

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH CASE NO. 2009040611

PARENT on behalf of STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT.

DECISION

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in San Francisco, California, on June 12, 2009.

Evan Goldsen, Attorney at Law, and Carly Christopher, Child Advocate, represented Student. Student's father (Father) was present throughout the hearing.¹ Student was not present at the hearing.

William Trejo, Attorney at Law, represented the San Francisco Unified School District (District). Pamela Macy, the District's Supervisor of Designated Instruction and Services (DIS), was present throughout the hearing.

On April 14, 2009, Student filed a request for a due process hearing. At hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to June 29, 2009, for the submission of closing briefs. On June 26, 2009,

¹ Student's mother and father are collectively referred to as "Parents" in this Decision.

at the parties' request, the matter was further continued to July 10, 2009, for the submission of closing briefs. At the request of the District, due to delays in the delivery and transcription of the audio recording of the hearing, the matter was further continued to July 20, 2009. On that day, briefs were filed, the record was closed, and the matter was submitted.

ISSUES²

1. Did the District deny Student a free appropriate public education (FAPE) by predetermining Student's placement for the 2008-2009 extended school year (ESY), thereby denying Parents meaningful participation at the individualized education program (IEP) meeting held April 3, 2009?

2. Did the District deny Student a FAPE by failing to offer him an appropriate placement in the least restrictive environment (LRE) for the 2008-2009 ESY?

BACKGROUND

1. Student is a six-year-old male who lives with Parents within the boundaries of the District. He is eligible for special education and related services due to autistic-like behaviors. He was diagnosed at age two as having Pervasive Developmental Disorder--Not Otherwise Specified (PDD-NOS). Student has difficulty in socializing with peers, paying attention to teachers, remaining on task, and managing daily transitions.

2. After attending Wind in the Willows, a private preschool, Student was enrolled in September 2008 as an "inclusion student" in a general education kindergarten class at the District's Dianne Feinstein Elementary School, with a one-to-

² Student's request for due process hearing set forth numerous issues that the parties settled before the hearing. The ALJ has slightly reworded the remaining issues for clarity.

one aide and occupational therapy (OT) and speech and language (S/L) support. Student completed kindergarten in that placement. For the school year (SY) 2009-2010, the District has offered to place Student in a general education first grade class, with similar services and supports.

3. In the District, an "inclusion student" is, like Student, a student eligible for special education and related services whose IEP places him or her in general education, with services and support, during the regular school year. In SY 2008-2009, the District had between 80 and 90 inclusion students who were between kindergarten and fourth grade, and who may have been eligible for ESY in the summer of 2009. For budgetary reasons, the District no longer offers general education summer programs to students below grade five. In the spring of 2009, the District notified the parents of inclusion students by letter that those students would be offered ESY placements in special day classes (SDCs) containing other inclusion students.

4. At an IEP meeting on April 3, 2009, the District offered to place Student for the ESY in one of the SDCs for inclusion students. At Student's annual IEP meeting on May 18, 2009, the District also offered Student a placement for the remainder of SY 2008-2009 and for SY 2009-2010 in general education classes, with services and supports including a one-to-one aide, a behavior support plan, and individual OT and S/L support. Parents did not accept the offers.

PREDETERMINATION OF ESY OFFER / PREVENTION OF PARENTAL PARTICIPATION

5. Under the Individuals with Disabilities in Education Act (IDEA), 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. A district must fairly and honestly consider the views of parents expressed in an IEP meeting. School officials may not arrive at an IEP meeting with a "take it or leave it" attitude, having already decided on the program to be offered.

School officials do not predetermine an IEP offer simply by discussing a child's programming in advance of an IEP meeting, but a district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. Student argues that the District members of his IEP team arrived at the April 3, 2009 IEP meeting having already decided that the only ESY placement they would consider would be in a mild-to-moderate SDC composed of inclusion students.

6. The April 3, 2009 addendum IEP meeting was a continuation of an addendum IEP meeting on February 10, 2009, which was called to review a draft of a behavior support plan, discuss assessment plans, and consider whether Student should be retained in kindergarten for another year. Parents were accompanied at the meeting by their attorney Evan Goldsen, and by child advocate Carly Christopher. At the outset of the April 3 meeting, Parents requested that a possible ESY placement be added to the agenda for discussion at the meeting.

7. Parents obtained a partial transcript of the April 3, 2009 IEP meeting by having a certified shorthand reporter transcribe an audio recording of part of the meeting. Parents introduced the partial transcript in evidence at hearing, and Father testified that it was an accurate record of all of the discussion of ESY that occurred at the meeting. The transcript identifies speakers only as "Female Speaker" or "Male Speaker," but the identity of the speaker, or at least whether the speaker represented Student or the District, is apparent from the context of the discussion.

8. The partial transcript of the April 3, 2009 IEP meeting establishes that District was open to discussing ESY at that meeting. The evidence shows that a District team member began the ESY discussion by stating, "If you want to have the discussion of ESY now," and another District member asked: "What were your concerns with ESY?" A District member told Parents that the District had recently sent a letter to the parents

of students potentially eligible for ESY. The letter announced that, in the summer 2009, due to budgetary constraints, the District would have no general education classes for students below fifth grade, and that instead it would offer inclusion students placement for the ESY in a mild-to-moderate SDC composed of other inclusion students. Parents stated that they had not yet received the letter. A District member then promised to see that they got a copy, and added that the team could talk more about the ESY at Student's annual IEP meeting, which was scheduled for May 18, 2009.

9. In response to the District's ESY offer, Father stated at the April 3 meeting that Student "definitely seems to be a child who is in need of ESY services," and that the District ESY offer was not a proper placement. He stated that Parents had been investigating alternative ESY placements. Ms. Christopher, Student's advocate, repeated Parents' view that the proposed SDC placement was inappropriate. She stated that Parents' preference was a placement in the Lindamood-Bell language program (Lindamood-Bell). Ms. Christopher then added: "But we can have a discussion of that now or we can wait until the annual ... " Sophronia Brown-Bess, the District's Special Education Supervisor, responded: "[W]e can certainly discuss it further at the annual, but the District does have an offer on the table for ESY, which would be ... a mild/moderate special day class program." Apparently in response to Parents' concerns that the District's ESY offer would not place Student in general education, Ms. Brown-Bess explained that the law did not require the District to create a general education ESY program for inclusion students if it did not have a general education summer program for students who do not have disabilities. That statement was included in the letter that Parents had not yet received.

10. Rather than continuing the ESY discussion at the meeting, Parents reiterated that they needed to see the District's letter. A District member then asked if there was anything else Parents wanted to discuss, and either Mother or Ms. Christopher

responded: "I think all of our concerns have been addressed." The discussion then turned to other subjects, and the meeting was soon adjourned.

11. Father testified at hearing, and Student contends, that Ms. Christopher began to discuss Parents' preferred Lindamood-Bell placement at the April 3, 2009 IEP meeting, but that she was cut short, and that the District informed Parents that its SDC offer was all that was available. He also testified that he interpreted Ms. Brown-Bess' statement that the SDC offer was on the table as a rejection of any other possible ESY placements. However, Parents' partial transcript of the meeting does not support those claims. The evidence establishes that Ms. Brown-Bess merely stated that the SDC offer was on the table, a statement she testified meant that it was open for consideration. Nothing in the partial transcript shows that the District would not consider other options. As noted above, Parents expressly agreed to postpone further discussion of ESY placement until the May annual meeting, in part because they had not seen the District's letter concerning the ESY.

12. Father also testified at hearing, and Student contends, that Father was not permitted at the April meeting to present the results of his independent research into possible ESY placements. There is no indication in the partial transcript that he attempted to do so, or that the District prevented him from doing so. As Ms. Brown-Bess testified, it was the District's purpose only to open discussion of the ESY in April, since the team had insufficient time to consider it fully, and to postpone a fuller discussion until Student's annual meeting in May, after Parents had obtained the letter. Parents agreed to that postponement. Thus Parents' argument that they were prevented from participating in further discussion of an ESY placement at the April meeting was not supported by the evidence.

13. Although Student does not claim that the District predetermined its offer at the May 18, 2009 annual IEP meeting, or that it precluded parental participation at

that meeting, the events of the May meeting are relevant because they show that the District remained open to considering ESY placements other than the one it proposed in April.³ At the May meeting, Parents arranged for the appearance by telephone of Rachel Seigal, a representative of Lindamood-Bell. Ms. Seigal described in detail the results of her assessment of Student, and argued that he needed four hours a day of Lindamood-Bell training during the summer to prepare him for first grade. The parties agree that Parents, their advocate, and District team members asked Ms. Seigal questions about her assessment and her proposal. Father testified that Parents' attorney may have questioned Ms. Seigal as well. As Father put it: "Certainly the school district did [ask questions]; I know that for sure." In addition, Pamela Macy, the District's Supervisor of DIS, attended the May 18, 2009 IEP meeting as the District's administrator, and acted as the facilitator of the meeting. She testified that she and other District staff members asked questions of Ms. Siegel, and that there was a full discussion of Ms. Seigal's proposed ESY placement at the meeting.

14. In his closing brief, Student argues that no discussion of the ESY took place at the May 18, 2009 IEP meeting. He points out that the agenda of the meeting did not list the ESY as an issue, and the notes of the meeting reflect only that a District team member asked Ms. Seigal a single question about her qualifications to diagnose a disability. However, these facts do not demonstrate that the discussion did not occur. Rather, they merely show that the notes of the meeting were not exhaustive. Ms. Macy testified that the notes of the meeting, although accurate as far as they went, did not report the entire discussion. Father also testified that not everything was included in the

³ Student filed his complaint on April 14, 2009, before the May meeting had occurred. After the May meeting, Student made no effort to amend his complaint or otherwise add to this dispute any issue related to the May meeting.

notes. The testimony of Father and Ms. Macy, discussed above, confirms that the ESY was discussed at the May meeting. No one testified to the contrary.

15. Student also asserts, for the first time in his closing brief, that at the May 18, 2009 IEP meeting, Ms. Seigal only described her assessment of Student, not a proposed ESY placement. The evidence is otherwise. Parents proposed the Lindamood-Bell placement as part of the ESY discussion at the April meeting. At the May meeting, Ms. Seigal proposed a specific number of hours for a summer Lindamood-Bell program for Student. Both Father and the District's witnesses testified that Lindamood-Bell was discussed as a possible ESY placement. The resolution proposed in Student's complaint was for an ESY placement in a Lindamood-Bell program. Student's new assertion has no support in the record.

16. Ms. Macy has also been a Program Administrator for DIS for the District, and the head speech pathologist for the District's screening and assessment. She has more than 30 years of experience as a speech and language pathologist conducting diagnostic assessments and providing treatment and remediation for students with a wide range of disabilities. Ms. Macy gave several reasons at hearing why she did not believe that a Lindamood-Bell summer placement was appropriate for Student. She testified that the proposed training would have involved one-to-one instruction in a carrel in front of a computer for four hours a day. Student's behavioral and attention problems would not allow him to benefit from such a concentrated effort. Student frequently "elopes" – leaves the classroom – and Lindamood-Bell training could not address that. Nor could Student work on the goals in his IEP in such training.

17. Ms. Macy testified that after the discussion of Lindamood-Bell, she stated that the IEP team needed to discuss the ESY, but Ms. Christopher said that Parents had already talked about ESY, they already knew what the offer was, and they were not going to accept it. Ms. Macy then stated that the District was there and willing to talk

about ESY, but there was no answer. She asked whether Parents wished to discuss any other issues, and Ms. Christopher said: "No." Parents did not disagree at hearing with Ms. Macy's description of her statements at the meeting. When Father was asked whether he remembered Ms. Macy's saying that the District was prepared to discuss ESY placement, he responded: "Not specifically, although I may have forgotten." No witness cast doubt on Ms. Macy's testimony. In questioning a witness, Student's advocate, Ms. Christopher, referred to a tape recording of the May meeting, but Student made no attempt to introduce any part of such a recording into evidence. It may fairly be presumed that the recording would not support Student's current description of the meeting.

18. Thus the evidence established that at the April 3, 2009 IEP meeting, the District invited Parents to discuss the ESY, and that the parties briefly did so. The District offered an ESY placement, but there was no evidence that the offer was exclusive of any other possible placement, or that the District's mind was closed. Parents did not have a copy of the District's letter regarding ESY, and agreed to the postponement of further discussion of the ESY until the May 18, 2009 IEP meeting. The evidence further established that at the May meeting, Parents' expert, Rachel Seigal, described her assessment findings and her proposal for a Lindamood-Bell ESY placement, and answered questions from both parties. The District invited further discussion of an ESY placement, but Parents, through their advocate, declined to participate in it. The District fully considered Parents' proposed placement, and had thoughtful reasons for rejecting it.

19. Based on the foregoing, the preponderance of evidence showed that the District did not predetermine an ESY placement for Student before the April 3, 2009 IEP meeting, and did not prevent Parents from having meaningful participation in the ESY decision.

OFFER OF ESY PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

The absence of a regular education summer program in the District

20. The IDEA requires that a student with a disability be placed in the least restrictive environment (LRE) in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers.

21. A district must provide ESY services to a student in special education if an ESY program is required to provide the student a FAPE. If a student requires an ESY program, that program must be in the LRE. However, California law relieves a school district of any obligation to create a regular education summer school program just to satisfy the LRE requirement. If, during the regular academic year, the student's IEP specifies integration in the regular classroom, a district is not required to meet that component of the IEP if no regular summer school program is being offered by the district.

22. Student did not prove that the District offered any regular summer school program for students of his age group or grade level. Student contended that the District offered two suitable summer programs at the Presidio Child Development Center (Presidio Center), but introduced no evidence in support of that contention. Ms. Brown-Bess testified without contradiction that the District operated one summer program at the Presidio Center, but it was a preschool program and therefore not appropriate for Student, who is school-age and in between kindergarten and first grade. Student did not argue that a return to preschool would be appropriate for him. Ms. Brown-Bess testified it was possible that a small number of students between kindergarten and second grade could have been enrolled in that preschool program, but that does not establish that the program was appropriate for Student.

23. Ms. Brown-Bess also established that the other summer program at the Presidio Center is a private program that the District neither manages nor funds. Student produced no evidence to contradict that statement, and identified no other summer program offered by the District that he might have attended. Since the evidence showed that the District does not offer a regular summer school program for Student's age group or grade level, it was not required to create one in order to provide an LRE for Student.

Student's need for exposure to typical peers

24. Student argues nonetheless that he was denied FAPE because the District's ESY offer of placement in an SDC would not have placed him in the LRE. He reasons that since the parties agree that general education with services and supports is the LRE for him during the regular school year, it must also be the LRE for him during the summer. He concludes that the District's failure to place him in a general education program for the ESY was therefore a denial of FAPE. Since the District was not obliged to create a general education summer program so Student could be placed in it, the necessary implication of Student's argument is that the District was required to provide him a private school placement in a general education environment.

25. Even on its own terms, Student's argument that he was denied a FAPE in the ESY is unpersuasive. Student introduced the testimony of a single expert witness in support of his argument. Richard King is a marriage and family therapist who has a master's degree in counseling psychology and a bachelor's degree in English, with a minor in psychology. He is Student's therapist. Mr. King testified that Student struggles with social skills and needs the opportunity for peer modeling that he can obtain only through exposure to typical peers. Mr. King would not recommend placing Student in an SDC. He testified that he did not know of any SDC in the District that would be appropriate for Student during the summer, and that he was concerned that Student

would model the undesirable behavior of other students with disabilities if he were placed in an SDC. In Mr. King's opinion, having typical peers around Student is a big part of helping in his socialization, and a placement among typical peers would be "more appropriate" for him than an SDC placement. Mr. King also testified that Student also difficulty with transitions, and the change to an SDC might be difficult for him.

26. Mr. King's testimony was unconvincing for a number of reasons. While he clearly has a close and beneficial relationship with Student, he is not a licensed psychologist, he is not an educator, and his background includes very little experience or training in the education of students with disabilities. He has never taught or worked in an SDC. He testified he has observed only one SDC in his career, and he did not describe that observation, or claim that the SDC he observed resembled the one offered Student. All the rest of his information about SDCs was hearsay that came from talking to the children on his caseload, their parents, and some teachers. He agreed that SDCs are not all the same. Thus Mr. King's testimony that he did not know of any appropriate SDC for Student does not establish that one does not exist. Mr. King could not, and did not, directly testify that the SDC placement offered Student was inappropriate, since he knew nothing about it. Moreover, the SDC offered Student is unusual in that it contains other inclusion students, not the students normally found in SDCs during the regular school year. Mr. King did not address that difference.

27. Mr. King's testimony was contradicted, in some respects, by that of Naomi Berman-Schrofft, Student's kindergarten teacher, who testified for the District. She established that Student made considerable progress in her general education kindergarten class. She attributed most of that progress not to Student's opportunity for exposure to typical peers, but to the services and supports he received, such as his one-to-one aide and OT and S/L support. These services were integral parts of the District's ESY offer. As Student observes, Ms. Berman-Schrofft at first stated that she did not "see"

Student in an SDC. However, Ms. Berman-Schrofft immediately qualified that testimony by saying that the only SDC with which she was familiar was a class for the emotionally disturbed, which would not be appropriate for Student. She agreed that whether another kind of SDC might be appropriate for Student would depend on the nature of the particular SDC. Thus her testimony did not address whether the SDC actually offered to Student was appropriate for him.

28. Because neither Mr. King nor Ms. Berman-Schrofft could address the appropriateness of the SDC actually offered to Student, there was no evidence that the offered program would not have provided him a FAPE. No witness addressed whether Student's peer modeling opportunities among other inclusion students would be so significantly inferior to his peer modeling opportunities among typical peers that the difference would mean he was denied a FAPE. Mr. King agreed that, in a general education setting as well as an SDC setting, there would be maladaptive behavior that Student might model, but he did not address the difference between the likely incidence of maladaptive behavior in general education programs and that in the SDC offered Student.

29. Pamela Macy opined that the ESY offer the District made to Student was an appropriate placement for him. Student manifests difficulty with behavior, communication content and form, vocabulary, morphology and syntax, and particularly with situational language or social causative thinking skills. The mild-to-moderate SDC program offered presents an intensive language and learning opportunity for a child with Student's challenges. The program emphasizes personalized instruction, and offers opportunities for practicing pragmatic competency skills. It could provide the individual attention Student needs because it has a much lower student-to-teacher ratio than a general education classroom. The SDC has two credentialed teachers and two

paraprofessionals. Student would also have had the assistance of his own paraprofessional.

30. Ms. Macy's testimony was not disputed by Student. It was more persuasive than Mr. King's testimony because of Ms. Macy's much greater training and experience in the education of students with disabilities like Student's, and because, unlike Mr. King, she was able to testify about the actual SDC offered Student. On balance, the evidence did not support a finding that the absence of general education students with whom Student could mingle would have denied him a FAPE in the ESY placement the District offered. Instead, it established that the District's offer addressed Student's unique needs and was reasonably calculated to allow him to obtain some educational benefit from the placement.

31. Moreover, Student's claim that he was denied a FAPE in the ESY by the District's failure to put him in a general education classroom is contradicted by Parents' proposal that Student be placed in the Lindamood-Bell program for the ESY. As mentioned above, the evidence showed that that program would have consisted of four hours a day of one-to-one instruction in front of a computer in a carrel. No general education students would have been involved. And when the District declined to offer the Lindamood-Bell program as an ESY placement, Parents placed Student in the private Literacy and Language Center in San Francisco. Father testified that the academic training there was one-to-one, and that Student's opportunity to mingle with other students occurred when they played together before school. Asked whether those other students included special education students, Father answered: "That's the main focus of the place." The parties stipulated that the Language and Literacy Center is an appropriate placement for Student. If a placement involving one-to-one academic instruction and an opportunity to play with other special education students before

school is appropriate for Student, then the presence of general education students was not necessary to provide Student a FAPE in the ESY.⁴

Student's eligibility for ESY

32. More fundamentally, Student's FAPE argument incorrectly assumes that he was legally entitled to an ESY program of any kind.

33. Student's evidence addressed the FAPE standards that apply to the regular school year. However, the standards for determining whether a student is entitled to an ESY placement in order to receive a FAPE are different. The purpose of special education during the ESY is to prevent serious regression over the summer months. The mere possibility of regression does not entitle a student to an ESY placement, because all students may regress to some extent during lengthy breaks from school. A more specific showing is necessary to establish ESY eligibility.

34. In California, a student is eligible for ESY only if his IEP team finds that interruption of the student's educational programming may cause regression. The team must also find that the likely regression, when coupled with the student's limited recoupment capacity, would render it impossible or unlikely that, without a summer program, the student would attain the level of self-sufficiency and independence that would otherwise be expected in view of his disability. This regression and recoupment analysis must be done by the IEP team. If the analysis results in a decision that the student must have an ESY program to receive a FAPE, that decision must be recorded in the student's IEP.

⁴ Student did not seek reimbursement for the expenses of the Literacy and Language Center in his complaint or prehearing conference statement, or mention the issue at hearing. His attempt in his closing brief to raise the issue is untimely and cannot be considered.

35. The evidence about Student's eligibility for ESY was contradictory and incomplete, and was inadequately addressed by the parties. Ms. Brown-Bess testified that, at the April 3, 2009 IEP meeting, the team determined that Student was eligible for ESY services. Based on her demeanor at hearing, her recollection appeared to be uncertain. Asked why the team had found Student eligible for ESY, Ms. Brown-Bess requested permission to examine the IEP documents, briefly examined them but found nothing that supported her recollection, and then testified, apparently from memory, that the team's determination was made so that Student would not experience regression. However, in light of the other evidence, this statement was most likely a mistake in recollection. As the District's Special Education Supervisor, Ms. Brown-Bess attends many IEP meetings. She testified she had attended from 20 to 25 IEP meetings just between April 3, 2009 and her testimony at hearing on June 12, 2009.

36. The IEP document from the April 3, 2009 IEP meeting contradicts Ms. Brown-Bess's testimony, and states that the IEP team found Student was not eligible for ESY:

ESY SERVICES

ESY Eligibility: No, the IEP team has determined that [Student] is not eligible for extended school year services.

Significant regression?: No, [Student] does not exhibit evidence of significant regression that would result in irreparable harm as a result of extensive school breaks.

The only reference to an ESY placement in the April 3, 2009 IEP document is the statement that the District's offer was made in order to provide Student "educational benefit."

37. The best evidence of what happened at the April 3, 2009 IEP meeting was the certified court reporter's partial transcription of the audio recording of the IEP meeting. Father established that the transcript contains the entire conversation about ESY at that meeting, and the District did not disagree. The transcript does not support either Ms. Brown-Bess's recollection that the IEP team found Student eligible for ESY, or the statement in the written IEP that the team found him ineligible. The transcript shows only that the District made the SDC offer. It does not show any discussion of regression or recoupment, or of Student's possible eligibility for ESY.

38. The written IEP from the May 18, 2009 IEP meeting repeats *verbatim* the statement of ineligibility from the April 3, 2009 IEP quoted above. No one testified that the subject of Student's ESY eligibility was discussed at the May meeting. The notes of the meeting show only that Parents' proposed Lindamood-Bell placement was discussed, and that Student's kindergarten teacher suggested he "should practice his skills over the summer."

39. Notably, Student has never challenged the findings of ESY ineligibility contained in the April 3 and May 18, 2009 IEP documents. Student was represented at both meetings by Parents, his attorney Mr. Goldsen, and his advocate Ms. Christopher. Student's representatives must have known of the written findings of ineligibility, yet the evidence established that at no time has Student ever questioned those findings. Student's complaint does not mention the findings or allege that they were wrong.

40. Student made no attempt at hearing to demonstrate that he was legally eligible for ESY services. He did not engage in any analysis of his likelihood of regression or recoupment. Father and Mr. King testified in passing they were concerned Student might regress, but did not explain or justify their concerns. There was no evidence concerning the likelihood, or likely severity, of Student's regression, or the difficulty he might have in recovering from it. There was no evidence that the absence of an ESY

program may cause Student to regress to the extent that, when coupled with limited recoupment capacity, his regression would render it impossible or unlikely that he would attain the level of self-sufficiency and independence that would otherwise be expected in view of his disabling condition. In short, Student made no showing that, by the governing legal standards, he was legally eligible for an ESY placement.

41. The preponderance of evidence thus shows that the IEP team never affirmatively found Student eligible for ESY services, and never recorded such a decision in an IEP as the law requires. The team's ESY offer was therefore discretionary, and was based not on any fear of regression, but rather on the belief that Student might benefit from a summer program that the District was apparently making available to all inclusion students as a substitute for the regular education summer programs it had eliminated for budgetary reasons.

42. Because the District was not legally required to provide Student any ESY program, Student's argument that its offer was inadequate cannot succeed. If Student was not legally entitled to any ESY offer, it follows that he was not entitled to a better offer than he received.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

LIMITATION OF ISSUES

2. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

ELEMENTS OF A FAPE

3. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(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).)

4. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*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*, at p. 198.) School districts are required to provide only 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.)

5. 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. (*Rowley, supra*, at pp. 206-207.) 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. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

PARENTS' RIGHT TO PARTICIPATE IN THE DECISIONAL PROCESS

6. 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 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.)

7. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

PREDETERMINATION OF OFFER

8. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345.) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist., supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox*

County Schs., supra, 315 F.3d at p. 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)

ISSUE NO. 1: DID THE DISTRICT DENY STUDENT A FAPE BY PREDETERMINING HIS PLACEMENT FOR THE 2008-2009 ESY, THEREBY DENYING PARENTS MEANINGFUL PARTICIPATION AT THE IEP MEETING HELD APRIL 3, 2009?

9. Based on Factual Findings 1-19, and Legal Conclusions 1-8, the District did not deny Student a FAPE by predetermining Student's placement for the 2008-2009 ESY, nor did it deny Parents their right to meaningful participation in the IEP meeting held April 3, 2009. District team members placed one offer on the table, but did not state or imply that it was the only offer that would be considered. Parents agreed to postpone further discussion of the ESY until Student's annual IEP meeting on May 18, 2009. At the annual meeting, Parents presented their preferred ESY placement in the Lindamood-Bell learning program, and the District team members considered it. Further discussion of the ESY at the May meeting was terminated by Parents, not the District. The discussion at the May meeting shows that the District team members did not have a closed mind about ESY placement at the April meeting. Parents do not allege that their participatory rights were denied in the May meeting itself.

LEAST RESTRICTIVE ENVIRONMENT

10. 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)(2006).)

EXTENDED SCHOOL YEAR SERVICES

11. A district is required to provide ESY services to a student with an IEP if an ESY program is necessary to provide the student a FAPE. (34 C.F.R. § 300.106(a)(2006).) However, the standards for determining whether a student is entitled to an ESY placement in order to receive a FAPE are different from the standards pertaining to FAPE in the regular school year. The purpose of special education during the ESY is to prevent serious regression over the summer months. (*Hoelt v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.) The mere fact of likely regression is not enough to require an ESY placement, because all students "may regress to some extent during lengthy breaks from school." (*MM v. School Dist. of Greenville County* (4th Cir 2002) 303 F.3d 523, 538.) The standard for determining ESY eligibility in California is set forth by regulation:

Extended school year services shall be provided for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of

self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.

(5 C.C.R. § 3043, 1st par.) If an IEP team decides that a student requires ESY to receive a FAPE, an ESY placement must be offered in the IEP: "An extended year program, when needed, as determined by the [IEP] team, shall be included in the pupil's individualized education program." (*Id.*, subd. (f).)

12. California's standards for ESY eligibility are consistent with longstanding interpretations of federal law. (*Hoelt v. Tucson Unified School Dist.*, *supra*, 967 F.2d at p. 1301; *Cordrey v. Euckert* (6th Cir. 1990) 917 F.2d 1460, 1470; *Alamo Heights Independent School Dist. v. State Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1158; *Battle v. Pennsylvania* (3d Cir. 1980) 629 F.2d 269, 275; Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46582-46583 (Aug. 14, 2006).)

ESY SERVICES AND THE LRE

13. California law relieves a school district of the obligation to place an inclusion student in a general education program if the district offers no regular summer school programs:

If during the regular academic year an individual's [IEP] specifies integration in the regular classroom, a public education agency is not required to meet that component of the [IEP] if no regular summer school programs are being offered by that agency.

(5 C.C.R. § 3043, subd. (h).)

14. Student argues that subdivision (h) of section 3043 of Title 5 of the California Code of Regulations is invalid because it conflicts with the IDEA's requirement that a student must be placed in the LRE. Although Student cites no authority for this claim, and research reveals none, Student argues that his conclusion is compelled by the combination of two federal regulations.⁵ The first requires a district to ensure that a continuum of alternative placements is eligible to meet the needs of disabled students. (34 C.F.R. § 300.115(a)(2006).) That continuum must include "regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." (34 C.F.R. § 300.115(b)(2006).) The second regulation provides that a district must ensure that "extended school year services are available as necessary to provide FAPE," and that in the provision of those services the district may not "[u]nilaterally limit the type, amount, or duration of those services." (34 C.F.R. § 300.106(a)(1), (a)(3)(ii)(2006).) Student concludes that federal law compels the District to provide regular classes as part of the continuum of alternative placements in the summer as well as in the regular school year, and that the District's failure to have regular summer school classes for students in Student's age group or grade level is therefore an impermissible unilateral limitation on the type of ESY services it must provide.

15. The only applicable authority appears to be the interpretive advice of the United States Department of Education, the agency that enforces the IDEA and that wrote the regulations in question. Section 300.115 of Title 34 of the Code of Federal Regulations is general, and is not directed specifically to ESY services. The Department

⁵ Student cites three decisions in which federal courts rejected state policies flatly banning more than 180 days of instruction (a normal school year) for any special education student. Those decisions have no application here, since the District offered Student a summer program and individually considered his unique needs in doing so.

has long interpreted its requirement of a continuum of alternative placements not to apply to summer programs:

Because ESY services are provided during a period of time when the full continuum of alternative placements is not normally available for any students, the Department does not require States to ensure that a full continuum of placements is available solely for the purpose of providing ESY services.

(*Letter to Myers, supra*, 16 IDELR 290.) And section 300.106(a)(3)(ii) of Title 34 of the Code of Federal Regulations, which prohibits the unilateral limitation of the type, amount, and duration of summer services, has never been interpreted as requiring a school district that does not offer a program in summer to create one simply to provide an LRE. In commenting on the 1999 revisions to the IDEA regulations governing the ESY, the Department stated:

While ES services must be provided in the LRE, public agencies are not required to create new programs as a means of providing ES services to students with disabilities in integrated settings if the public agency does not provide services at that time for its nondisabled children.

(Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed.Reg. 12406, 12577 (March 12, 1999).) The Supreme Court has held that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 844 [81 L.Ed.2d 694].) Since the only extant authority contradicts

Student's argument and is entitled to considerable weight, Student's argument that the California regulation is inconsistent with the IDEA must fail.

ISSUE NO. 2: DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER HIM AN APPROPRIATE PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT FOR THE 2008-2009 ESY?

16. Based on Factual Findings 1-4 and 22-42, and Legal Conclusions 1-5 and 10-15, the District did not deny Student a FAPE in the 2008-2009 ESY by failing to offer him an appropriate placement in the LRE. Student did not prove that he required the presence of general education students at school during the summer in order to receive a FAPE. The evidence showed that the ESY program that was offered Student addressed his unique needs and was reasonably calculated to allow him to obtain some educational benefit. The District proved that it offered no regular summer school program for students of Student's age group or grade level. It was therefore not required to create such a program for Student. Nor was the District required to provide Student a private placement in a general education environment. Student did not prove that he was eligible for any ESY placement, or challenge the District's failure to find him eligible. Since the District need not have offered Student any ESY placement, Student was not entitled to a better placement than the District, in its discretion, offered him.

ORDER

Student's requests for resolution 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. Here, the District prevailed on both 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: July 29, 2009

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings