.

OT Services

16. Student contends that her April 16, 2009, IEP was not implemented with respect to OT services, because she missed three weekly sessions that were not made up. Further, she contends that the occupational therapist abandoned Goal Number 8, an OT goal. Based upon Legal Conclusions 1 and 7, Student had the burden of demonstrating that any failure of the District to implement the IEP was material. A material failure to implement the IEP can be demonstrated if the Student failed to progress on her goals, or otherwise failed to make educational progress. Based upon Findings of Fact 1 through 12, and 27 through 31, and Legal Conclusions 1 through 7, District materially implemented the IEP with respect to OT services, and did not deny Student a FAPE with respect to these services. Student's IEP dated April 16, 2009, provided that Student would receive OT services at a frequency of one session per week, for 30 minutes. During fall 2009, these services were provided on all but three occasions. On one occasion, Student was absent. On another occasion, the District OT was absent due to illness. On the third occasion, the OT session was cancelled due to school-wide testing. These missed therapy sessions were not made up. However, the uncontradicted evidence demonstrated that, during fall 2009, Student had made progress on her OT goal that addressed her visual motor and visual perceptual skills. This goal required her to consistently write her first and last name, with good letter formation and letter

placement. The evidence was undisputed that, by the time of the due process hearing, Student had met and exceeded this goal. Mother presented no specific evidence that Student could not perform the tasks required of the goal. (Findings of Fact 1 through 12, and 27 through 30.)

17. Student also contends that Ms. Davis, the occupational therapist, improperly abandoned Goal Number 8, the OT goal regarding sensory modulation, which consisted of providing Student with strategies so that she could attend during classroom independent work centers. Student contends that the District should have called an IEP meeting rather than unilaterally abandoning the goal. However, the goal was not abandoned, in the sense that Student received no assistance with her needs to attend and transition. Rather, as Student did not require the OT strategies contained in the goal, Student's difficulties with attention and transitions were successfully addressed through behavioral strategies. During the fall of 2009, Student made progress on attention and transitions, and worked well during independent workshop time. Mother provided no specific evidence that Student could not perform the tasks required of this goal. (Findings of Fact 1 through 12, 27, and 29.)

18. Under these circumstances, based upon Findings of Fact 1 through 12, and 27 through 30, and Legal Conclusions 1 through 7, there was no material failure to implement the IEP regarding OT services. District did not deny Student a FAPE on this ground.

ORDER

The relief sought by Student in her Amended Complaint is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due

process matter. District prevailed on the single issue, including each of its subparts, heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: April 14, 2010

_____/s/____

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings