

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS on behalf of STUDENT,

v.

SYLVAN UNION SCHOOL DISTRICT,

OAH CASE NO. 2008100702

SYLVAN UNION SCHOOL DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2008110371

DECISION

This hearing convened in Modesto, California, on February 23, 26, 27, and March 3, 4, 5 and 11, 2009, before Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH).

Sarah Daniel, Attorney at Law, appeared on behalf of Sylvan Union School District (District). Shanon Casey, Director of Special Services, attended the hearing on behalf of the District.

Tamara Loughrey, Attorney at Law, appeared on behalf of Student. Attorney Justin Arnold also represented Student during some portions of the hearing. Student's mother (Mother) attended the hearing on Student's behalf. Student's father (Father) attended some portions of the hearing. Mother and Father speak Finnish and English.

Accordingly, a certified Finnish interpreter was present throughout the hearing. The interpreter interpreted for parents only on an as-needed basis and only infrequently.

On November 7, 2008, OAH received an amended request for a due process hearing from Student (Student's Complaint), identified as Case No. 2008100702, naming District. On November 10, 2008, OAH received a request for a due process hearing from District (District's Complaint) naming Student. That matter is identified was OAH Case No. 2008110371.

On December 3, 2008, OAH granted a motion to consolidate both cases. That order also specified that all applicable timelines and hearing dates would be those of OAH Case No. 2008100702. On that same date, OAH granted a joint motion for a continuance.

During the hearing, both parties requested leave to deliver their closing arguments in writing. The ALJ determined that there was good cause for a continuance for the parties to submit written closing arguments, and granted a continuance for that purpose. On April 6, 2009, OAH received the parties' written closing briefs. On that date, the record was closed and the matter submitted for decision.

STUDENT'S ISSUES¹

1. During the 2006-2007 school year (SY), did the District appropriately assess Student's:

- A. Psychoeducational functioning; and
- B. Speech and language?

¹ Student's issues were clarified at a prehearing conference conducted by another ALJ from OAH, and further clarified at the commencement of the due process hearing. They have been reworded for purposes of analysis.

2. During the 2007-2008 SY, did the District appropriately assess Student's:
 - A. Psychoeducational functioning; and
 - B. Speech and language?
3. Was the District's psychoeducational assessment completed on October 15, 2008, appropriate?
4. Did the District deny Student a free appropriate public education (FAPE) during the 2006-2007 SY by failing to provide him with appropriate:
 - A. Behavioral/social-emotional services, including:
 - i. Consultation;
 - ii. Behavioral aide support;
 - B. Reading (decoding, comprehension), self-help and living-skills goals?
5. Did the District deny Student a FAPE during the 2007-2008 SY by:
 - A. Failing to provide his parents with procedural safeguards regarding suspensions on May 17, 2008;
 - B. Failing to provide him with in-home program to teach theory of mind, preteach and reinforce academic subjects;
 - C. Failing to provide him with an appropriate behavioral aide;
 - D. Failing to provide him with appropriate reading (decoding, comprehension), self-help and living skills goals?
6. Did the District deny Student a FAPE during the 2008-2009 SY by:
 - A. Failing to provide his parents with procedural safeguards notice regarding suspensions on September 9, 2008 and September 18, 2008;
 - B. Predetermining the offer at the September 30, 2008, October 7, 2008, and October 15, 2008 IEP team meetings;
 - C. Failing to provide him with in-home program to teach theory of mind, preteach and reinforce academic subjects until October 2008 and after

- October 2008, and failing to provide a home program to address all of his needs;
- D. Failing to implement his behavioral support plans (BSPs) and failing to provide a trained aide;
 - E. Failing to provide him with appropriate self-help and living skills goals; and
 - F. Failing to provide him with appropriate services during his suspension and appeal to allow him to participate in the general education environment?

DISTRICT'S ISSUE²

1. Was the District's psychoeducational assessment completed on October 15, 2008, appropriate?

CONTENTIONS

Student contends that the District failed to conduct a psychoeducational evaluation during the 2006-2007 SY and 2007-2008 SY. District contends that it was not obligated to assess Student's psychoeducational functioning until 2008 because it assessed that area in 2005. With regard to speech and language, Student argues that the District's speech and language assessment completed in October 2006 was inadequate because it did not address pragmatic speech. District asserts that pragmatic speech was not an area of suspected disability for Student at the time of the October 2006 speech and language assessment. Regarding these assessments for the 2007-2008 SY, the Student and District contentions are the same as for the previous school year.

Regarding the District's psychoeducational evaluation completed in October 2008, Student contends that it was not appropriate because Scott Hatcher, the District school psychologist who conducted the evaluation, did not conduct a sufficiently

² District's Issue is identical to Student's Issue No. 3.

comprehensive evaluation.³ District contends that Mr. Hatcher's evaluation was legally sufficient.

Regarding FAPE for the 2006-2007 SY, Student alleges that the District should have provided a behavioral aide and behavioral consultation services. The basis for this contention was never made clear for this period. Student also alleges that Student required more goals in reading and goals in self-help and living skills in order to receive a FAPE. District argues that Student's program was sufficient at the beginning of the School year when Student was in a special day class and was appropriately "tweaked" at multiple IEP team meetings over the school year to address Student's escalating behaviors.

For Student's fourth grade SY, the 2007-2008 SY, he was placed in a regular education class at Mary Ann Sanders Elementary, with the support of a full-time one-on-one aide, resource specialist program (RSP) services, and behavioral consultation services from a nonpublic agency (NPA) called Genesis, along with related services. Student contends first that the District committed a procedural violation by failing to give Mother and Father notice of their rights in May 2008 after a behavioral incident. Substantively, Student argues that the District should have provided an in-home behavior program in order to implement a theory of mind program and to preteach and

³ Mr. Hatcher's daughter passed away unexpectedly after he testified, but during the due process hearing. The hearing ended early on one of the hearing days so that District personnel could attend the funeral proceedings. Mr. Hatcher's daughter's unexpected passing happened after Mr. Hatcher testified and, thus, in no way affected his testimony, or the factual determinations and/or the legal conclusions related to his assessment.

reinforce skills, an appropriate behavioral aide, additional goals in reading and goals in self-help and living skills. District argues that at all times it offered Student a FAPE.

For Student's fifth grade SY, the 2008-2009 SY, he remained at Mary Ann Sanders with substantially the same program as the previous year. Student alleges that he was procedurally denied a FAPE because his parents were not given procedural safeguards notice on two occasions when Student was suspended from school. Additionally, Student alleges that the District predetermined a new placement offer in September and October 2008, which was an offer designed to curb Student's escalating behaviors.

Substantively, Student argues that the District failed to offer Student services during a suspension and appeal, and failed to develop goals addressing self-help and living skills. Student also alleges that the District failed to offer a home program from the beginning of the SY to October 2008 to teach theory of mind, preteach academic skills and reinforce academic skills. After October 2008, District offered a new placement for Student at a nonpublic school (NPS). Student alleges that the District should have offered a home program instead of the NPS at that time. District argues, in relevant part, that the NPS offered Student a FAPE. Finally, Student alleges that the District denied him a FAPE by failing to implement Student's BSPs and that his new one-on-one aide was not qualified. District argues that it at all times offered Student a FAPE.

FACTUAL FINDINGS

JURISDICTION

1. Student is 13 years of age. During all times at issue in this case, he was a resident within the boundaries of the District, where he lives with his family. Student has been diagnosed with autism and is eligible under that category, which in California is entitled "autistic-like behaviors." He also is eligible under the category of specific learning disability (SLD).

FACTUAL BACKGROUND

2. Student moved to the boundaries of the District from Finland in October 2005. While in Finland, Student was eligible for special education services under Finnish law. Although Student speaks some Finnish, his primary language is English, and he has been taught using English and tested using English.

3. Student attended District schools from October 2005 to September 2008. In September 2008, about six weeks into the 2008-2009 SY, Student's parents removed him from school and began to provide private educational services at home. He has not returned to school since.

DISTRICT'S FAILURE TO ASSESS PSYCHOEDUCATIONAL FUNCTIONING DURING 2006-2007 SY

4. Student contends that the District failed to adequately assess him in the area of psychoeducational functioning during the 2006-2007 SY. The District argues that it was not obligated to assess Student because Student's parents never requested an assessment, that no teacher or school administrator requested an assessment, and that conditions did not warrant a District-initiated reassessment until his triennial assessment was due in October 2008.

5. The process for a special education assessment begins with a written referral for assessment by the parent, teacher, school personnel, or other appropriate agency or person. Local educational agencies (LEAs), like the District, are required to assess a student suspected of having a disability every three years, unless it determines that an earlier reassessment is warranted, or if a parent or teacher requests a reevaluation.

6. The District comprehensively evaluated Student in the fall of the 2005-2006 school year. The initial assessment included a psychoeducational evaluation. A psychoeducational report was prepared by District and presented to the family on

October 26, 2005. Therefore, the District was not required to reassess Student's psychoeducational functioning until October 2008, unless the District determined that an earlier assessment was warranted, or if a parent or teacher requested a reassessment.

7. There was no evidence that the District determined that a psychoeducational evaluation was warranted during the 2006-2007 SY. Likewise, Student's teachers did not request an assessment, and neither did his parents. Accordingly, District was not obligated to assess Student's psychoeducational functioning during this period.

DISTRICT'S FAILURE TO APPROPRIATELY ASSESS SPEECH AND LANGUAGE DURING 2006-2007 SY

8. Districts are required to assess a student in all areas of suspected disability whenever they conduct an assessment for the first time or in a particular area. Student contends that the District was required to assess Student's pragmatic language at the time of the October 2006 assessment because pragmatics, also referred to as social language, was an area of weakness for Student. District contends that pragmatics was not an area of suspected disability for Student.

9. A speech assessment was requested by Student's parents on October 10, 2006, at an IEP team meeting. Parents did not request that the assessment only address expressive and receptive language. Kay Phillips, a speech and language pathologist, conducted the assessment and reported her results one week later at an IEP team meeting held on October 17, 2006. Ms. Phillips administered the Expressive One-Word Vocabulary Test, the Receptive One-Word Vocabulary Test, the Language Processing Test, and the HELP Test; all tests that assess expressive and receptive language. Student was found eligible for speech and language services and a speech goal was proposed, consented to and implemented. Ms. Phillips did not assess Student's pragmatic language.

10. The evidence established that pragmatic language was an area of suspected disability at the time the District conducted its speech and language evaluation in October 2006. The privately obtained assessment that prompted the District's speech and language evaluation, an assessment by Dr. Arnold Herrera, which was provided to the District at or before an IEP team meeting held on October 10, 2006, states that Student should receive speech therapy "especially regarding the social aspects of language ..." Pragmatics and social language are the same. Mother also testified that Student had problems with pragmatics.

11. Because pragmatic language was an area of suspected disability as of October 2006, the District was required to assess that area. Because it failed to do so, the District's speech and language evaluation in October 2006 was inappropriate.

DISTRICT'S FAILURE TO ASSESS PSYCHOEDUCATIONAL FUNCTIONING DURING 2007-2008 SY

12. As determined above in Factual Findings 4-7, District was not required to conduct a psychoeducational assessment of Student until October 2008, unless it determined that further assessment was warranted, or if Student's parents or teachers requested a reassessment.

13. There was no evidence that anybody requested a psychoeducational evaluation or that the District determined one was warranted during the 2007-2008 SY. Therefore, the District was not required to reassess Student's psychological functioning during this period.

District's Failure to Assess Pragmatic Speech During 2007-2008 SY

14. As determined above in Factual Findings 8-11, District should have assessed Student's pragmatic language during the 2006-2007 SY. The need to assess continued the next school year. The District did not assess Student's pragmatic language

until August 2008. Accordingly, for the reasons stated above, the District failed to appropriately assess Student in the area of pragmatic language during the 2007-2008 SY.

Appropriateness of the District's Psychoeducational Assessment
Conducted by Scott Hatcher in October 2008

15. As previously determined, the District was required to conduct a triennial evaluation of Student in all areas of suspected disability by no later than October 2008. Districts are required to utilize testing and assessment materials and procedures selected and administered so as not to be racially, culturally, or sexually discriminatory; that are administered in a language and form most likely to yield accurate information; that are used for purposes for which the measures are valid and reliable; are administered by trained and knowledgeable personnel and are administered in accordance with any instructions provided by the test developer; are designed to assess specific areas of educational need, not provide a single general intelligence quotient; and do not use a single measure or assessment as the sole criterion for determining eligibility or determining appropriate educational programming.

16. Scott Hatcher, a school psychologist, completed the psychoeducational portion of the triennial evaluation in September 2008 and he presented his results at an IEP team meeting on October 15, 2008.

17. The evidence established that Scott Hatcher was appropriately qualified and experienced to assess Student. He was familiar with all of the assessment tools he utilized in assessing Student. Mr. Hatcher has a bachelor of arts in psychology from the University of South Carolina, a master's degree in counseling with an emphasis in school psychology from Sacramento State University, and a School Psychologist credential from the State of California. He was a credible witness and an expert in school psychology.

18. The evidence also established that Mr. Hatcher selected and administered tests most likely to lead yield accurate results and that are administered in a language and form most likely to yield accurate information which also addressed all of Student's psychoeducational areas of need. He administered the Behavior Assessment for Children (BASC), a behavior test; the Differential Abilities Scales (DAS), a cognitive test; the Wechsler Nonverbal Scale of Ability (Wechsler), a nonverbal cognitive test; the Vineland Adaptive Behavior Scales (Vineland), a test of adaptive functioning; the Neuropsychological Assessment (NEPSY), a developmental neuropsychological assessment; and the Woodcock-Johnson III (WJ-III), an academic achievement test. Moreover, the evidence also established that Mr. Hatcher administered all of the above assessments in accordance with the manufacturer's instructions in English, which was Student's primary language. Finally, the evidence established that assessments administered were not racially, culturally, or sexually discriminatory.

19. Finally, the evidence established that the District did not rely on a single test to determine needs and to develop Student's IEP. Mr. Hatcher administered multiple assessments, as listed above. In the area of cognitive ability, Mr. Hatcher administered a verbal and a nonverbal test to verify Student's low cognitive functioning. He chose to administer the Wechsler after the DAS because Student has expressive and receptive language delays.

20. As determined above, the District's psychoeducational evaluation met all legal requirements and was therefore appropriate.

Whether District Denied Student a FAPE During the 2006-2007 SY

21. Special education-eligible pupils are entitled to a FAPE. Substantively, a FAPE includes a program that is: (1) designed to meet a student's unique educational needs; (2) reasonably calculated to provide the student with some or meaningful

educational benefit; (3) provided in conformity with an individualized education program (IEP); and (4) provided in the "least restrictive environment" (LRE).⁴

22. A student's FAPE is delivered through a document called an IEP. When determining whether a particular IEP is substantively appropriate, the law requires that the IEP not be judged in hindsight. Rather, the IEP must be evaluated based on information available to the IEP team at the time it was developed, i.e., the "snapshot" in time.

23. At the commencement of the 2006-2007 SY, Student was placed in a special day class (SDC), a self-contained classroom where children with disabilities spend at least half of the day, located at Sylvan Elementary School. Student also received the designated instruction and services (DIS) of occupational therapy (OT) and speech and language therapy (SLT) pursuant to the operative IEP, developed on October 17, 2006.⁵ The Sylvan SDC was taught by a credentialed special education teacher. Student was "mainstreamed," meaning he was educated with his typically developing peers, for music and art. Student was in the fourth grade during this school year.

⁴ As discussed below, the LRE requirement is that children with disabilities must be educated with their typically developing, non-disabled peers to the maximum extent appropriate.

⁵ The October 17, 2006 IEP is the first IEP at issue during the 2006-2007 SY. Previous IEPs are not discussed because they were not at issue in this due process hearing.

Whether Student Required Behavioral Consultation and/or Behavioral Aide Services in October 2006

24. The bulk of the October 17, 2006 IEP is not at issue; i.e., it is not disputed that Student's placement at the Sylvan SDC, or that the DIS OT and SLT services for that matter, were substantively appropriate and designed to meet Student's unique needs. Similarly, it was not disputed that the October 17, 2006 IEP provided an education in the LRE for Student.

Student, however, does dispute whether, in addition to the above services, he should have received consultation services and a behavioral aide in the SDC. In essence, Student alleges that without the services of a behavioral aide and consultation services, Student's program was not reasonably calculated to provide him with some or meaningful educational benefit.

25. Although listed as an issue for the entire school year, Student presented no evidence whatsoever that he required an aide and/or behavior consultant services in the SDC to control problematic behaviors at the time of the October 2006 meeting. Indeed, the evidence established that Student exhibited relatively few problematic behaviors at the time of the October 2006 IEP team meeting. He got along well with his SDC teacher and, according to District witnesses, made academic progress until one of the adults in his classroom with whom he had a good relationship became ill. Student did not have a behavioral support plan (BSP), which is required whenever a student exhibits behaviors that interfere with learning, because his behaviors were generally under control. Student did not establish that an aide or consultation services were necessary for Student to receive a FAPE.

Whether Student Required Self-help and/or Living Skills Goals in October 2006

26. Student also contends that the October 2006 IEP did not offer a FAPE because it lacks goals to address alleged needs in the areas of self-help and living skills. The basis for this allegation was never made clear because there was no evidence of such needs. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the pupil's needs that result from the pupil's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the pupil's disability.

27. There was no evidence that either self-help and/or living skills were an area of unique need at the time of the October 2006 IEP. Instead, the evidence established that these areas *were not* areas of need for Student. Student's parents obtained a private assessment in April 2007 from Kaiser's Autism Spectrum Disorders Clinic. Kaiser found that Student was capable of dressing, grooming and bathing himself – all fundamental self-help and living skills.

28. Because self-help and living skills were not areas of unique need as of October 2006, the District did not deny Student a FAPE by failing to draft goals in those areas.

Whether Student Required Additional Reading Goals (Decoding and Comprehension) in October 2006

29. Reading was an area of unique need for Student.

30. The October 2006 IEP had one goal that addressed reading. The goal addressed fluency, which is a function of decoding, pacing and accuracy. The evidence established that this goal adequately addressed decoding.

31. Michal Post is a credentialed teacher and a part-time professor of special education. She was both a credible witness and an expert in curriculum development.

She testified that the October 2006 IEP should have included an additional reading goal to address the basic building blocks of reading in order to improve Student's general ability to read. Ms. Post noted that Student scored in the 1st percentile in broad reading on the WJ-III, a test of achievement, which was administered to Student in October 2005. She explained, in pertinent part, that because his score on that evaluation was so low that he "probably" required an additional goal to address reading comprehension.

32. The District called no witness and presented no evidence that contradicted Ms. Post's plausible testimony that Student should have had an additional reading goal to address comprehension based on his low WJ-III broad reading score obtained in October 2005. Ms. Post's testimony therefore established that the October 2006 IEP was not designed to meet all of Student's unique needs because it lacked a reading goal addressing comprehension.

33. Although it has been determined that the October IEP was substantively deficient because it lacked sufficient reading goals, the inquiry does not end there. Not all substantive failures require a finding that an IEP denied a student a FAPE. Only material failures result in a FAPE denial.

34. The lack of sufficient reading goals was an immaterial failure and therefore it did not result in a FAPE denial. The evidence established that, although Student did not have goals addressing all of his discrete reading needs, Student's SDC at Sylvan addressed the building blocks of reading on a daily basis, including the area of deficit identified by Ms. Post. Student's program at Sylvan addressed phonics, word attack and vocabulary, and reading comprehension in the everyday curriculum. As a result, although Student required one more reading goal than the District developed, this failure did not result in a substantive FAPE denial.

Whether Student Required Behavioral Consultation and/or Behavioral Aide
During the Rest of the 2006-2007 SY

35. During the 2006-2007 SY, Student's behaviors at school began to escalate. To address this problem, the District convened a series of IEP team meetings beginning in February 2007.

36. Concurrently with the IEP team meetings, the District initiated an assessment of Student's behaviors. Amalie Holly, a Stanislaus County employee at the time, conducted a functional behavioral assessment (FBA) and drafted a behavioral support plan (BSP) to address Student's behaviors. Ms. Holly is a board certified behavioral analyst (BCBA). Her FBA and BSP addressed Student's primary problematic behaviors at that time: off-task/non-compliance (blurting out, talking to others) and tantruming (crying, yelling, screaming).

37. Ms. Holly's FBA and BSP were presented at an Addendum IEP team meeting held in March 7, 2007. At this meeting, Student's parents requested that the District eventually move Student to a regular education environment with a behavioral aide. Student's parents took the BSP home to review it before agreeing to its implementation. Student's parents provided their signed consent to the District's request to assess Student to determine if he should be moved from the SDC to a regular education classroom with an aide.⁶

38. About one week after the March 7, 2007 meeting, on a date not disclosed by the evidence, Student's parents consented to the implementation of the BSP prepared by Mr. Holly. It was not disputed that the BSP was appropriate.

⁶ The evidence did not establish whether or not this "assessment" actually took place. It is not relevant, however, to the issues that must be heard and decided in the instant matter.

39. The addendum IEP team reconvened on March 19, 2007, to “discuss placement needs [including] whether a more restrictive environment is necessary.” The team discussed whether Student should be removed from his SDC at Sylvan to a Stanislaus County “autism” program located at Stroud Elementary School. No decision was made regarding moving Student at that time. However, to address Student’s escalating behaviors in the meantime, the District assigned an instructional aide to Student for four hours each day. Additionally, the services of a behavioral intervention case manager (BICM) were also added to Student’s IEP, two times per month, 20 minutes per session.

40. The following month, the IEP team met again and agreed to move Student from the SDC at Sylvan to C. F. Brown Elementary. Student was placed in the regular education environment at C. F. Brown with a one-to-one instructional aide and behavioral consultation services provided by a state-certified nonpublic agency (NPA) called Genesis commencing at the end of April 2007. Student’s placement at C. F. Brown was temporary. He was placed there until the District could complete construction of a new school called Mary Ann Sanders Elementary, which it anticipated would be finished in the summer of 2007.

41. Student remained at C. F. Brown for the remainder of the school year. He continued to exhibit the same types of behaviors in class and on campus that he had previously exhibited.

42. The evidence did not establish that Student required behavioral consultation services or aide services prior to his move from the Sylvan SDC to C. F. Brown Elementary, beyond those that were agreed to and actually provided. No witness testified that any additional services were required, and there was no other evidence to that effect. Instead, the evidence established that the IEP team worked collaboratively to address Student’s behaviors throughout the second half of the school year: Behavior

was assessed, a BSP was developed and implemented, consultation services were initiated, an aide was provided, and finally, when his behaviors did not dissipate substantially, the team agreed to try a different placement. There was no FAPE violation.

Whether Student Required Self-help and/or Living Skills Goals During the Rest of the 2006-2007 SY

43. It was previously determined that Student had no unique self-help and/or living skills needs as of October 2006. The evidence did not establish that anything changed in that regard during the remainder of the 2006-2007 SY. The IEP team meetings that were held during the second half of the SY addressed behaviors, not self-help or living skills. Accordingly, for the identical reasons previously stated, the District was not obligated to develop goals in these areas during any of the IEP team meetings held during the remainder of the 2006-2007 SY.

Whether Student Required Additional Reading Goals (Decoding and Comprehension) During the Rest of the 2006-2007 SY

44. It was previously determined that the District should have developed an additional reading goal as of October 2006 because of Student's unique needs in that area. The District never developed additional reading goals at any of the IEP team meetings held during the remainder of the school year. Accordingly, Student's IEP remained substantively inappropriate.

45. Nonetheless, the evidence established that even without the required goals, the District's ongoing failure was immaterial and therefore not a FAPE violation because Student continued to receive instruction in the additional reading areas previously identified at both Sylvan and at C. F. Brown Elementary. Student was provided a FAPE during the 2006-2007 SY.

Whether the District Denied Student a FAPE during the 2007-2008 SY

46. As discussed above, Student transitioned to a general education class with a full-time one-on-one aide at the end of the 2006-2007 SY. Student's annual IEP team meeting was convened in October 2007, and it was the IEP developed at that meeting that was at issue with regard to the 2007-2008 SY. During the summer, the District completed construction of Mary Ann Sanders Elementary, and Student started the school year at that site with the same program and related services as the previous year. He was placed in a regular 4th grade classroom taught by Sandra Forcade. Student was assigned a full-time one-on-one aide named Myrna Fairbanks, and he received resource specialist program (RSP) services from Shannon Hess.

47. Like the previous year, it was not disputed that the bulk of Student's IEP for the 2007-2008 SY, developed and agreed to at an IEP team meeting on October 17, 2007, provided a FAPE. For example, it was not disputed that most of Student's numerous annual goals were appropriate in that they addressed Student's areas of unique need, and/or that the services listed above were reasonably calculated to provide Student with some or meaningful educational benefit. The only areas of need not addressed appropriately, according to Student, were reading, including decoding and comprehension, social skills, and living skills.

Student's primary contention for the 2007-2008 SY was that his aide, Myrna Fairbanks, was not appropriately qualified and that Student required a 10-hour per week "home program" where academic subjects in Ms. Forcade's class could be pre-taught and reinforced at home, and where Student would be provided a "theory of mind" program. Student also alleges that the District procedurally denied Student a FAPE by failing to give his parents procedural safeguards on May 17, 2008.

Whether the District Failed to Provide Student with Notice of Procedural Safeguards Regarding Suspensions on May 17, 2008

48. Districts are required to give parents of children with disabilities notice of procedural safeguards when, in relevant part, "on the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct." The failure to provide such a notice is a procedural violation.

49. Procedural violations, such as failing to give parents notice of procedural safeguards when a district disciplines a student in special education, may result in a denial of FAPE. Procedural denials result in a FAPE denial only if they significantly impede on the parents' right to participate in the IEP decision making process, impede a child's right to a FAPE, and/or cause a deprivation of educational benefits.

50. Turning to Student's allegation, there was no evidence that Student was disciplined on or near May 17, 2008. There was no procedural violation because there was no reason why the District was obligated to provide Student's parents with any notice on or near that date.⁷

Whether Student Required Self-help and/or Living-skills Goals in October 2007

51. As previously discussed, when determining if an IEP is substantively appropriate, the IEP must be evaluated based on information available at the time it was developed.

⁷ This sub-issue appears to have been mistakenly pled by Student in the complaint, as it is not addressed in his closing argument.

52. Like the previous SY, there was no evidence that self-help and/or living skills were areas of need in October 2007. Accordingly, goals were not required in those areas. There was no FAPE violation.

Whether Student Required Additional Reading Goals (Decoding and Comprehension) in October 2007

53. Student's allegations for the October 2007 IEP were not made abundantly clear. Unlike the previous SY, a reading comprehension goal was added to the IEP in October 2007, in addition to the previous goal that addressed decoding.

54. Student's expert, Michal Post, testified generally that the 2007 reading goals were vague and could not be implemented. Student's reading comprehension goal was for Student to identify five "who, what, when, where and how questions" with 90 percent accuracy in two consecutive trials." Ms. Post did not understand how a teacher could implement this goal. Her testimony was not persuasive on this point. Shannon Hess drafted the goals and was responsible for their implementation as Student's RSP teacher during the 2007-2008 SY. Ms. Hess, who has been teaching for about two years, explained that this goal is measurable and explained clearly how it was implemented and that Student made progress during the school year. Ms. Hess's testimony was more persuasive because she was able to implement, and actually implemented, the goal that Ms. Post said could not be implemented, and Student made progress toward achieving the goal despite his behaviors that interfered with learning, as reported in the October 2008 IEP team meetings. There was no violation.

Whether Student Required a Home Program During the 2007-2008 SY

55. As previously discussed, Student alleged that the District should have supplemented Student's school program with a home program to reinforce and pre-

teach what Student was learning at school, and primarily to implement a methodology called “theory of mind” to help with Student’s social skills.

56. The evidence established that “theory of mind” is a methodology used to teach children, and often children with autism, about understanding their feelings and other’s feelings. Student had difficulty as of October 2007 understanding his feelings and other’s feelings. For example, he would occasionally cry when it was appropriate to laugh. These actions impacted his social relationships with others (as did his significant behavior problems).

57. When determining if an IEP is appropriate based on then available information, the law requires that the ALJ focus on the adequacy of the IEP developed by the District – not the IEP that the parents and/or others wanted because they thought it would provide the child with the “best” education. As long as the IEP provides the child with the basic floor of opportunity, i.e., is designed to meet the child’s unique needs and reasonably calculated to provide the Student with some or meaningful educational benefit, the IEP is appropriate even if additional services and supports would benefit the child more.

58. Examining Student’s allegation under this standard, no home program was required. The October 2007 IEP *without* a home program met or exceeded the standard. As discussed above, the bulk of Student’s IEP was not challenged as inappropriate, including: his placement in a regular 4th grade class with a full-time aide, daily RSP services, DIS services (adapted physical education, speech and language, and occupational therapy), plus the services of behavioral consultant from an NPA who oversaw Student’s aide and the implementation of his BSP. As determined above, Student had no other unique needs that were not met through goals and appropriate services. His IEP therefore offered a FAPE, and Student was provided a FAPE.

59. Because it has been found above that the IEP was legally sufficient, it is not necessary to address Student's allegations about the home program. Nevertheless, out of an abundance of caution, Student's allegations regarding why a home program was necessary will be addressed below.

60. First, with regard to the need for a home program to reinforce and pre-teach what was being taught in the classroom, there was no witness that testified that this was necessary for Student to receive a FAPE. And although an IEP is not to be judged in hindsight, Student actually made progress toward achievement of many of his academic goals during the school year, as reported at subsequent IEP team meetings, without pre-teaching and/or reinforcement in a home program.

61. Second, with regard to the methodology "theory of mind," Student presented no evidence why social skills could not be, and were not, worked on and taught to him at school. And the great weight of the evidence established that all those involved in Student's education worked on and taught him social skills during school hours. Student's behavioral consultant, aide, and RSP teacher all worked on social skills during the school day. Additionally, the District did utilize and implement the methodology of "theory of mind" with Student at school during the school year. Both his NPA behavioral consultant and his RSP teacher utilized and implemented "theory of mind" to address social skills during the second half of the year. There was no need for a home program to address "theory of mind."

Whether Myrna Fairbanks was Appropriately Qualified to be Student's Aide

62. Although listed as a sub-issue, Student presented no evidence that Ms. Fairbanks was not appropriately qualified to work as Student's aide. Student did not call Ms. Fairbanks as a witness and her training and experience were not established by the evidence. Nonetheless, all who testified, including Mother, explained that Ms. Fairbanks

was an excellent aide. Student failed to meet his burden of establishing that Ms. Fairbanks was not qualified.

Whether the District Denied Student a FAPE During the 2008-2009 SY

63. Student was placed in a regular education fifth grade class taught by David Humphrey at the beginning of the 2008-2009 SY (July 2008). Pursuant to his October 2007 IEP, which was not due to be reviewed and revised until the annual IEP team meeting in October 2008, Student received all of the same services and supports that he received in the previous school year. That IEP was determined above to offer Student a FAPE.

64. In June 2008, just prior to the beginning of the school year, District held a meeting to discuss parent's request for a home program to implement the "theory of mind" methodology. The District denied parent's request for the identical reasons as before; because Student's school program adequately addressed Student's social skills needs.

65. At the end of September and beginning of October 2008, the District convened three IEP team meetings regarding a manifestation determination, Student's triennial review, and Student's annual IEP team meeting. At the final IEP team meeting held on October 15, 2008, District offered to change Student's placement from a regular education class at Mary Ann Sanders to Sierra Vista, which specializes in educating children who exhibit behavior problems.

66. Student's FAPE denial allegations fall into two categories: procedural and substantive. Procedurally, Student alleges that the District failed to give parents notice of procedural safeguards in September 2008 contemporaneously with two disciplinary removals. Additionally, Student alleges that the District predetermined its ultimate recommendation to recommend a change of placement from Mary Ann Sanders to Sierra Vista.

67. Substantively, Student argues that that the District should have provided Student a home program up to October 2008 to provide theory of mind, preteaching and reinforcement of academic skills, failed to provide goals addressing self-help and living skills, failed to implement his BSPs, and failed to provide him with appropriate services while Student was suspended in the fall of 2008. Additionally, Student argues that after October 2008, District should have offered all services at the home.

Whether the District failed to Provide Student's Parents with Procedural Safeguards Notice on September 9, 2008 and September 18, 2008

68. As previously discussed, a district is required to provide parents with notice of procedural safeguards, in relevant part, on the date on which the decision is made to make a disciplinary removal that constitutes a change of placement. Disciplinary removals of less than 10 days do not constitute a "change in placement."

69. On September 9, 2008, Student was suspended for "committing an obscene act," "engaging in habitual profanity/vulgarity," and disrupting school activities. Student was suspended for only one day. Because he was suspended for only one day, the District did not make a decision to remove him for a period that would have constituted a change in placement. The District was not required to provide Student's parents with procedural safeguards for the one-day suspension on September 9, 2008. There was no procedural violation.

70. On September 18, 2008, Student was suspended for three days for threatening physical injury to another person and for disruption of school activities. As before, the District was not required to provide Student's parents with procedural safeguards because it was not established that the three-day disciplinary removal constituted a change of placement. There was no procedural violation.

71. Assuming *arguendo* that the District was required to provide Student's parents with procedural safeguards notice, there was no evidence that this failure

significantly impeded the parents' right in the decision making process, and the procedural violation therefore did not constitute a denial of FAPE. Parents received their procedural safeguards notice at least 13 times in the 23 months prior to September 2008. Additionally, the District held a manifestation IEP team meeting to discuss Student's behaviors on September 30, 2008. At the meeting, Student's attorney was present and the procedural safeguards notice was discussed, according to the IEP.

Whether Student Required a Home Program During the 2008-2009 SY up to October 2008

72. Student alleges that he required a home program during the 2008-2009 SY. It was previously determined that the Student did not require a home program during the 2007-2008 SY for pre-teaching and reinforcing skills and/or to implement a theory of mind program at Student's home.

73. It was determined above that Student did not require a home program during the 2007-2008 SY because the District offered Student a FAPE in the October 2007 IEP, which was to be revised at the annual meeting in October 2008.

74. Student failed to establish that anything changed during the implementation of the October 2007 IEP such that a home program became necessary at the beginning of the 2008-2009 school year, which began in July 2008. Although Student's parents asked for one at an IEP team meeting in June 2008, Student failed to establish that anything had changed such that Student required a home program. Student continued to make progress in all areas but behaviors, which was Student's primary area of need.

Whether Student Required a Home Program After October 2008 in Lieu of Sierra Vista

75. In October 2008, the District offered a new placement at Sierra Vista. Sierra Vista is a state-certified nonpublic school (NPS) which primarily educates children who

exhibit serious behavioral problems. While many of the children at Sierra Vista are emotionally disturbed, it also serves children like Student who have autism. At the time the District made its offer of Sierra Vista, Student had been suspended twice in a six-week period, and the unanimous testimony of all witnesses was that his behaviors, including hitting, throwing objects, tantruming, noncompliance and general aggression, were so intense that they were interfering with his learning and that of other students. Parents sought a home program where all academic and special education services could be delivered until his behaviors could be controlled, but the District offered Sierra Vista with a transition plan where he would go for only part of the day until he could be acclimated to the school.

76. The great weight of the evidence established that Sierra Vista was an appropriate placement offer as of the October 2008 IEP team meeting. Because Sierra Vista specializes in behaviors like those displayed by Student, the offer was reasonably calculated to provide him with meaningful educational benefit. The evidence established that Student's behaviors were severe and interfered with learning. Student required more than a behavioral aide.

77. Regarding the parents' preference for a home program beginning in October 2008, District properly rejected their request. As discussed above, districts are required to educate all children in the least restrictive environment. The most restrictive environment is a home program where a pupil has no access to peers, typically developing or not. While Sierra Vista had no typically developing peers, it was a less restrictive environment for Student than a home program, and the District was legally required to reject Parents' request in that regard.

Whether the District Predetermined its Offer of Sierra Vista at the September and October 2008 IEP Team Meetings

78. Student alleged that the District predetermined its offer of Sierra Vista at three IEP team meetings held in September and October 2008. While a school district is permitted to meet prior to an IEP team meeting to discuss options, personnel must come to IEP team meetings with an open mind. A district's failure to discuss plausible options in good faith; i.e., to predetermine an offer, disenfranchises the parent and constitutes a procedural violation.

79. Student's attorney was present at all three of the above meetings, which were recorded and eventually transcribed. Although some district personnel met prior to one of the meetings, there was no evidence that they predetermined Sierra Vista as their offer of FAPE. All District witness testified that they did not predetermine the Sierra Vista offer. Their testimony was supported by the meeting transcripts, which reflect multiple discussions of placement options over the three meetings, which options included Student's current (regular education) placement, a home program and Sierra Vista. There was no procedural violation.

Whether Student Required Goals Addressing Self-help and Living-skills

80. Student presented no evidence that self-help and living skills were areas of unique need for Student. The District was not required to develop goals addressing these areas.

Whether Tracy Barries was Qualified and Whether the District Implemented Student's BSPs During the 2008-2009 SY

81. Student's primary allegation at the hearing was that the aide assigned to Student, Tracy Barries, (1) was not qualified; and/or (2) failed to implement Student's BSPs during the approximate six-week period from July 2008 until Student's parents unilaterally and permanently removed Student from Mary Ann Sanders on September

22, 2008. Districts must provide qualified individuals to instruct children and they are required to implement IEPs as they are written. However, only a material failure to implement an IEP constitutes a FAPE denial.

82. The evidence established that Tracy Barries was qualified to be Student's behavioral aide. Mr. Barries has a bachelor's degree in sociology. The District selected Mr. Barries to work with Student because he had successfully worked with other Students with severe behavioral problems as a gang coordinator in Stockton, California, for seven years, and because he had worked with children with autism. In addition to his previous work experience, Mr. Barries received 30 hours of training from Genesis, a state-certified NPA. Genesis was responsible for oversight of Student's behavioral services and implementation of his BSPs, which Genesis developed. After the initial training, Mr. Barries received regular, ongoing training from Genesis at Mary Ann Sanders from certified behavior consultants employed by Genesis. He was qualified to be an aide.⁸

83. Mr. Barries was a credible witness. His testimony established that he implemented Student's BSPs with fidelity to the extent possible. Student's non-compliance behaviors escalated such that implementation of the BSPs would have caused Student to disrupt the class or other classes. Multiple district witnesses testified that during the approximate six-week period that Mr. Barries worked with Student, Student's behaviors escalated to the extent where it was not always possible to implement the plans exactly as written, because they would have required the District to leave Student in the classroom while tantruming, exposing himself, hitting, or other disruptive behavior. Student's tantrums sometimes lasted 15 minutes or longer and

⁸ There was no evidence presented regarding what, e.g., the minimum education requirements are for an aide. Student presented no evidence in that regard.

could not always be controlled – even the highly experienced behavioral consultants from Genesis experienced tantrums during the six-week period which were so loud that multiple adjoining classrooms were disrupted. Eventually the principal of Mary Ann Sanders, Russell Antracoli, directed Mr. Barries not to strictly follow the BSPs because doing so appeared to cause Student’s behaviors to escalate. In particular, Mr. Barries was directed to allow Student additional computer time (a preferred activity) to keep Student from acting out.

84. While Mr. Barries was an appropriately trained aide, he was not strong in the area of simultaneous data collection, which was one of his duties as Student’s aide. He sometimes failed to keep all of the data that Genesis asked him to record regarding Student’s behaviors. In particular, he sometimes failed to provide “consequence” data simultaneous with an observation. Romina Kiryakous, one of Student’s behavioral consultants and the owner of Genesis, testified that this data was necessary to determine what the function of Student’s behavior was, i.e., why he was becoming so increasingly noncompliant and disruptive. Although Mr. Barries sometimes failed to simultaneously record data, the evidence established that he logged most of the required information at the end of the day in summary form.

85. Mr. Barries’s failure to record data and strictly comply with Student’s BSPs did not deny Student a FAPE because the failures were not material. It was not established that these failures *caused* Student’s behaviors. Student’s behaviors began escalating during the end of the previous school year (2007-2008) and there was no evidence that the previous aide, Ms. Fairbanks, did not appropriately implement Student’s behavior plans.⁹ Moreover, the failures were infrequent and Student was only

⁹ The evidence established that Ms. Fairbanks no longer wanted to work with Student because of his difficult behaviors.

in school for six weeks before his parents removed him. Additionally, the District provided ongoing consultation on an as-needed basis – Genesis personnel were frequently on-site during the six-week period working with Mr. Barries and Student in an effort to ensure appropriate implementation of Student’s BSPs. Finally, the District initiated a new FBA during the six-week period in order to revise Student’s BSP. For all of the above reasons, although Mr. Barries did not always follow the BSPs, the failure was immaterial.

86. In summary, Tracy Barries was appropriately qualified to work as an aide for Student. Moreover, while Mr. Barries did not always implement the BSP, this failure was not material.

Whether the District Failed to Offer Student Appropriate Services During his Suspension and Appeal

87. Districts are not required to provide special education services during a period of suspension until a child had been suspended for more than 10 days.

88. Student was not suspended for more than 10 days during the 2008-2009 SY. He was suspended for only five days. After the September 18, 2008, suspension, Student was free to return to school. He is not entitled to services because his parents chose not to return him to school after that period.

Remedies

89. It has been found above that the District failed to assess Student’s pragmatic language needs for almost two years beginning in October 2006. When a District fails to fulfill its legal obligations, appropriate relief may include compensatory education.

90. In the instant case, the District’s failure to assess pragmatic needs deprived the IEP team of information it needed to determine if Student required goals and

services. It has been previously determined that pragmatic language was an area of suspected disability. It was also an area of unique need. Student's speech and language providers, his RSP teacher, and others partially addressed this area during the two years in which it was not assessed *because* he had obvious deficits, as a child with autism. However, because the District failed to assess Student in this area, there is a dearth of information about what he needed during the period and very little information about what he incidentally received during this period. In short, as a result of the District's failure, there is little information regarding what Student lost and what an appropriate compensatory remedy should include.

91. The only information about Student's previously unidentified deficit during the approximate two-year period it failed to assess his pragmatic language was the assessment it conducted at the end of that period. Student's October 2008 IEP states that "[Student] has significant delays in the areas of: pragmatics ..." Two pragmatic language goals were added to Student's IEP, and an additional 20 minutes of speech and language services per week were offered.

92. It is reasonable to assume that the "significant delays" Student exhibited in October 2008 also existed in October 2006 when the District should have assessed Student's pragmatic language. Using the additional services offered in October 2008 as a benchmark, the District shall provide Student with 20 minutes per week of small-group speech and language DIS for two school years to compensate him for what he lost because of the District's failure to assess and resultant failure to identify his unique need in pragmatics. This DIS service is in addition to, and shall not supplant, the services prospectively necessary to provide Student a FAPE.

LEGAL CONCLUSIONS

1. The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

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

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

4. There are two parts to the legal analysis in claims brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) Second, the court must assess whether the LEA's proposed program was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.) In addition, the educational program must be in the LRE, which requires that a child, to the maximum extent appropriate be educated with typically developing, non-disabled peers. (*Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398; cert. denied (1994) 512 U.S. 1207; 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).)

5. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) ___ F.3d ___, 2009 WL 349795; *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3.)

6. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley's* "some educational benefit" simply as "educational benefit" (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 645.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir.2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

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

not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon, supra*, 195 F.3d at p.1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

DISTRICT'S ISSUE/STUDENT'S ISSUE 3

Was the District's psychoeducational assessment completed on October 15, 2008 appropriate?

8. Whenever a district assesses a student, the student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subds.(e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4).)

9. A reassessment of the student shall be conducted if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment, or if the pupil's parents or teacher requests a reassessment. (Ed. Code, § 56381.) A reassessment shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise, and shall occur at least once every three years, unless the parent and the local educational agency agree, in writing, that a reassessment is unnecessary. (Ed. Code, § 56381.)

10. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii).) Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on

what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer. (Ed. Code, § 56320, subd. (b)(1); 34 C.F.R. § 300.304(c)(1)(ii).)

11. Tests and other assessment materials must be administered by trained and knowledgeable personnel and must be administered in accordance with any instructions provided by the producer of the assessments, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3); 34 C.F.R. § 300.304(c)(1)(iv), (v).)

12. The assessment of a pupil, including the assessment of a pupil with a suspected low incidence disability, shall be conducted by persons knowledgeable of that disability. (Ed. Code, § 56320, subd. (g).) A disability is defined as mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, or specific learning disability. (34 C.F.R. § 300.8(a)(1).) "Low incidence disability" means a severe disabling condition of hearing impairment, vision impairment, and severe orthopedic impairment, or any combination thereof. (Ed. Code, § 56026.5.)

13. Pursuant to Factual Findings 15 to 20, and Legal Conclusions 8 to 13, the District conducted a legally sufficient psychoeducational evaluation of Student as part of his triennial evaluation in October 2008. Scott Hatcher was appropriately qualified, trained, and he utilized a variety of assessment tools to determine Student's cognitive functioning.

STUDENT'S ISSUES

Issues 1(a) and 2(a): Whether the District appropriately assessed Student's psychoeducational functioning during the 2006-2007 SY and 2007-2008 SY?

14. Pursuant to Factual Findings 4-7 and 12-13, and Legal Conclusions 8-13, District was not obligated to assess Student's psychoeducational functioning until October 2008. There were no intervening request to reassess during the 2006-2007 and 2007-2008 SYs, no District-determined need to reassess, and his triennial evaluation was not due until October 2008.

Issues 1(b) and 2(b): Whether the District appropriately assessed Student's speech and language during the 2006-2007 SY and 2007-2008 SY?

15. Pursuant to Factual Findings 8-11 and 14, and Legal Conclusions 8-13, District was obligated to assess Student's pragmatic language beginning in October 2006 through August 2008 when it commenced a pragmatic language assessment. Pragmatic language was an area of suspected disability during that period and should have been assessed by the District. The District failed to appropriately Student's pragmatic language needs during this period.

Issue 4(a): Whether the District denied Student a FAPE during the 2006-2007 SY by failing to offer Student behavioral/social emotional services including consultation services and behavioral aide support?

16. Pursuant to Factual Findings 21-25 and 35-42, and Legal Conclusions 2-7, there was no evidence that Student required consultation services and behavioral aide support until the District offered and provided said services during the second semester of the 2006-2007 SY. The evidence established that the offer was appropriate at the snapshot in time that it was developed, and that it was appropriately altered through a

collaborative IEP and assessment process through the remainder of the SY. Accordingly, the District did not deny Student a FAPE.

Issue 4(b): Whether the District denied Student a FAPE during the 2006-2007 SY by failing to offer goals addressing reading (decoding, comprehension), self-help and living skills?

17. Among the information that shall be stated in an annual IEP is a statement of measurable annual goals designed to: (1) meet the student's needs that result from the individual's disability to enable the student to be involved in and make progress in the general curriculum; and (2) meet each of the student's other educational needs that result from the student's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

18. Not all substantive failures require a finding that a district denied a student a FAPE. Failures must be "material" and not de minimus in order to constitute a FAPE denial. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.) 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 v. Baker School Dist.*, supra, 502 F.3d at p. 822.)

19. Pursuant to Factual Findings 26-28 and 43, and Legal Conclusions 2-7 and 17, Student's IEP was not legally insufficient because it lacked self-help and/or living skills goals, because these were not area of unique need.

20. Pursuant to Factual Findings 29-34 and 44-45, and Legal Conclusions 2-7 and 17-18, Student's IEP was legally insufficient because it should have included a goal addressing Student's reading comprehension. However, the failure to include a reading comprehension goal was not a material failure because reading comprehension was

addressed in Student's program during the relevant time period and because Student made progress in this area.

Issue 5(a): Whether the District denied Student a FAPE during the 2007-2008 SY by failing to provide Student's parents with procedural safeguard notice on May 17, 2008?

21. Pursuant to Factual Findings 48-50, and Legal Conclusion 26, District was not required to provide procedural safeguards notice to parents because he was not disciplined on or near that date. There was no procedural violation.

Issue 5(b): Whether the District denied Student a FAPE during the 2007-2008 SY by failing to provide Student with an in-home program to teach theory of mind, preteach and reinforce academic subjects?

22. Pursuant to Factual Findings 55-, 61 and Legal Conclusions 2-7 and 17, Student did not require a home program because the District's offer, which did not include a home component, was otherwise appropriate.

Issue 5(c): Whether the District denied Student a FAPE during the 2007-2008 SY by failing to provide Student with an appropriate behavioral aide?

23. Pursuant to Factual Finding 62, and Legal Conclusions 3-7 and 17, Student did not require a home program because Myrna Fairbanks was an appropriately qualified aide. Additionally, pursuant to Legal Conclusion 2, Student bore the burden of establishing by a preponderance of the evidence that Ms. Fairbanks was not qualified, and there was no such evidence.

Issue 5(d): Whether the District denied Student a FAPE during the 2007-2008 SY by failing to offer goals addressing reading (decoding, comprehension), self-help and living skills?

24. Pursuant to Factual Findings 51-52, and Legal Conclusions 2-7 and 17, Student's IEP was not legally insufficient because it lacked self-help and/or living skills goals, because these were not areas of unique need.

25. Pursuant to Factual Findings 53-54, and Legal Conclusions 2-7 and 17-18, Student's IEP had appropriate reading goals addressing the areas of decoding and comprehension. There was no FAPE violation.

Issue 6(a): Whether the District denied Student a FAPE during the 2008-2009 SY by failing to provide Student's parents with procedural safeguard notice on September 9 and September 18, 2008?

26. Districts are required to provide parents with procedural safeguard notice "on the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability" because of a violation of school rules. (34 C.F.R. § 300.530(h).) A "change of placement" is a single removal for more than 10 consecutive school days or a series of removals which constitutes a pattern. A pattern occurs when, in relevant part, the total number of school days of removal is greater than 10 days. (34 C.F.R. § 300.536(a).)

27. Pursuant to Factual Findings 68-71, and Legal Conclusions 26, District was not required to provide Student with notice of procedural safeguards because it never made a determination to remove Student for a period that constituted a change of placement, i.e., the total days of suspension equaled five days. There was no procedural violation.

Issue 6(b): Whether the District denied Student a FAPE during the 2008-2009 SY by predetermining its offer at the September 30, October 7, and October 15, 2008 IEP team meetings?

28. Among the information that an IEP team must consider when developing a pupil's IEP is the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).) In *W.G. v. Board of Trustees of Target Range Unif. Sch. Dist. No. 23*, *supra*, 960 F.2d at p.1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

29. Pursuant to Factual Findings 78-79, and Legal Conclusions 4-5 and 28, District did not predetermine its offer of Sierra Vista. There was procedural violation.

Issue 6(c): Whether the District denied Student a FAPE during the 2008-2009 SY by failing to provide him with in-home program to teach theory of mind, preteach and reinforce academic subjects until October 2008 and after October 2008, failing to provide a home program to address all of his needs?

30. Pursuant to Factual Findings 72-74, and Legal Conclusions 2-7, and 17, Student did not require an in-home program at the beginning of the SY up to October 2008.

31. Pursuant to Factual Findings 75-77, and Legal Conclusions 2-7, and 17, an in-home program after October 2008 in lieu of the District's offer of Sierra Vista was not the LRE for Student, and the District could not legally place Student in an in-home program because to do so would have denied Student a FAPE.

Issue 6(d): Whether the District denied Student a FAPE during the 2008-2009 SY by failing to implement his BSPs and by providing an unqualified aide?

32. Pursuant to Factual Findings 81-86, and Legal Conclusions 2-7, and 17-18, Student's aide was appropriately qualified. However, the District failed to implement Student's BSPs for six weeks at the beginning of the 2008-2009 SY. This failure, however, was not material because there was only a minor discrepancy between what was supposed to be provided and what was not provided. Mr. Barries's failures did not cause a deprivation of benefits, the period at issue was short (6 weeks), and the failures were infrequent.

Issue 6(e): Whether the District denied Student a FAPE during the 2008-2009 SY by failing to offer goals addressing self-help and living skills?

33. Pursuant to Factual Finding 80, and Legal Conclusions 2-7 and 17, Student had no unique need for goals addressing these areas.

Issue (f): Whether the District denied Student a FAPE during the 2008-2009 SY by failing to provide him with appropriate services during his suspension and appeal to allow him to participate in the general education environment?

34. During the first 10 days in which a child is disciplined, the District is not required to provide special education and/or related services. (34 C.F.R. § 300.530(d)(3).)

35. Pursuant to Factual Findings 87-88, and Legal Conclusion 34, District was not required to provide Student with special education services during either suspension in September 2008 because they did not exceed a total of 10 days. Moreover, after that period, Student's parents chose not to return him to school. There was no violation.

REMEDIES

36. When a school district denies a child with a disability a FAPE, the child is entitled to relief that is appropriate in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See e.g. *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Id.* at p. 1497.) An award of compensatory education does not require the automatic provision of day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Parents of Student W., supra*, 31 F.3d at p. 1496).)

37. Equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14 [114 S.Ct. 361].)

38. Pursuant to Factual Findings 89-92, and Legal Conclusions 2 and 37, using the additional services offered in October 2008 as a benchmark, the District shall provide Student with 20 minutes per week of small-group speech and language DIS for two school years to compensate him for what he lost because of the District’s failure to assess and resultant failure to identify his unique need in pragmatics. This DIS service is in addition to, and shall not supplant, the services prospectively necessary to provide Student a FAPE.

ORDER

1. Within 10 days of the date of this Order, the District shall provide Student with 20 minutes per week of small-group pragmatic speech designated instruction and services for two school years. This service is in addition to, and shall not supplant, the services prospectively necessary to provide Student a FAPE.
2. All of Student's other claims 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. The following findings are made in accordance with this statute: Student prevailed on Issues 1(b) and 2(b). District prevailed on all other 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 ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: May 4, 2009

/s/

TREVOR SKARDA

Administrative Law Judge

Office of Administrative Hearings