

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
MOTHER ON BEHALF OF STUDENT
v.
SAN BRUNO PARK SCHOOL DISTRICT

OAH CASE NO. 2008040327

DECISION

Administrative Law Judge (ALJ) Debra R. Huston, Office of Administrative Hearings, State of California (OAH), heard this matter in San Ramon, California, on May 27 and 28, 2008. Student's mother (Mother) represented Student. Shawn Olson Brown, attorney at law, represented the San Bruno Park School District (District). Pam Robertson, assistant superintendent of District, was present throughout the hearing.

Student filed her complaint on April 8, 2008.¹ Oral and documentary evidence were received during the hearing on May 27 and 28, 2008. At the hearing, the ALJ granted the parties' request to file written closing arguments. Upon receipt of written closing arguments on June 11, 2008, the matter was submitted and the record was closed.²

¹ Mother filed a letter of complaint with OAH on April 2, 2008. Mother did not serve a copy of this letter on District. OAH staff contacted Mother and instructed her to complete the due process complaint form, file it with OAH, and serve it on District. The complaint form was filed with OAH on April 8, 2008.

² On May 21, 2008, District filed a Motion In Limine To Dismiss As No Claims Are In Controversy. The ALJ heard argument on the motion at the commencement of hearing and denied the motion.

ISSUES

Did the District deny Student a free appropriate public education (FAPE) during the 2007-2008 school year by failing to implement her last agreed-upon individualized education program (IEP) by:

1. Failing to provide Student with a qualified one-to-one aide, as required by her behavior intervention plan (BIP)?
2. Failing to provide speech and language therapy (SLT), 30 minutes weekly?
3. Failing to provide adaptive physical education (APE), 30 minutes two times a week?³

REQUESTED REMEDIES

Student requests an order that District provide the services described above, including a qualified one-to-one aide, SLT services, and APE services. In addition, Student seeks "make-up" time for services not provided.

CONTENTIONS OF THE PARTIES

Student contends that District failed to provide her the support of a qualified one-to-one aide, as required by her BIP. In addition, Student contends District failed to provide most of the SLT sessions required by her IEP, and also failed to provide any of the APE sessions required by her IEP.

District contends that Student's BIP did not require a one-to-one aide, and that District fulfilled the requirements of Student's BIP by providing Student the support of a

³ The times specified for SLT in Issue 2 and for APE in Issue 3 are the accurate times at issue, as clarified at the prehearing conference. Student's complaint erroneously switched the times for SLT and APE.

one-to-one aide when needed, as required by her BIP. In addition, District contends that it arranged for a behaviorist from the San Mateo County Office of Education and also for a private psychologist contracting with District to observe Student's classroom and consult with Student's classroom teacher. Finally, District contends there was no FAPE denial because Student made some progress in the areas of academics and behavior and received some educational benefit at school.

District concedes that it did not provide Student all of the SLT services required pursuant to her IEP, but contends it failed to do so only because District was unable to hire a speech and language therapist until April 2008 due to a shortage of speech and language therapists. District contends that it provided Student with five hours of SLT from January 2008 until April 2, 2008, by contracting with a retired speech and language therapist to provide the services, and that it was District's intent to make up the missed sessions after it could hire a speech and language therapist. District contends after Mother removed Student from school on April 2, 2008, District was unable to continue providing SLT services to Student, or to make up the missed sessions. District also contends that Student failed to show that she had a continuing need in the area of speech, and that the failure to provide services did not amount to a denial of FAPE.

District concedes that it did not provide Student with any of the APE services required by her IEP. However, District contends that Student had good motor skills, and that Student presented no evidence that she required APE services. In addition, District contends that it provided Student with physical education in the general education class for 30 minutes, two times a week, with a one-to-one aide, and that it also provided classroom-based group occupational therapy to Student for 20 minutes, two times a week. Therefore, District contends, Student's motor skills were being addressed throughout the 2007-2008 school year, although not in an APE class. District finally contends that any failure to provide APE services was not a denial of FAPE.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 10-year-old girl. At all relevant times Student was a resident of District and was eligible for special education under the category of autistic-like behaviors. The parties do not dispute either Student's eligibility for special education or her eligibility category.

2. Student was first found eligible for special education when she was in preschool and residing within the jurisdictional boundaries of another school district in California. Student attended school in her previous district through the third grade. The previous district implemented Student's IEP, which included a BIP. In June 2007, Student moved with her family to San Bruno, and Mother provided information about Student to Ms. Pam Robertson, assistant superintendent of District, that month. At the commencement of the 2007-2008 school year, Student was placed in the fourth grade in a cross-categorical SDC at Crestmoor Elementary School (Crestmoor) in District. Student's parents did not sign the IEP offered by District on October 22, 2007. However, it was undisputed at hearing that District was responsible for implementing Student's last agreed-upon and last-implemented IEP, which included the BIP, that was being implemented in by Student's previous district of attendance.

3. During the 2007-2008 school year at Crestmoor, Student experienced severe behavioral problems, and Student's parents and District engaged in an ongoing disagreement as to whether Student was provided with the aide support required pursuant to her BIP. On April 2, 2008, Student had a prolonged tantrum at school and she ran from the classroom and could not be found by District staff for two to ten minutes. Student's teacher called Mother to pick up Student from school. Mother picked up Student, and Student did not return to school after that day. Shortly thereafter, Mother filed this request for due process.

FAILURE TO IMPLEMENT STUDENT'S BIP

4. A student with exceptional needs is legally entitled to a FAPE that addresses those needs. Under state and federal law, one of the factors used in determining whether a school district provided a FAPE to a student is whether the services it provided to the student conformed to his or her IEP. A failure to implement any provision of the IEP violates a student's right to a FAPE where the failure has been determined to be material. A student is not required to demonstrate that he or she suffered educational harm in order to prevail on a claim that a school district failed to implement his or her IEP.

Qualified one-to-one aide

5. State and federal law require school districts to address behavior problems of children with disabilities that may interfere with the learning of a child with a disability, or with that of other students. An IEP that does not appropriately address behavior that impedes a child's learning denies the student a FAPE. In addition, school districts are required to provide appropriately and adequately prepared and trained personnel to carry out the provisions of the IDEA and serve children with disabilities. It is the express intent of the California Legislature that regular and special education personnel be adequately prepared to provide educational instruction and services to students with disabilities.

6. As discussed in Factual Finding 2, Student attended school in another school district during the 2006-2007 school year. As a result of Student's severe behavioral problems in her cross-categorical SDC in her previous school district, Student's IEP team moved her to an autism SDC in October 2006. In addition, the school district in which Student attended school that year conducted a functional analysis assessment (FAA) of Student, which was completed in January 2007. It was determined

that Student's behavior problem was serious in that it was assaultive and included other pervasive, maladaptive behaviors, such as tantrums and running from the classroom and staff. It was also determined as part of Student's FAA that Student's behavior significantly interfered with implementation of the goals and objectives of her IEP. Based on the FAA, Student's IEP team adopted a BIP for Student as part of Student's January 22, 2007, IEP. Student's previous school district of attendance convened another IEP team meeting on May 14, 2007, to review Student's placement in the autism SDC, and developed an IEP at that meeting. Student's BIP is part of Student's May 14, 2007, IEP.

7. Student began attending school within District at the commencement of the 2007-2008 school year. District made an IEP offer to Student's parents during the October 22, 2007, IEP team meeting, and Student's parents rejected that offer because they did not agree there was enough aide support for Student in her classroom. Although the parties disagree as to whether Student's January 2007 IEP or her May 2007 IEP is the last agreed-upon and last-implemented IEP, it is undisputed that the BIP was part of both IEPs. It is determined that the May 14, 2007, IEP is the last agreed-upon and last-implemented IEP.

8. Student contends that her BIP required District to provide a qualified one-to-one aide to Student, and that District failed to do so. At hearing, Student contended that her BIP required that a one-to-one aide be assigned specifically to Student during the school day. Student contends that District's failure to provide the qualified one-to-one aide as required in her BIP resulted in a denial of FAPE to Student. District contends that Student's BIP did not require that a one-to-one aide be assigned specifically to Student. District further contends that Student's class at Crestmoor had approximately 13 Students, one special education teacher, and two paraeducators, and that District provided the services of a one-to-one aide, as required in Student's BIP.

9. With respect to one-to-one services, Student's BIP specifically provides:

[Student] should have the support of a staff member for 1:1 instruction, but should continually be exposed to small and large group activities where possible. [Student] should be shadowed in group activities, but this staff member should only intervene if [Student's] behaviors cannot be managed by the leader of the group. Staff should have a non-verbal signal for enlisting the help of a shadow so that behavior escalation does not get inadvertently reinforced through access to attention.

The BIP also requires that the staff implementing the BIP be qualified to implement the BIP, and that each staff person responsible for implementing the BIP sign that he or she has read and understands it.

10. With respect to implementation of the BIP, the BIP provides for proactive and reactive strategies that staff are required to use when Student engages in a target behavior, such as running or tantruming. In addition, the BIP requires that Student have clear consequences for engaging in a target behavior, and that these consequences be explained to Student prior to engaging in the behavior so the consequences are not unpredictable or arbitrarily decided upon by staff. The consequences include warning, redirection, maintaining a behavior chart, and time-out for Student. The BIP also requires staff to evaluate Student's behavior with her after she has calmed down after engaging in a target behavior, and also to provide reinforcement to Student to improve her behaviors. The BIP requires that the reinforcement include a point system through which Student may earn points in order to earn a chosen re-enforcer. The BIP provides instructional requirements for improving Student's self-monitoring, and also for recording of progress in this area. In addition, the BIP requires the teacher and classroom staff to record, on a daily basis, the frequency of Student's target behaviors

through the use of ABC Charts. Thus, in addition to requiring the support of a staff member for one-to-one instruction and to shadow her in group activities, the BIP contains requirements regarding implementing the BIP and documenting information, and these implementation and documentation requirements require the services of a staff member.

11. However, the evidence established that the language of the BIP did not require that Student be assigned a specific aide to provide one-to-one services to her at all times during the school day. The BIP states that “each staff person” responsible for implementing the BIP is required to sign that he or she has read and understands it. Thus, the language of the BIP contemplates that more than one staff person would provide services under the BIP. This interpretation is consistent with that of Ms. Robertson, who is in charge of special education for District. Ms. Robertson interpreted the above-quoted language of the BIP regarding “1:1 instruction” to mean that Student needed a classroom staff member available to provide Student with one-to-one support as needed. Ms. Robertson’s interpretation was based partially on information she received from Student’s previous school district. Early in the school year, Ms. Robertson contacted an administrator in Student’s previous district, and was told that aides in the autism SDC in which Student was placed were not assigned to a particular student but, rather, were assigned to the classroom in general.

12. However, even though Student was not entitled to a one-to-one aide assigned specifically to her, the weight of the evidence established that the staff in Student’s class, including the classroom teacher and the two paraprofessional aides, were not qualified to implement the one-to-one services required in the BIP. For example, Ms. Michelle Walker, Student’s classroom teacher for the 2007-2008 school year, who is currently working toward obtaining her special education credential, established that neither she nor her two paraprofessional aides were qualified or trained

regarding BIPs, how to implement the one-to-one service requirements of Student's BIP, or how to maintain the ABC Chart required by the BIP. Ms. Walker testified credibly that she did not know what a BIP was when she began the school year with Student in her class. Ms. Walker established that she learned from Mother in November 2007 that the BIP was a document that was part of Student's IEP, and that it was supposed to be implemented. However, the BIP was not followed or implemented, and Ms. Walker established that her classroom did not have the staffing required to implement the BIP. Ms. Walker did not know whose job it was to implement the BIP. No one from District went over the BIP with Ms. Walker or her staff, and neither Ms. Walker nor her staff signed the BIP to indicate that they had read and understood it. In addition, Ms. Robertson established that the principal at Crestmoor has not been trained in implementing BIPs.

13. Although the evidence established that private psychologist, Susan Burkhardt, and District behaviorist, Margie Rubin, were sent to Ms. Walker's classroom by District to provide consultation to Ms. Walker regarding Student's behavior, neither of them explained the BIP to Ms. Walker or her paraprofessionals, or trained Ms. Walker or her paraprofessionals to implement the BIP. Dr. Burkhardt observed for a total of about four hours, and told Ms. Walker that she wanted Ms. Walker to implement positive reinforcement. Ms. Rubin was in Ms. Walker's classroom maybe three times. Both offered suggestions, and Ms. Walker noticed some improvement in Student's behavior as a result of the strategies she tried pursuant to their suggestions. However, Ms. Walker established that overall, Student's behaviors remained the same throughout the year, and worsened after spring break.

14. The evidence established that despite Dr. Burkhardt's and Ms. Rubin's advice to Ms. Walker, Student's behaviors continued throughout the school year until Mother removed Student from school on April 2, 2008. Ms. Walker established that

throughout the year Student exhibited target behaviors daily that required support. She tantrumed daily to weekly, and her tantrums typically lasted 20 minutes and involved falling on the floor, knocking over desks, screaming, slamming doors, and kicking. Student spat at people, hit the paraprofessionals and other students, kicked her teacher from behind, and threw items at people. Student physically injured another child at least once. Other students were afraid of Student and cowered when she came near. Student left the classroom approximately once a day to once a week and went to the parking lot or to the office, she removed her clothing in class, and she wandered into other classrooms on her way to and from the bathroom if she was not accompanied by an aide. Ms. Walker established that when Student tantrumed, everything in the classroom had to stop. If Student's behavior required that she be separated from the rest of the class, Ms. Walker had the rest of the class leave the classroom because Student refused to leave during these times. Ms. Walker testified credibly that Student needed a one-to-one aide during lunch and recess, she required intense academic instruction because she lacked focus, and she had to be reminded to work every two to three minutes by a staff person. In addition, Student required a staff person to accompany her during lunch and recess and to the restroom, and to follow her when she ran from the classroom. She required a one-to-one aide for any mainstreaming in general education, and any time she engaged in a tantrum. Sometimes Student required the services of more than one person. For example, on April 2, 2008, the day Mother removed Student from school, Student tantrumed for about an hour and ran out of the classroom and into the field, and three people worked for over an hour to get her back into the class. In March 2008, Student was running from the classroom approximately once a day. After spring break, Student's behaviors became more noncompliant and her outbursts more severe. Ms. Walker testified credibly that Student was a danger to herself and to other students and that she impeded the learning of herself and other students when she did not have the

support of a one-to-one aide.

15. While Ms. Robertson testified there was sufficient staff in Ms. Walker's classroom to provide one-to-one support to Student as required by her BIP, Ms. Walker's testimony to the contrary is given more weight because Ms. Robertson spent little time in the classroom, a few hours in total, while Ms. Walker was in the classroom every day. In addition, Ms. Walker's testimony is corroborated by evidence that she had continually requested support in dealing with Student's behaviors all year and had, early in the year and at the October 22, 2007, IEP meeting, informed Ms. Robertson that Student needed a one-to-one aide. In addition, while the evidence established that while Student did not have a one-to-one aide assigned specifically to her in her previous school district of attendance, the autism SDC in which Student was placed in that school district had a sufficient number of qualified staff to implement her BIP, in that the class was composed of eight students and eleven staff members, all of whom were trained to implement Student's BIP. Student's behavior improved markedly while she was in that classroom. Student's class within District had 13 students and three staff members, none of whom were trained to implement her BIP, and Student's behavior worsened. Ms. Robertson was aware that Student's class in her previous school district had a high staff-to-student ratio. District contends that it did not deny Student FAPE because Student made a small amount of academic progress. However, Student is not required to establish that she suffered educational harm in order to prove that she was denied FAPE.

16. Based on the foregoing, District failed to provide qualified one-to-one aide services to Student as required by her BIP. Having determined that District failed to implement the provisions of Student's BIP regarding one-to-one aide services, it must be determined whether the failure was material. The evidence established that the failure was material because Student's behavior problems all school year were serious and interfered with her ability to learn. Ms. Robertson and Ms. Walker established that

Student is very bright and that her cognitive ability is higher than average. However, the evidence established that Student's academic performance was affected by her behaviors that result from her autism. Indeed, Student's primary difficulty interfering with her ability to learn is her behavior. District's failure to implement Student's BIP, and to provide the one-to-one services she required pursuant to the BIP, amounted to a material failure to implement Student's IEP's core component. The failure to implement the identified portion of her IEP therefore denied Student a FAPE.

Speech and language therapy

17. Student's May 14, 2007, IEP required speech therapy of 30 minutes a week, which amounted to 19 hours of speech therapy over the course of the school year. However, District provided no SLT services to Student during the fall of 2007 because District did not have a speech therapist available to provide the services to Student. Ms. Walker and Ms. Robertson established that between January 2008 and April 2, 2008, when Student was removed from school by Mother, District provided Student with five hours of SLT services by contracting with a retired speech and language therapist to provide the services.

18. Based on the foregoing, District failed to provide 14 of the 19 hours of speech therapy services required by Student's IEP. Thus, the services provided by District did not comport with Student's IEP. Student's IEP team had determined she needed the SLT services. District's failure to provide almost three-fourths of the SLT sessions required pursuant to Student's IEP was a material failure to implement Student's IEP and denied her FAPE.

Adaptive physical education

19. Student's January 2007 and May 2007 IEP required APE for 30 minutes, two times a week, which amounts to 38 hours a year. Ms. Walker and Ms. Robertson

established that District provided Student with no APE sessions during the 2007-2008 school year. While the evidence established that Student attended a general education physical education class for 30 minutes two times a week, and that she was provided classroom-based occupational therapy services for 20 minutes two times a week, Student's IEP did not authorize District to substitute the services of a properly qualified APE teacher with a general education physical education class taught by a general education teacher or with group occupational therapy provided by an occupational therapist. In addition, Ms. Walker established that Student participated only about 10 percent of the time in the physical education class she attended, and there was no evidence that the occupational therapy sessions addressed the same needs the APE was required to address. Thus, the services provided did not comport with Student's IEP. In light of the fact that Student's IEP team determined she needed APE services twice a week for 30 minutes, District's failure to provide Student with any APE services required by her IEP for an entire academic year was a material failure to implement her IEP and denied her FAPE.

REQUESTED RELIEF AND REMEDIES

20. As discussed in Legal Conclusions 17 and 18, compensatory education is an equitable remedy, and the ALJ has the authority to order equitable remedies. Relief must be reasonably calculated to provide the educational benefit that would have likely accrued from the special education services that should have been provided.

21. Student contends that she is entitled to an order that District provide a one-to-one qualified aide, SLT services, and APE services. In addition, Student seeks make-up time for services not provided. At the conclusion of hearing, the ALJ requested that the parties' closing briefs include argument regarding equitable remedies.

22. As determined in Factual Findings 5 through 16, District denied Student a FAPE by failing to provide qualified one-to-one staff as required to implement her BIP.

Student contends in her closing brief that as a result of this denial of FAPE, Student is entitled to compensatory education in the amount of 162 hours, as well as a qualified one-to-one aide to provide those services for the 2008-2009 school year and the extended school year.

23. Ms. Robertson recommended, on behalf of District, that Student be assigned a one-to-one aide who is appropriately trained to implement her BIP. Evidence at hearing established that District had tried in recent weeks, but had been unable, to find a qualified one-to-one aide for Student. However, Ms. Robertson established that District could train existing District staff to implement the BIP, and could provide a qualified one-to-one aide to implement Student's BIP. District also contends that the appropriate equitable remedy for both compensatory education and prospective placement is placement in a structured autism program available through either the North County collaborative, a nonpublic school in San Mateo County, or in a nonpublic school in a neighboring county because no structured autism or similar placement exists within District. Ms. Robertson established that District had attempted during the school year, but had been unable, to locate a placement that could implement Student's BIP and that would accept Student.

24. Notwithstanding District's efforts, Student's year within District was spent without the qualified one-to-one staff required to implement her BIP, and the evidence established that Student's behavior worsened and also interfered with her learning during the entire school year as a result. Therefore, District is ordered to provide qualified one-to-one aide services, as required by Student's BIP, to Student in her current placement, beginning immediately. If District is unable to provide the qualified one-to-one staff required to implement Student's BIP, District is ordered to provide an appropriate placement for Student in which her BIP can be implemented. District is ordered to implement this placement by the first day of the 2008-2009 school year.

25. The evidence also supports a finding that Student is entitled to compensatory education because of the loss of educational benefit, and worsening behavior, that Student suffered as a result of District's failure to provide the one-to-one services required by her BIP for the 2007-2008 school year. The award of compensatory education must be reasonably calculated to provide the educational benefit that would have likely accrued to Student from the aide services that should have been provided pursuant to Student's BIP. The evidence demonstrated that Student suffered educationally and behaviorally during the entire school year as a result of District's failure to provide the one-to-one services required by Student's BIP. Student's BIP was designed to address Student's behaviors that interfered with her academic progress, yet Student did not, for the entire school year, have the one-to-one services required by her BIP. Although Ms. Walker established that Student made "a little" or "some" academic progress during the school year, she also established that Student's behaviors interfered with her ability to make progress. In addition, Student received no educational benefit at all from District from April 2, 2008, through the date of hearing because, as discussed in Factual Finding 14, Mother removed Student from school on that day. Therefore, District is ordered to provide a total of 150 hours of academic and behavioral services to Student, to be provided by appropriately qualified staff outside of Student's regular school day, unless Mother requests otherwise, over the next two years. If District is unable to provide the services, Mother and District shall work together to find a certified nonpublic agency to provide the services, so long as the services address behavior and academics.

26. The evidence established that District provided Student with five hours of the required 19 hours of SLT services during the 2007-2008 school year. The weight of the evidence supports an order that District provide Student with 14 hours of SLT services, to be provided by an appropriately credentialed speech and language therapist

over the next year outside of Student's regular school day, unless Mother requests otherwise, because this is the amount of SLT services that Student's IEP team determined she needed and there was no credible evidence to establish that she needed more or less.

27. Student was entitled to 38 hours of APE services during the 2007-2008 school year. There was no credible evidence that Student's APE needs were met through general educational physical education classes or through group occupational therapy sessions. The weight of the evidence supports an award of APE services in the amount of 38 hours, to be provided to Student by an appropriately credentialed APE teacher outside of Student's regular school day, unless Mother requests otherwise, because this is the amount of APE services that Student's IEP team determined she needed and there was no credible evidence to establish that she needed more or less.

28. These SLT and APE services shall be in addition to those required by Student's IEP, shall be provided outside the regular school day if Mother so chooses, and shall be provided within one year from the date of this Decision.

29. In balancing the equities in this case, Mother's removal of Student from school on April 2, 2008, does not affect the amount of services awarded to Student in this case. As determined in Factual Finding 14, the evidence established that Student's behavior presented a danger to herself and to others. For that reason, Mother's removal of Student from school does not weigh against her in balancing equities. In addition, the evidence established that Mother attempted diligently, during the entire school year, to obtain for Student the services required by Student's IEP.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student has the burden of proving the essential elements of his or his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

FAILURE TO IMPLEMENT STUDENT'S IEP

2. A child with a disability has the right to a FAPE under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education and related services that are available to the student at no cost to the parent, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. Title 20 United States Code 1414(d)(2)(C)(i)(I) provides for an interim placement for students who transfer from one school district to another, as follows:

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or

develops, adopts, and implements a new IEP that is consistent with Federal and State law.

4. Section 56325, subdivision (a)(1), mirrors Title 20 United States Code section 1414(d)(2)(C)(i)(I), with the additional provision that, for a student who transfers into a district not operating under the same SELPA, the local educational agency (LEA) shall provide the interim program "in consultation with the parents, for a period not to exceed 30 days, by which time the [LEA] shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law."

5. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 200-201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*).)

6. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial and significant provisions of the IEP. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822 [hereafter *Van Duyn*].)

7. However, the materiality test is not a requirement that prejudice be shown: "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Van Duyn, supra*, 502 F.3d at p. 822.) The child's educational progress, or lack of it, may be probative of whether there was more than a minor shortfall in services. A shortfall in services and a shortfall in the child's achievement in that area tend to show that the failure to implement the IEP was material. Similarly, if the child performed at or above the anticipated level of achievement, this would tend to show that the shortfall in services was not material. The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP. (*Ibid.*)

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2007-2008 SCHOOL YEAR BY FAILING TO PROVIDE A QUALIFIED ONE-TO-ONE AIDE TO STUDENT, AS REQUIRED BY HER BIP?

8. State and federal law requires school districts to address behavior problems that affect the education of the child with a disability or of other students. An IEP team must consider whether a child's behavior impedes his or her learning or that of others, and if the team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subds. (b)(1) & (c).) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California*

Special Educ. Hearing Office (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1161-1162; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

9. In general, states receiving funding under the IDEA are required to provide appropriately and adequately prepared and trained personnel to carry out the provisions of the IDEA, and to ensure that those personnel have the content knowledge and skills to serve children with disabilities. (20 U.S.C. § 1412(a)(14).) It is the express intent of the California Legislature that special education programs provide appropriate qualified staff, consistent with credentialing requirements, to fulfill the responsibilities of the local plan (Ed. Code, § 56001, subd. (n)), and that regular and special education personnel are adequately prepared to provide educational instruction and services to individuals with exceptional needs (Ed. Code, § 56001, subd. (o)).

10. As determined in Factual Findings 5 through 15, District failed to fulfill the requirement of Student's BIP that it provide one-to-one staffing because the special education personnel, including Student's teacher and the two paraprofessionals who worked in the classroom, were not appropriately or adequately prepared or trained to provide educational instruction and services to Student as required in her BIP.

11. As discussed in Factual Finding 16, District's implementation failure was a material failure to implement her IEP because Student experienced severe behavioral problems all year that interfered with her ability to access her education. Student's primary need that the District was required to address through specialized instruction in a non-general education class was her behaviors that resulted from her autism. Therefore, District's failure to provide qualified one-to-one aide staffing as required to implement Student's BIP denied Student FAPE.

12. As discussed above, *Van Duyn* instructs that a child does not have to suffer a demonstrable harm in order to sustain her burden of proof that she was denied

services mandated by her IEP. However, as discussed in Factual Finding 14, Student's evidence established that her educational progress was affected by the District's implementation failure.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2007-2008 SCHOOL BY FAILING TO PROVIDE SPEECH AND LANGUAGE THERAPY, 30 MINUTES WEEKLY, AS REQUIRED IN HER IEP?

13. As discussed in Factual Findings 17 and 18, District was required by Student's IEP to provide her with SLT for 30 minutes once a week. District provided Student with only five of the 19 hours of SLT services required by her IEP during the 2007-2008 school year. As determined in Factual Finding 18, District's failure to provide 14 of the 19 hours of SLT services during the school year was a material failure to implement Student's IEP and denied her FAPE.

14. While a child does not have to suffer a demonstrable harm in order to sustain her burden of proof that she was denied services mandated by her IEP (*Van Duyn*), as discussed in Factual Finding 18, Student's IEP team determined she needed SLT for 30 minutes a week, and District provided only five of the required 19 hours that Student was entitled to receive over the course of the year.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2007-2008 SCHOOL YEAR BY FAILING TO PROVIDE ADAPTIVE PHYSICAL EDUCATION, 30 MINUTES TWO TIMES A WEEK, AS REQUIRED IN HER IEP?

15. As discussed in Factual Finding 19, District was required by Student's IEP to provide her with APE services twice a week for 30 minutes, which amounted to 38 hours of APE services during the 2007-2008 school year. As determined in Factual Finding 19, District did not provide any of the APE services required pursuant to Student's IEP, and District's failure to provide any of the required APE services was a material failure to implement her IEP and denied her FAPE.

16. While a child does not have to suffer a demonstrable harm in order to sustain her burden of proof that she was denied services mandated by her IEP (*Van Duyn*), as determined in Factual Finding 19, Student's IEP team determined that she needed APE for 30 minutes two times a week and District did not provide it.

DETERMINATION OF RELIEF

17. Courts have long recognized that equitable considerations are appropriate when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (hereafter *Puyallup*), citing *Sch. Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].) Compensatory education is an equitable remedy; it is not a contractual remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d at p. 1497.) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

18. There is broad discretion to consider equitable factors when fashioning relief for FAPE violations. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 14 [126 L.Ed.2d 284, 114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at p. 1496.)

19. As discussed in Factual Findings 20 through 29, Student is entitled to relief as a result of District's material failure to implement Student's IEP, which denied Student FAPE. Student is entitled to relief that is reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied.

20. District shall continue to implement in full Student's May 14, 2007, IEP, including the BIP, until the parties agree to another IEP or until a subsequent IEP is found appropriate through a due process hearing or other legal procedure. District shall provide the one-to-one staffing that is required to implement Student's BIP, and the staff responsible for implementing the BIP shall be qualified to implement the BIP. If District is unable to provide the qualified one-to-one staff required to implement Student's BIP, District is ordered to provide an appropriate placement for Student in which her IEP, including her BIP, can be implemented. District is ordered to implement this placement by the first day of the 2008-2009 school year.

21. In addition, Student is entitled to compensatory education as a result of District's failure to provide the one-to-one staffing required by Student's BIP. As determined in Factual Finding 14, the evidence demonstrates that Student suffered behavior problems all school year, and that those behavioral problems interfered with her ability to access her education. The ALJ therefore finds, as determined in Factual Finding 25, that Student is entitled to a total of 150 hours of compensatory education services, to be provided by appropriately qualified staff, in the areas of academics and behavior, which District is ordered to provide after the regular school day and during summer vacation, unless Mother requests otherwise, within two years from the date of this Decision. If District is unable to provide any or all of the hours using District staff, District is ordered to provide the services through an appropriate certified nonpublic agency. Mother and District shall work together to find a certified nonpublic agency to provide the services, so long as the services address behavior and academics. Student shall have two years from the date of the issuance of this order to use the hours. Student will forfeit any hours not used.

22. With regard SLT services, as determined in Factual Findings 17 and 18, Student is entitled to compensatory education as a result of District's failure to provide

14 of the 19 hours of SLT required by Student's IEP during the 2007-2008 school year. As determined in Factual Finding 26, District is ordered to compensate Student with the 14 hours of SLT services it failed to provide to her. District shall provide the hours using an appropriately credentialed speech and language therapist within one year following the date of this Decision. District shall provide the additional hours to Student after her regular school day and during Student's summer vacation, unless otherwise requested by Mother. Student will forfeit any hours not used within one year. If District is unable to provide any of all of the hours with District staff, District is ordered to provide the services through an appropriate certified nonpublic agency.

23. With regard to the lost APE services, as determined in Factual Finding 19, Student is entitled to compensatory education as a result of District's failure to provide the 38 hours of APE required by Student's IEP during the 2007-2008 school year. As determined in Factual Finding 27, District is ordered to compensate Student with the 38 hours of APE services that it failed to provide to her. District shall provide the hours through either a credentialed District APE teacher or an appropriate certified nonpublic agency, at the District's discretion. District shall provide the hours within the one year following the date of this Order. District shall provide the additional hours to Student after her regular school day and during Student's summer vacation, unless otherwise requested by Mother. Student will forfeit any hours not used within one year.

ORDER

1. The District shall continue to implement in full Student's May 14, 2007, IEP and BIP until the parties agree to another IEP or until a subsequent IEP is found appropriate through a due process hearing or other legal procedure. District shall provide the one-to-one staffing that is required to implement Student's BIP, and the staff responsible for implementing the BIP shall be qualified to implement the BIP. If District is unable to provide the qualified one-to-one staff required to implement

Student's BIP, District is ordered to provide an appropriate placement for Student in which her IEP, including her BIP, can be implemented. District is ordered to implement this placement by the first day of the 2008-2009 school year.

2. District shall provide Student with a total of 150 hours of compensatory education in the areas of academics and behavior, to be provided by appropriately qualified staff, in the areas of academics and behavior, which District is ordered to provide after the regular school day and during summer vacation, unless Mother requests otherwise, within two years from the date of this Decision. If District is unable to provide any or all of the hours using District staff, District is ordered to provide the services through an appropriate certified nonpublic agency. Mother and District shall work together to find a certified nonpublic agency to provide the services, so long as the services address behavior and academics. Student shall have two years from the date of the issuance of this order to use the hours, and will forfeit any hours not used within two years of the date of this Order.

3. District is ordered to compensate Student with the 14 hours of SLT services it failed to provide to her. District shall provide the hours using an appropriately credentialed speech and language therapist within one year following the date of this Decision. District shall provide the additional hours to Student after her regular school day and during Student's summer vacation, unless otherwise requested by Mother. If District is unable to provide any of all of the hours with District staff, District is ordered to provide the services through an appropriate certified nonpublic agency. Student will forfeit any hours not used within one year of the date of this Order.

4. District is ordered to compensate Student with 38 hours of APE services that it failed to provide to her. District shall provide the hours through either a credentialed District APE teacher or an appropriate certified nonpublic agency, at the District's discretion. District shall provide the hours within the one year following the

date of this Order. District shall provide the additional hours to Student after her regular school day and during Student's summer vacation, unless otherwise requested by Mother. Student will forfeit any hours not used within one year of the date of this Order.

5. All other requests for relief are denied.

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. Student prevailed on all issues in this matter.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: July 10, 2008



DEBRA R. HUSTON

Administrative Law Judge

Office of Administrative Hearings

Special Education Division