

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BAKERSFIELD CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2010070560

DECISION

Administrative Law Judge (ALJ), Michael G. Barth, Office of Administrative Hearings, State of California, heard this matter in Bakersfield, California, on August 23, 24 and 25, 2010.

Anahid Hoonanian, Attorney at Law, represented the Bakersfield City School District (District). Shirley Nicholas, District's Assistant Director of Special Education, was present throughout the hearing on behalf of the District. Dr. Julius Steele, District's Special Education Director, was present during the first day of the hearing.

Parent attended the first day of hearing. However, at the end of the first day she stated that she would not continue to attend.¹ Parent did not attend the remainder of the hearing.

¹ Parent was placed under oath at the beginning of the hearing. At the end of the first day of hearing Parent made a statement that was considered as testimony. The ALJ attempted to convince Parent of the importance of her attending the hearing, but she decided not to participate further.

District filed its request for due process hearing on July 9, 2010. On July 28, 2010, the parties requested and received a continuance of the hearing dates. Oral and documentary evidence were received at hearing. At the close of the hearing, based on District's request, the record remained open until September 20, 2010, for the submission of written closing arguments. District submitted a closing brief by September 20, 2010, and the matter was then submitted for decision.²

ISSUE³

Whether District can implement the individualized education program (IEP) dated March 26, 2010, as amended on the other dates, without Parent's consent, because it offers Student a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

CONTENTIONS OF THE PARTIES

District contends that the March 26, 2010 IEP, as subsequently amended, offers Student a FAPE. District further contends that the IEP was reasonably calculated to provide Student with meaningful educational progress in the LRE, and that its offer of placement and services are appropriate.

Parent contends that Student, who will turn five years old on October 9, 2010, is too young for kindergarten, and placement in a general education kindergarten class,

² To maintain a clear record, the District's closing brief has been marked as Exhibit D-48. Student submitted no closing brief.

³ This issue is as framed in the August 5, 2010 Order Following Prehearing Conference, and as further clarified at hearing. The ALJ has reframed the issue for the purpose of clarity.

when he is ready would be more appropriate. Parent believes a placement in a pre-kindergarten class for school year (SY) 2010-2011 would be a more appropriate and will prepare Student to attend a regular education kindergarten class in SY 2011-2012. Student asserts that he should continue to receive the 30 hours a week of Applied Behavioral Analysis (ABA) therapy in his home from The Center for Behavior Research and Education (CBRE), a nonpublic agency.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a four-year-old boy who lives with Parent within the geographical boundaries of District. He is eligible for special education services in the category of autism-like behavior.

2. Student received in-home services from age two until his third birthday under Part C of the Individuals with Disabilities Education Act (IDEA) in the Early Start program. Thirty hours of ABA services were provided weekly by CBRE. Kern County Mental Health Services funded these services.

3. When Student turned three years of age on October 9, 2008, he was assessed for special education and related services. District assessed Student and convened an initial IEP team meeting. This meeting occurred over three sessions: October 17, 2008, November 21, 2008, and March 4, 2009. At the end of the process, District found Student eligible and offered Student individualized and small group instruction in a pre-kindergarten classroom for children with autism, as well as other related services, including speech therapy and transportation. District proposed continuing ABA services, previously provided by Early Start, in Student's home provided by District personnel. Parent did not consent to the initial IEP.

4. On July 17, 2009, Parent requested mediation and a due process hearing, OAH Case No. 2009070832. On October 3, 2009, Parents and District entered into a settlement agreement (agreement). Among other things, District and Parent agreed as follows: (a) District would provide Student with public preschool placement options for SY 2009-2010; (b) District would fund 15 hours⁴ a week of ABA therapy from CBRE, which would continue until July 15, 2010; (c) District would provide individual speech and language therapy in Student's home, two times a week for 30 minutes each session; (d) Parent agreed that she would make Student available for a psychoeducational assessment, occupational therapy assessment, and speech and language assessment; (e) Parent and District staff would observe Student in the home program one time per month for one hour; (f) Parent and District agreed to convene an IEP team meeting by April 1, 2010.

5. After the agreement went into effect, District began scheduling the assessments. Gary Hayden, a district program director for special education, managed the implementation of the agreement, scheduling of assessments and convening the IEP team meeting. Scheduling proved difficult, and as the April 1, 2010 date approached, only the psychoeducational assessment was completed. Parent was hard to reach and was uncooperative in assisting District in meeting its obligations under the agreement. District documented 31 telephone calls and made numerous undocumented calls to Parent, with only 13 conversations taking place with Parent. These calls related to implementing the agreement: arranging for Parent's visits to preschool classrooms,

⁴ The Kern Regional Center continued financially supporting 15 hours per week of ABA therapy services for Student. The District's support of 15 hours per week of ABA therapy services allowed Student to receive 30 hours per week of ABA therapy until July 15, 2010.

attempting to schedule assessments and attempting to schedule IEP team meetings with Parent. Between August 28, 2009, and February 1, 2010, the period when the bulk of these scheduling calls were required, Parent changed her telephone number five times and did not inform District of the changes.

6. Between February 3, 2010, and June 30, 2010, District sent 14 letters by U.S. Mail to Parent, attempting to persuade her to participate in the process to implement the terms of the agreement. To assure delivery, District sent 10 of these letters by certified mail, return receipt requested; Parent only accepted two of the 10 letters. On at least five occasions, District personnel attempted to hand-deliver documents to Parent's home with mixed success.

7. According to Parent the delays happened because she did not believe that Student needed the services offered by District. She had not wanted occupational therapy or speech and language therapy for the past two years and did not want her son to attend school in a special education classroom.

PROCEDURAL VALIDITY OF THE IEP

8. There are two parts to the legal analysis of the validity of an IEP. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. Second, the tribunal must decide whether the IEP was reasonably calculated to enable the child to receive meaningful educational benefit.

Parents' Nonattendance at the March 26, 2010 IEP Meeting

9. A district must afford the parents of a child with a disability the opportunity to participate meaningfully in IEP team meetings. It must take steps to ensure that all IEP team members, including parents, attend an IEP meeting, and that parents have an adequate opportunity to participate and to present information to the IEP team.

10. A district must notify parents of an IEP team meeting early enough to arrange a mutually convenient date and must ensure that they will have an opportunity to attend. It may not conduct an IEP team meeting in the absence of parents unless the district is unable to convince the parents that they should attend; in which case it must keep a record of its attempts to arrange a mutually agreed-on time and place for the meeting.

11. District sent letters to Parent by U.S. Mail and registered mail return receipt requested on February 3, 2010, and March 1, 2010. These letters detailed the problems that District encountered in implementing the agreement and placing Student. The March 1, 2010 letter mentioned that District intended to convene an IEP team meeting by April 1, 2010, but suggested no alternative dates for the meeting.

12. On March 24, 2010, after making multiple unsuccessful attempts to contact Parent by telephone, Mr. Hayden sent a letter to Parent detailing his attempts to contact her and to arrange an IEP team meeting. The March 24, 2010 letter provided notice of the IEP team meeting scheduled for March 26, 2010. Mr. Hayden sent the letter by registered mail with return receipt requested, but he did not send the letter by U.S. Mail. The letter was not claimed by Parent and was returned to District. Although Mr. Hayden made multiple attempts to call Parent, he did not speak to her and could not leave a message because her voice mailbox was full.

13. Mr. Hayden convened the March 26, 2010 IEP team meeting without Parent. Four District members of the IEP team attended: Nikki Styles, special education program support specialist; Sherry Meagher, school psychologist; Andrea Yako, speech and language pathologist; and Gary Hayden, program manager. District made no substantive decisions about Student's education or placement at this meeting. The psychoeducational assessment was complete, but District could not begin the IEP process until the occupational therapy assessment and the speech and language

assessment were completed. The purpose of this meeting was to meet the requirements of the agreement, to discuss strategy to schedule the needed assessments and to discuss how to incorporate Parent into the IEP process.

14. District's decision to hold an IEP team meeting without Parent on March 26, 2010, was the result of a less-than-cooperative Parent and District's perceived need to meet the terms of the agreement to finalize an IEP before April 1, 2010. Since reaching the settlement agreement October 3, 2009, Parent had increasingly failed to answer her telephone or respond to voicemail messages. On one occasion, a call was answered by a female who stated that this was no longer Parent's telephone number; District later verified that it was a correct telephone number.

15. Taking all of these circumstances into consideration, District's notice to Parent sent by registered mail on March 24, 2010, for the March 26, 2010 IEP meeting was insufficient. Although District called Parent numerous times to schedule the IEP team meeting, District was unable to leave any message or speak with Parent. The attempt to send a registered letter two days before the scheduled meeting was not early enough to ensure that Parent would have an opportunity to attend, particularly when this letter was not also sent by regular U.S. mail. As a result District committed a procedural error.

16. Although District committed a procedural error in its notice to Parent regarding the March 26, 2010 IEP meeting, and then holding the IEP meeting without Parent, Student continued to receive educational services under the parties' agreement. Furthermore, District made no decisions regarding Student's education at the March 26, 2010 IEP meeting. After this meeting, District arranged and held two subsequent IEP team meetings that included Parent on May 12, 2010, and June 7, 2010, which resulted in the development of an IEP and an offer of placement. Therefore, District's procedural violation did not significantly impede Parent's opportunity to participate in the decision-

making process regarding the provision of FAPE to her child, or cause a deprivation of educational benefits. As a result the procedural error did not result in a denial of a FAPE.

The continued May 12, 2010 IEP Meeting

17. In addition to parents, an IEP team must include at least one regular education teacher of the student, one special education teacher of the student (or, where appropriate, a special education provider), a representative of the school district, an individual who can interpret the instructional implications of assessment results, and other individuals invited at the discretion of the parent or the school district who have knowledge or special expertise regarding the student.

18. Scheduling an IEP team meeting continued to be a challenge for District. Notices to schedule IEP team meetings were hand-delivered to Parent's home for a May 6, 2010 IEP meeting, then a May 8, 2010 meeting, and finally a May 12, 2010 meeting where Parent attended. In each instance, where a notice was delivered to Parent, District provided Parent with a draft IEP, notice of parental rights, procedural safeguards, copy of the agreement, and a notice of the next IEP team meeting.

19. The May 12, 2010 IEP meeting was attended by Parent; Lenore Wilson, regular education teacher; Sara Abromaitis, special education teacher; Shirley Nicholas, assistant director of special education for District;⁵ Shelly Meagher, school psychologist; Andrea Yako, speech and language pathologist; Marcie Mehaiko, occupational therapist; Caprice Schweiger, CBRE regional director; and Maritza Cobian, CBRE lead therapist. The meeting was attended by every person the law required.

⁵ By the time of the May 12, 2010 IEP meeting Mr. Hayden was replaced by Ms. Nicholas, who is Mr. Hayden's supervisor, because of allegations Parent made against Mr. Hayden of improprieties. The District determined that these allegations were untrue, but decided to assign a different administrator to work with Parent.

20. By the time the IEP team meeting on May 12, 2010 was convened, all the required assessments were completed and discussed at the meeting. The psychoeducational assessment was conducted in Parent's home on March 12 and 19, 2010. The speech and language assessment was conducted in Parent's home on April 19 and 29, 2010, and provided to Parent shortly before the meeting. The occupational therapy assessment was conducted at the Terrio clinic, as contracted through District, on May 3, 2010, the report was prepared in time to be discussed at the meeting.

21. During the May 12, 2010 meeting, parties were introduced, roles were discussed and the notice of procedural safeguards was provided to Parent. The school psychologist, occupational therapist and speech and language pathologist then presented their assessment reports and responded to questions from all team members including Parent and the CBRE representatives. The team then discussed Student's present levels of performance. The CBRE members presented their evaluation of Student, which was considered by the entire team. Parent concerns were addressed throughout the meeting.

22. The regular education teacher provided information of how Parent can assist in preparing Student for kindergarten and provided Parent with a pamphlet that gave suggestions and exercises to assist in the transition of Student to a classroom environment. The team described the summer school program, called "Kindergarten Bridge." and advised Parent to enroll Student.

23. District believed that Student would experience difficulty in a regular classroom setting and explained the basis of this opinion to Parent. CBRE's recommendations for goals for the IEP supported District's conclusion as they recommended individual classroom services appropriate for a special day class (SDC). Student is a high-functioning child with autism. He is verbal, friendly, makes eye contact, maintains an appropriate attention span, but is prompt-dependent and has difficulty

when engaged in group activities. District believed that Student required a specialized program to address his unique speech and language and occupational therapy needs. Notwithstanding District's opinion, CBRE's concurrence, supporting assessments and explanations, Parent did not accept the placement offer for Student. Parent believed that District members of the team did not know her child, and thought that Student should attend a pre-kindergarten class in the 2010-2011 school year, which would prepare him to attend kindergarten in a regular education classroom in the 2011-2012 school year.

24. Parent and the CBRE representatives were concerned that District had not adequately considered Student's behavior problems as part of the IEP. District team members had not observed any behavioral issues, but acknowledged that they had spent little time with Student and deferred to Parent and the CBRE members' judgment. District asked CBRE to provide a Behavioral Support Plan (BSP) to be included in the IEP. The parties agreed to continue the meeting to allow time to fully understand the assessments and to allow District to observe student in the home educational setting. Parent agreed to allow the observation of Student and District agreed to assign a behavioral specialist to the IEP team.

The Continued June 7, 2010 IEP Meeting

25. On June 2, 2010, Rebecca Ruiz,⁶ behavioral specialist, and Lenore Wilson, regular education teacher, went to Parent's home to observe Student. Ms. Ruiz and Ms.

⁶ Ms. Ruiz holds a master of arts degree in educational counseling and holds a both a educational specialist and pupil and personnel services credentials. She is certified in ABA therapy and is certified by the Superintendent of Schools as a behavior intervention case manager. Ms. Ruiz is currently employed by District as a behavior

Wilson observed Student receiving instruction from CBRE. They noted that Student required continuous verbal prompting and some physical prompting. Student also showed some frustration when his teacher placed a pen in his hand and asked him to draw a square, as he frowned, put his head down, and stopped making eye contact, but did follow the instruction and draw a square. Parent limited the observation time to 30 minutes and asked that Ms. Ruiz and Ms. Wilson send her a report of the observation.

26. The June 7, 2010 IEP team meeting began at 8:30 a.m., the team had gathered, but Parent was not present. At 9:25 a.m. Parent arrived, was offered a copy of the procedural safeguards, but declined, and the meeting then began. The June 7, 2010 IEP meeting was attended by Parent; Lenore Wilson, regular education teacher; Sara Abromaitis, special education teacher; Shirley Nicholas, assistant director of special education for District; Shelly Meagher, school psychologist; Marcie Mehaiko, occupational therapist; Ms. Ruiz, behavior specialist; Caprice Schweiger, CBRE regional director; and Maritza Cobian, CBRE lead therapist. Andrea Yako, speech and language pathologist was not available for the meeting; Parent provided written consent to excuse Ms. Yako. The meeting was attended by every person the law required.

27. The meeting began with a discussion about District's observation of Student in Parent's home. The IEP team discussed Student's present level of performance and District's proposed goals were reviewed. CBRE submitted academic, social and behavior goals, and these were incorporated into the IEP. After analysis of all of the information gathered, the IEP team determined that Student's unique needs were best served by placement in a SDC at Wayside Elementary School. The design of the SDC was for children with mild-to-moderate language deficiencies and children with

management specialist where she conducts behavioral assessments, functional analysis and behavioral support plans for students with behavioral support need.

autism; it is held at a campus with regular education kindergarten classes and provides opportunities for mainstreaming. Student would be able to work in small groups, have one-to-one assistance and learn processes of working in a classroom environment. District took all CBRE reports into consideration and incorporated all of their suggested goals into the IEP. Ultimately, 19 goals were developed. Parent again stated that she believed that Student was not ready for kindergarten, wanted continued in-home ABA services and would not approve the IEP. Parent requested a 15 minute break at 11:00 a.m. and did not return.

OTHER PROCEDURAL REQUIREMENTS

28. The March 26, 2010 IEP was the product of IEP team meetings held on May 12, 2010, and June 7, 2010. Both of these meetings were properly noticed, held, and staffed. Federal and State law require that a valid IEP contain numerous specific statements and findings. The IEP contains all the specifics the law requires. Except for the procedural error that occurred at the meeting conducted on March 26, 2010, District complied with all the procedural requirements of federal and State law in developing and presenting the March 26, 2010 IEP. As determined in Factual Finding 16, the procedural violation did not result in a denial of FAPE.

SUBSTANTIVE VALIDITY OF THE IEP

Psychoeducational Assessment

29. Shelly Meagher has been a District school psychologist for the past 16 years. She holds credentials as a school psychologist and as a school guidance counselor. She has a master's degree in education with an emphasis in school psychology and a bachelor's degree in experimental psychology. She is board certified as a behavioral analyst, a behavioral intervention case manager and certified in ABA. Ms. Meagher has administered approximately 1,700 psychoeducational assessments

(including cognitive testing). Each of these assessments contributed to the development of an IEP where she participated on the IEP team.

30. Ms. Meagher conducted her psychoeducational examination of Student in September 2010, in Student's home. In performing her assessment she used and considered the following: her observations of Student; Parent interview; Gilliam Autism Rating Scale, Second Edition (GARS-2); Autism Diagnostic Observation Scale Module (ADOS); Bracken Basic Concept Scale Module, Third Edition (Bracken); Neuropsychological Status testing, Second Edition (NEPSY-II); Sensory Profile, short form; Vineland-II (Parent report); and The Developmental Test of Visual Motor Integration 5th Edition (VMI-5).

31. Ms. Meagher credibly testified regarding the outcome of her assessment. She began the assessment with the Parent interview and administering the GARS-2, Sensory Profile and Vineland II. Parent completed all questionnaires presented to her by interview and cooperated with Ms. Meagher. While working with Parent, with Student present, Ms. Meagher could collect information, observe Student, and give Student an opportunity to become familiar with her. As a result of the Parent interview, using the assessment instruments, Ms. Meagher determined that Student had good self-help and adaptive skills, but had barriers in social interaction and language. Student's written language skills were at low average; Student scored low on daily living skills, and on social skills showed good potential, but scored low. Overall Student was below average due to his autistic characteristics. Parent reported behavioral problems, but nothing in the assessment or Ms. Meagher's observation indicated that Student had any severe behavior issues. Parent appropriately expressed concern about Student's education and was a good reporter.

32. Ms. Meagher then began to assess Student. Student was pleasant and easy to work with. He showed no self-stimulatory behavior, and although he did resist at

times, he was easily redirected. Ms. Meagher began her assessment with the ADOS, which evaluates a child's social communicative behaviors, followed by the NEPSY-2, which provides an overview of neuropsychological development. She then administered the VMI-5, for visual motor integration skills, and then the Bracken to measure school readiness. Overall, Student demonstrated autistic-like behaviors, and he exhibited barriers in language and communication. However, he also displayed an adequate attention span, was friendly, and held sufficient prerequisite knowledge to enter kindergarten if he was provided adequate support. Ms. Meagher determined that Student's performance was consistent with a child aged three-years-and-two-months old to three-years-and-six-months old. At the time of the Ms. Meagher's assessment Student was four-years-and-five-months old.

33. After completing the assessment and writing her report, Ms. Meagher reviewed the report of a private assessment conducted by Dr. B.J. Freeman, at Parent's request, in January 2010. Ms. Meagher found that Dr. Freeman's assessment of Student was consistent with her own.

34. Ms. Meagher is an advocate of ABA therapy and believes that Student's in-home program had been effective and resulted in skills that had prepared him to enter kindergarten in a SDC. Student's educational progress will be hindered by continuing his education only with in-home ABA therapy because he will not develop social skills, classroom skills and will not develop independent learning skills. At this time, Student is both physically and mentally ready to participate in a classroom, provided that proper support is available. Student must now develop the skills to learn in a classroom setting, begin to understand social norms, interact with peers, and decrease his reliance on prompts from adults.

Occupational Therapy Assessment

35. Marcie Mehalko has been a licensed occupational therapist for the past 12 years. Ms. Mehalko is employed by Terrio Therapy, a nonpublic agency, under contract with District to conduct occupational therapy (OT) assessments and provide services.

36. Ms. Mehalko conducted her assessment of student at the Terrio clinic on May 3, 2010. She utilized the following assessment tools: file review; Parent interview; general observations during testing; observation of sensory modulation difficulties during testing; Sensory Profile (completed by Parent); and the Peabody Developmental Motor Scales—Second Edition: Fine Motor Subtests (PDMS-2: FM).

37. Student possesses poor fine motor skills as compared to his peers. Of particular note, his grasping ability is very poor, which will make writing more difficult for Student compared to his peers. Overall, Student demonstrated difficulty with sensory modulation. When children have good sensory modulation they can organize input to create an appropriate adaptive response, such as responding to a teacher. Because Student has difficulty with sensory modulation, he will have difficulty organizing input and creating an appropriate adaptive response. In a classroom, these issues will make it difficult for Student to respond to a teacher, move around the classroom safely, respond appropriately to social and environmental cues, sit for long periods, and determine appropriate responses to situations or understanding the usefulness of visual information. As a result of this assessment, Ms. Mehalko recommended that occupational therapy support be provided for 30 minutes each week. Ms. Mehalko designed an OT goal for Student, which was incorporated into the IEP and will require occupational therapy support for Student to meet this goal. OT services are necessary to meet Student's unique educational needs.

Speech and Language Assessment

38. Andera Yako, has been a credentialed speech and language pathologist for four years. She holds a master of science degree and a bachelor of art degree in speech and language. Ms Yako has conducted approximately 100 speech and language assessments and has participated in approximately 300 IEP team meetings as a member.

39. Ms. Yako was assigned to provide speech and language services for Student in Parent's home as part of the agreement. She called Parent approximately 20 times attempting to arrange these services, but was never able to arrange to provide these services. Ms. Yako did successfully arrange to conduct the speech and language assessment with the help of District staff and conducted the assessment, with the help of an aide, in three sessions beginning in mid-April 2010.

40. Ms. Yako used both informal and formal assessment tools. The informal tools used were oral-facial examination; Boehm Test of Basic Concepts (Boehm-3); and observation. The formal tools used were: the Expressive Vocabulary Test (EVT); the Preschool Language Scale-4 (PLS-4); and the Test for Auditory Comprehension of Language (TACL-3).

41. Student was friendly and social, but had delayed language abilities. At the time of the assessment Student was four-years-and-six-months old; however, he displayed a use of language skills in the range of a child between three-years-and-one-month to three-years-and-six-months old. The PLS-4 revealed that Student displayed skills in several areas, like identifying and naming common items, body parts, colors, and shapes. He could also match objects to pictures and was able to answer "where" questions and complete analogies without a visual prompt. However, he had difficulty understanding negatives in sentences or understanding picture analogies. He also showed difficulty with a number of basic concepts: longest, both, around, tallest, many, most, before, shortest, together, some, middle, between and least. The TACL-3 is

administered to children to measure their ability to understand the structure of spoken language. Student scored age equivalence between three-years-and-three months and three-years-and-six-months old.

42. Student met the eligibility criteria for language delays or disorders. Ms. Yako, as part of the IEP team, developed four goals for language and communication that were placed into Student's IEP, which will be discussed in detail below. Speech and language services are necessary to meet Student's unique educational needs.

Goals and Present Level of Performance

43. An IEP must contain a statement of measurable annual goals designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general curriculum, and must meet each of his other educational needs that result from his disability. It must also contain a statement of the student's present levels of performance (PLOPs). These levels establish baselines for measuring the child's progress throughout the year so that adequate new goals can be written. Parent did not object to the goals developed, only to the placement of Student.

44. District developed 19 goals based on firsthand knowledge of Student through assessments, observations of Student, Student's educational records, as well as input provided by Parent and CBRE. The goals are measurable and based upon Student's present level of performance. The IEP team imposed a mandatory 45-day review of the IEP with the entire team to assure that the goals were appropriate and to adjust those goals as necessary after Student demonstrated his performance in a classroom setting. There was no disagreement among the IEP team members, including Parent and CBRE, regarding the PLOPs or goals presented in the IEP.

Speech and Language Services

45. Based upon the recommendations of Andrea Yako, District's speech and language pathologist and approval of the IEP team, including Parent and the CBRE representatives, District offered speech and language services to Student. District offered to provide individual speech and language services, in 20 minute sessions two times per week at the school site. This level of services meets Student's needs.

OT Services

46. Based upon the recommendations of Marcie Mehalko, occupational therapist and approval of the IEP team, including Parent and the CBRE representatives, District offered occupational therapy services to Student. District offered to provide individual occupational therapy services once each week at the school site. This level of services meets Student's needs.

One-to-One Aide

47. District also offered to provide a one-to-one adult aide, classified as highly qualified under the No Child Left Behind Act, to support Student in his transition to the classroom. Ms. Meagher established how critical it is for Student to have early successes. The one-to-one aide will provide an important element in assuring early success by providing the necessary prompts appropriately. Because Student is now prompt dependent the possibility of Student's success is improved by decreasing prompts as Student gains the skills to perform in the classroom environment. This level of services meets Student's needs.

Setting

48. Ms. Meagher established that Student needs a classroom where he can receive more individualized attention than is possible in a regular education setting. Ms.

Meagher testified credibly that while Student would initially succeed in a regular education kindergarten, after a couple of weeks, when the curriculum became more difficult, Student would check out, become overwhelmed, and act out.

49. The IEP team considered a range of settings from a class for children with severe disabilities to a regular education classroom. They discussed and rejected continuing Student's in-home ABA therapy because it would not provide sufficient socialization and would increase his prompt dependency. Ultimately the IEP offered to place Student in Roxanne Nikkel's mild-to-moderate SDC at Wayside Elementary School (Wayside). Ms. Nikkel has been a credentialed special education teacher for 10 years holds a master's degree in special education and works solely with children with mild-to-moderate disabilities. Ms. Nikkel observed Student while he attended the summer program. She concluded from the observation that Student cannot stay focused in a large group and ignores social cues that other children understand. She stated that he is perfect for her class because Student will work in small groups and can seamlessly obtain OT and speech and language assistance he requires during class. Ms. Nikkel reviewed the IEP and the psychoeducational assessment and found all consistent with what she observed.

50. Wayside is a kindergarten through fifth grade campus. There is one special education kindergarten class and two regular education kindergarten classes. All classes teach the general curriculum for kindergarten. The special education class modifies the method and pace of the curriculum to meet the unique needs of the children attending in an approximately five-hour school day. At any given time various methodologies are employed, including the use of visual icons, visual schedules, ABA, discrete trial training, and facilitated play. Presently there are eight students in Ms. Nikkel's kindergarten class, but the class could have as many as 12 children. Ms. Nikkel and two adult aides conduct the class in small groups with two to three students in a group.

51. Ms. Nikkel's class is a highly structured environment and utilizes visual schedules, picture symbols or icons, verbal and physical redirection, and one-on-one instructional support throughout the school day. The school provides breakfast and lunch to the children during the school day. The Wayside kindergarten program offers opportunities for mainstreaming and reverse mainstreaming. Special education children participate with their regular education counterparts in recess and lunch. When appropriate, children in special education class may move to a regular education class for short periods of the day and may be permanently assigned to a regular education class if they are able. There are also occasions where children from the regular kindergarten class are moved into the special education class to work on an area that cannot be addressed in the regular class.

52. In the SDC, Student can obtain the individualized attention that he needs to succeed while obtaining the speech and language and OT services that he requires for his education in a classroom setting. Most importantly, here he can initially succeed and gain the confidence necessary to continue his education in a regular classroom setting when he is prepared to do so. In this setting District can meet each of Student's educational needs that result from his disability and adjust the goals and methodology as they observe Student's progress. District's offer of a SDC provides Student with a FAPE as it is reasonably calculated to permit Student to make meaningful educational progress.

Extended School Year (ESY)

53. ESY is provided when it is required for a disabled student in order to prevent serious regression. In this case, the ESY offered by District was appropriately used to introduce Student to the classroom environment. The IEP proposed that Student attend ESY at Thorner Elementary School for the summer of 2010, known as the "Kindergarten Bridge" program. The program began June 14, 2010, and ended July 15,

2010, and is in session four days a week. Ms. Meagher established that Student would benefit greatly from ESY, as the District IEP team had decided. She and other District witnesses credibly testified that the program offered to Student for the ESY met his needs. Student did attend this program, but attended only three days each week and arrived an hour late each day. Parent did not believe Student required breakfast at the school and continued with in-home ABA therapy causing Student to be absent on the fourth day each week. Even with this limited exposure, Student made progress particularly in his interaction with his classmates. When Student first arrived he stayed to himself, but toward the end of the program he engaged in play with his classmates and showed an increasing interest in their activities.

LRE

54. The IDEA requires that a student with a disability be placed in the LRE in which he can be satisfactorily educated. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. Determining whether a student is placed in the LRE involves the balancing of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of placing the student in the regular education setting.

Educational Benefits

55. Student may benefit through placement in a regular education classroom by observing the behavior of other students and would not be placed at risk of modeling inappropriate behavior that may be observed by him in a special education classroom. However, based on observations by District personnel in Parent's home, the ESY program, and Ms. Meagher's assessment, District established that the educational benefits of Student's placement in a full-time regular class are outweighed by the

difficulty that Student would experience in a regular class. District established that Student would receive educational benefit in the SDC with its small class size and curriculum modified to meet Student's unique needs. District demonstrated that the manner of instruction in Ms. Nikkel's class with small-group instruction and a one-to-one aide to assist in transition would assure that the Student would receive educational benefit. Student requires constant prompting and requires assistance in becoming more independent, this can be accomplished in the SDC. Therefore, District's offer of an SDC would provide Student with academic progress.

Non-academic Benefits

56. Student was isolated in the in-home ABA program, only interacting with adults and his siblings; the result being that his only participation in the classroom setting was through his short time in the ESY. Being in a SDC to receive academic instruction will allow Student to interact with his peers and learn needed classroom skills that he will need in a regular education classroom. Student will have limited exposure to his regular peers that can be increased as his social skills develop. Student will gain substantial non-academic benefits from being placed in a SDC.

Classroom Disruption

57. It is unclear what effect Student would have on the teacher and children in a regular class. According to District personnel that have observed Student in both the home and classroom environment, he is a happy and compliant child. However, according to Parent and CBRE he becomes frustrated and has tantrums that would disrupt a regular classroom. However, Ms. Meagher and Ms. Nikkel credibly testified that Student would not be a disruptive force in the SDC. The cost was not a factor in the determination to offer the SDC.

58. A balancing of the four factors establishes that the SDC is the LRE for Student. In a SDC Student will achieve educational benefit through specialized instruction. Additionally, the students in Ms. Nikkel's SDC did not have behavior problems so significant that they would impede Student's academic progress or teach him maladaptive behaviors. Therefore, the SDC at Wayside Elementary School is the LRE for Student.

59. In sum, District has addressed all of Student's unique needs in the proposed IEP. The goals are all rooted in accurate present levels of performance, determined recently and thoroughly by teachers and professionals working in consultation with providers who have known and worked with Student since he was two-years-old, as well as by competent outside experts. The goals are precise and measurable and are well-chosen and sufficient in the credible opinions of Student's teachers, providers, and assessors. The proposed IEP is reasonably calculated to allow Student to obtain meaningful educational benefit in the LRE.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Because District filed the request for due process hearing, it has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

CONSEQUENCES OF PROCEDURAL ERROR

2. The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 205-206 [73 L.Ed.2d 690] (*Rowley*).) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

PRESENCE OF PARENTS AT IEP MEETINGS

3. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A school district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting, parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

4. A district must notify parents of an IEP meeting "early enough to ensure that they will have an opportunity to attend," and it must schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a)(2) (2006)⁷; Ed. Code, §§ 56043, subd. (e); 56341.5, subds. (b),(c).) A district may not conduct an IEP team meeting in the absence of parents unless it is "unable to convince" the parents that they should attend, in which case it must keep a record of its attempts to arrange a mutually agreed on time

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

and place. Those records should include detailed records of telephone calls, correspondence, and visits to the parents' home or place of employment. (34 C.F.R. § 300.322(d); Ed. Code, § 56341.5, subd. (h); see *Shapiro v. Paradise Valley Unified School Dist.*, No. 69 (9th Cir. 2003) 317 F.3d 1072, 1077-1078.)

REQUIRED MEMBERS OF AN IEP TEAM

5. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

ELEMENTS OF A FAPE

6. Under the IDEA and State law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The term FAPE means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the state educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of title 20 of the United States Code. (20 U.S.C. § 1401(9)). "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

7. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available or to provide

instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

8. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

REQUIREMENTS OF AN IEP

9. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320; Ed. Code, § 56345.) An annual IEP must contain, inter alia, a statement of the individual's present levels of academic achievement and functional performance (PLOP), including the manner in which the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The statement of PLOPs creates a baseline for designing educational programming and measuring a student's future progress toward annual goals.

10. An annual IEP must also 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. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to

accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

11. In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP's goals is central to the determination of whether a student has received a FAPE. In *Adams, etc. v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, the court stated: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit."

12. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

LRE

13. Federal and State law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) In light of this preference, and in order to determine whether a child can be placed in a general

education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of placement in a regular education class.

ISSUE: WHETHER DISTRICT CAN IMPLEMENT THE IEP DATED MARCH 26, 2010, AS AMENDED, WITHOUT PARENT'S CONSENT, BECAUSE IT OFFERED STUDENT A FAPE IN THE LRE?

14. Based on Factual Findings 1, and 9-28, and Legal Conclusions 1-5, the IEP meetings held by District on May 12, 2010, and June 7, 2010, were attended by all participants the law requires. The IEP contains all the contents required for an IEP. Although the first IEP meeting held on March 26, 2010, did not adequately notify Parent, it was not a denial of FAPE and no other procedural errors were found. The IEP was fully developed and an offer of placement was made in meetings where Parent was present and was done with her input.

15. Based on Factual Findings 1, and 29-59 and Legal Conclusions 1 and 6-13, District's March 26, 2010 IEP offer complies with the substantive requirements of the IDEA and would place Student in the LRE. It addresses all of Student's unique needs and is reasonably calculated to allow him to obtain meaningful educational benefit. It places Student with typically developing peers in all the situations in which Student's education can be satisfactorily pursued there, and in the more restrictive setting of an SDC for the individualized instruction and services that can be appropriately delivered only in such a setting.

ORDER

District's IEP offer dated March 26, 2010, constituted an offer of a FAPE in the LRE for Student for the school year 2010-2011 and may be implemented by District.

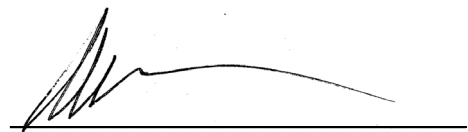
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: October 7, 2010

A handwritten signature in black ink, appearing to read 'Michael G. Barth', is written over a solid horizontal line.

MICHAEL G. BARTH

Administrative Law Judge

Office of Administrative Hearings