BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. CARLSBAD UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016110599

DECISION

Parents, on behalf of Student, filed a due process hearing request with the Office of Administrative Hearings on November 8, 2016, naming Student. On January 11, 2017, Student filed an amended complaint.[1]

Administrative Law Judge Sabrina Kong heard this matter in Carlsbad, California, on February 22, and 23, 2017.On February 23, 2017, the ALJ granted a continuance to March 8, 2017. On March 7, 2017, OAH granted District's request for a hearing continuance because District's counsel was ill. On March 10, 2017, the ALJ held a status conference and continued the hearing to March13, 2017. The ALJ held the last day of hearing telephonically in Van Nuys, California, on March 13, 2017.

Attorney William Pohl represented Student on February 22, and 23, 2017. Parents attended the hearing on February 22, 2017, and Mother attended the hearing on February 23, 2017. Mr. Pohl withdrew as Student's attorney on March 7, 2017. On March

[1] District filed its response to Student's amended complaint on January 24, 2017, which permits the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. March 27, 2017) ___ F.3d ___, 2017 WL 1131821, **5-6.)

13, 2017, Parents represented Student.[2] Attorney Justin Shinne field represented District. Timothy Evanson, District's Director of Pupil Services, attended the hearing on all days.

A continuance was granted for the parties to file written closing arguments and the record remained open until March 27, 2017. The parties timely filed written closing arguments. The record was closed on March 27, 2017, and the matter was submitted for decision. [3]

ISSUES[4]

1. Did District deny Student a free appropriate public education, from September 28, 2016 to January 11, 2017, by failing to assess in the area of functional behavior?

2. Did District deny Student a FAPE from September 28, 2016 to January 11, 2017, by failing to offer Student: (a) an appropriate placement in the least restrictive environment; (b) transportation; and (c) appropriate pragmatic speech therapy and instructional support?

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[2] ALJ gave Student the option of continuing the hearing to hire another attorney at the March 10, 2017 status conference. Mother elected to represent Student and proceed with the March 13, 2017 hearing.

[3] On March 24, 2017, Student filed a motion to modify stay put. On March 27, 2017 Student filed a copy of Mr. Pohl's invoice, which was deemed a request to consider as new documentary evidence. Both motions were denied in a separate order.

[4] The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

SUMMARY OF DECISION

Student did not demonstrate that District was required to assess Student's functional behavior from September 28, 2016 to January 11, 2017 because: Student was not attending school during a large part of the relevant period; and Parents had agreed in a settlement agreement for District to assess Student's functional behavior in April 2017. Student also did not demonstrate that District denied him a FAPE by failing to offer appropriate placement, transportation and speech and language services from September 28, 2016 to January 11, 2017. District offered Student appropriate placement and services, but Parents did not accept any of District's offers. Therefore, Student is not entitled to any remedy.

FACTUAL FINDINGS

1. Student was a 14 year-old-boy, and resided within District at all relevant periods. He was eligible for special education under the primary category of autism, and the secondary category of speech and language impairment.

2. District provided Parents with an assessment plan to assess Student's functional behavior in the school environment in May 2016, towards the end of the 2015-2016 school year. Although Parents signed the assessment plan, District did not assess Student's behaviors in the school environment because Student attended a District school for approximately one day during the 2016-2017 school year, on or about August 29, 2016.Student did not attend a District school after August 29, 2016.

3. After August 29, 2016, Parents told District they wanted Student to attend the Winston School, a non-public school. On September 28, 2016, District and Parents entered into a settlement agreement in which they agreed District would fund and place Student at Winston; and if Winston did not accept Student, District would place Student in a non-public school mutually agreed to by the parties. District and Parents agreed

that a non-public school was the least restrictive environment placement and FAPE for Student. They also agreed to two hours of one-to-one aide support each afternoon that the non-public school was in session; bus transportation to attend the non-public school; and that placement, aide support and bus transportation were stay put for the 2016-2017 school year, including extended school year 2017. They further agreed District would assess Student in all areas of need by spring 2017, and District would assess Student's functional behavior before spring 2017 if Student's school of attendance recommended one. District's Director of Pupil Services Timothy Evanson signed the agreement on District's behalf and was familiar with the terms of the September 28, 2016 settlement agreement.

4. Mr. Evanson was familiar with Student, and worked with District's Special Programs Coordinator, Brent Nielsen, to secure an appropriate non-public school placement for Student. Mr. Evanson held an administrative services and a multiple subjects credential, and was credentialed to teach special education students with mild to moderate, and moderate to severe needs. He worked as a school administrator for over 20 years and as an administrator for several non-public schools for approximately 10 years.

5. Within a few days after execution of the September 28, 2016 settlement, Winston informed Mr. Evanson that it would not accept Student. Mr. Evanson immediately informed Parents of Winston's decision, sent Parents a list of non-public schools in San Diego, and requested that Parents sign a release permitting Mr. Evanson to speak with administrators from other non-public schools, including sharing confidential information about Student, to secure Student's placement at another non-public school. Parents never signed the release. Parents visited non-public schools and private schools on their own without informing or coordinating with District.

6. After Winston rejected Student, and because Parents never signed the release requested by Mr. Evanson, Mr. Evanson sent Student's last operative individualized education program and last District psycho-educational report from May 2016, with all identifiable personal information redacted, to San Diego non-public schools Mr. Evanson believed could meet Student's needs to see if they would accept Student based on his profile. Specifically, in October 2016, Mr. Evanson sent the redacted information packet to the San Diego Center for Children, and the Helix Academy, two non-public schools in San Diego. Helix Academy did not accept Student. The San Diego Center for Children had not yet accepted Student in October 2016. Parents requested that District place Student in Mardan, a non-public school in Orange County, despite District's suggestion of San Diego non-public schools which were closer to Student's home. At Parents' request, Mr. Evanson also sent Student's information packet to the Mardan School. Parents also requested that District place Student at New Vista, a private school in Orange County. Mr. Evanson informed Parents District could not place Student at New Vista because it was not a certified non-public school. Mr. Evanson opined that Helix Academy, the San Diego Center for Children and Mardan were all appropriate non-public school environments which could provide a FAPE for Student.

7. On October 11, 2016, because Student was not attending school, District offered Student an interim placement by home hospital enrollment with one hour of academic instruction per school day, 30 minutes of individual speech and language services per school week, and 30 minutes of individual counseling services per school week until the parties agreed upon a non-public school placement for Student. Parents did not respond to District's October 11, 2016 offer of home hospital enrollment.

8. In November 2016, the San Diego Center for Children accepted Student. Parents did not agree to place Student there. In November 2016, Mardan also accepted

Student. District contracted with Mardan within a week of Student's acceptance as an accommodation to Parents. District offered placement at Mardan with bus transportation. Parents requested that District reimburse them for two daily roundtrips to Mardan, which was over 50 miles each way, instead of bus transportation. District agreed to placement at, and reimbursement for two daily roundtrips transportation to Mardan.

9. District sent a proposed amendment to the September 28, 2016 settlement agreement for Parents' signature. Because Parents and District could not agree with the wording of the proposed amendment, Parents did not sign the proposed amendment. Instead, Parents unilaterally placed Student at Mardan, without informing District of their decision. If Parents had signed the proposed amended agreement, District would have paid for placement at Mardan, reimburse Parents for driving Student to Mardan, and the rest of the agreed services in the September 28, 2016 settlement agreement. In a November 2016 e-mail, Parents specifically instructed District not to speak with any non-public school about Student.

10. Student attended Mardan from November 27, 2016 until winter break of December 2016. Parents paid for Student's tuition at Mardan during this period. It was Mardan's personnel who first informed District about Student's placement at Mardan after Parents placed Student there. Parents informed District by e-mail that Student was at Mardan several weeks after they had placed Student; Parents submitted invoices to District requesting reimbursement for Student's tuition at Mardan. In January 2017, Parents no longer found Mardan appropriate for Student, because it was too far from home. Student did not return to Mardan after winter break. Parents decided to keep Student at home.

11. In January 2017, when Mr. Evanson learned that Student was no longer at Mardan, he asked San Diego Center for Children whether it would accept Student.

San Diego Center for Children informed Mr. Evanson it had no opening for Student. Mr. Evanson then called another non-public school, Banyan Tree, to see whether it would accept Student.

12. Parents did not consent for District to provide any IEP related services to Student from September 28, 2016 to January 11, 2017. Instead, Parents sought and paid for private counseling and speech and language services for Student.

13. In February 2017, Parents enrolled Student in Pacific Academy, an online program which was not a certified non-public school. Parents also hired a tutor and an aide to help Student access the online program. Parents requested that District reimburse them for tuition at Mardan, and for all services they elected to provide Student from September 28, 2016 to June 2017.

14. Student's behavior expert Adrienne Silva held a master's degree in behavior analysis, and a bachelor's degree in psychology. She was a board certified behavioral analyst, and a credentialed psychologist in Arizona. She was the owner and director of a behavior analysis company in California. She never observed or provided direct services to Student, but supervised and provided instructions to her employee who provided direct behavioral services to Student. She opined that the San Diego Center for Children would not be a FAPE for Student. Her opinion was based on a recent observation of another student at the San Diego Center for Children. She opined that the appropriate placement was where Student had the least number of changes to his daily routine, and where he would be amongst peers with similar social and behavioral functions. Her opinion was based on reviewing her employee's notes about Student, and an independent evaluator's psycho educational report. She noted that Student's behaviors, which included inflexibility, and verbal and behavioral outbursts were consistent with those of an autistic child. She opined that Student required a functional behavior assessment and could not receive a FAPE without either a functional behavior

assessment, or a behavior intervention plan. She was not aware of the terms of the September 28, 2016 settlement agreement, or that it provided for a time frame for a behavior assessment.

15. Mr. Nielsen held a master's degree in special education, a multiple subjects credential, had been in education approximately 22 years and a special education administrator for over 10 years. He worked with Student since 2013 and was a member of Student's IEP team, attended Student's last IEP, the May 2016 IEP, and was familiar with Student's needs. Mr. Nielsen opined that Winston, the San Diego Center for Children, and Helix Academy could all provide Student with a FAPE. He also opined that Winston and Helix Academy were both less restrictive environments than San Diego Center for Children. Mr. Nielsen also opined that District's offer of home hospital enrollment and related services on October 11, 2016, was appropriate for Student and would have me this educational needs until the parties agreed on a non-public school placement.

16. District and Parents agreed that the terms of the September 28, 2016 settlement agreement were valid and enforceable at all relevant times.

LEGAL AUTHORITY AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[5]

1. This due process hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.;

[5] Unless otherwise indicated, the legal citations in this introduction are incorporated by reference into the analysis of each issue decided below.

34 C.F.R. § 300.1 et seq. (2006)[6] ; Ed. Code, § 56000, et seq.; and Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are:(1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible 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(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401 (29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401 (26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

[6] All subsequent references to the Code of Federal Regulations are to the 2006 edition.

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "'meaningful' educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'…" (*Endrew F. v. Douglas School Dist. RE-1* (March 22, 2017, No. 15-827) 580 U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___],2017 WL 1066260 (*Endrew*)). The Supreme Court in *Endrew* stated that school districts needed to "offer a cogent and responsive explanation for their

decisions..." and articulated FAPE as that which is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstance."*Id.*

4. The IDEA affords parents or local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i); see *M.S. by and through Sartin v. Lake Elsinore Unified School Dist.* (9th Cir 2017) ___ Fed.Appx. ___, 2017 WL 711105.) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].) In this case, Student has the burden of proof.

ISSUE 1: ASSESSMENT OF FUNCTIONAL BEHAVIOR

6. Student contends District should have assessed Student's functional behavior during the September 28, 2016 to January 11, 2017 period. District contends that it did not need to assess Student's functional behavior during the specified period because Parents had agreed in a settlement agreement for District to assess Student's functional behavior in April 2017. Further, Mardan did not recommend that District conduct a behavior assessment during the time that Student was at Mardan.

7. Assessments are required to determine eligibility for special education, and what type, frequency and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f); *Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105.) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).).

8. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) To assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1)impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 *superseded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.* (9th Cir.2007) 496 F.3d 932, 939.)

9. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and

supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) The legislature intended that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).)

10. Here, District and Parents agreed in writing that Student's functional behavior would be assessed in April 2017, unless Student's school of attendance recommended an earlier assessment. Parents agreed that the September 28, 2016 settlement agreement was valid during the relevant time period. The only school Student attended during that period was Mardan for approximately three weeks in the fall of 2016. Student offered no evidence that Mardan recommended to District that Student be assessed in any area during the brief time of Student's attendance. Although Ms. Silva opined generally that Student required a behavior assessment, Student presented no evidence that his behaviors at Mardan impeded his learning or the learning of other students. Further, the evidence did not support that District would have had an opportunity to assess Student's behaviors at Mardan, because Student only attended Mardan briefly before Parents decided to pull him out. Therefore, Student did not demonstrate by a preponderance of the evidence that District denied Student a FAPE by not assessing his functional behavior from September 28, 2016 to January 11, 2017.

ISSUES 2 (A) (B) AND (C): PLACEMENT AND SERVICES

11. Student contends that District did not offer Student appropriate placement, transportation and speech and language services from September 28, 2016 to January 11, 2017. District contends that it offered Student appropriate placement and services, but that Parents were uncooperative, and did not accept any of District's offers.

12. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K.*

v. Longview School Dist. (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)"A hearing officer may not render a decision that results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school, or that results in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified pursuant to Section 56366.1." (Ed. Code, § 56505.2, subd. (a).)

13. A school district was not held liable for failing to provide services to a student when the failure is caused by the parents' lack of cooperation. (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F. Supp.2d 1093, 1110.) Parents' lack of cooperation in working with the school district prevented the district from providing and paying for Student's services. (*Pedraza v. Alameda Unified School Dist.* (N.D. Cal. Jan. 26, 2017, No. 12-15995) 2017 WL 371963 (*Pedraza*).)

Issue 2(a) - Placement

14. In determining the educational placement of a child with a disability a school district must ensure that: (1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; (2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; (3) unless the IEP specifies otherwise, the child attends the school

that he or she would if non-disabled; (4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.) "Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services" and that providing a continuum of alternative placements includes "the alternative placements listed in the definition of special education" and "supplementary services" to be provided in conjunction with regular class placement."34 C.F.R. § 300.115. (*See E.F. and J.F. v. New York City Department of Education* (E.D.N.Y., August 19, 2013, No. 12-CV-2217(MKB)) 2013 WL 4495676 and A.*D. v. New York City Department of Education*, (S.D.N.Y., March 19, 2013, No. 12-CV-2673 (RA)), 2013 WL 1155570 , *8 [Once the district determined the appropriate least restrictive environment where student could be educated, it was not obligated to consider and inquire into more options on the continuum]; see also *L.S. v. Newark Unified Sch. Dist.* (N.D.Cal., May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, pp. 5-6 [nonpub. opn]; *Katherine G. v. Kentfield Sch. Dist.* (N.D.Cal. 2003) 261 F.Supp.2d 1159, 1189-1190.).)

15. Here, the parties agreed in the September 28, 2016 settlement agreement that a non-public school was the least restrictive environment and FAPE for Student. Student did not present any evidence that FAPE was anything other than a non-public school. District acted reasonably to offer Student a FAPE by looking for an alternative, mutually agreeable placement for Student when Winston rejected him. Mr. Evanson asked Parents for permission to send Student's confidential information to other appropriate non-public schools. Parents did not cooperate and failed to provide District the required consent. Mr. Evanson continued his attempts to offer FAPE by sending

Student's profile, redacting personal identifying information to two San Diego non-public schools, and secured placement at the San Diego Center for Children in November 2016. When Parents refused placement at the San Diego Center for Children and suggested Mardan, a school which was outside of District's boundaries in Orange County, District timely contracted with Mardan and offered Student placement and bus transportation. Parents did not sign the proposed amendment to the September 28, 2016 settlement agreement that would have enabled District to place Student at Mardan at District expense, because they disagreed with the proposed amendment language. The evidence established that Parents proposed Mardan; District contracted with Mardan; and, despite District's attempts to amend the settlement agreement to identify Mardan as Student's placement, Parents unilaterally placed Student at Mardan at their own expense, without coordinating with District. Therefore, the evidence supported that Mardan was a mutually agreed upon alternative to Winston, and constituted an offer of FAPE by District. District did not deny Student a FAPE by failing to offer an appropriate placement.

16. The delay in Student's placement from October to November 2016 was not caused by any violation of the IDEA by District. Instead, the delay resulted because Parents did not provide consent for Mr. Evanson to speak and send confidential information about Student to administrators of other non-public schools to secure Student's placement when Winston rejected him. Further, delay also resulted because Parents rejected San Diego Center for Children. The September 28, 2016 settlement agreement required the parties to mutually agree upon an alternative placement to Winston, if Winston rejected him. The evidence did not persuasively support that Parents' rejection of San Diego Center for Children was anything more than their exercise of parental preference. District personnel opined persuasively that placement at San Diego Center for Children was appropriate for Student, and therefore constituted a

FAPE as to placement. Mr. Evanson and Mr. Nielsen both knew Student from working with him at school; and Mr. Nielsen was a member of Student's IEP team. Although Ms. Silva opined that San Diego Center for Children was not FAPE for Student, her opinion was not as credible or persuasive because it was based only on her review of her employee's notes; she never met, or directly worked with Student; and she did not provide any specific reasons as to why the San Diego Center for Children was not appropriate. Although Parents also requested placement at New Vista, District was not required to, and could not, place Student there because New Vista was not a certified non-public school.

17. District timely sought out and offered appropriate alternative placements when Winston rejected Student. Mr. Evanson found the San Diego Center for Children and Helix Academy. District offered an interim home-study program until Student was placed in a mutually agreed upon non-public school, and San Diego Center for Children. Parents preferred Mardan; District also offered Mardan. All of the placements District offered Student were appropriate and could have provided Student a FAPE. Parents unilaterally decided Student should not attend Mardan in January 2017, and implemented a new home-based program for Student, without cooperating with District's multiple efforts to provide Student a FAPE through appropriate placement offers. Similar to the parents' conduct in *Pedraza*, Parents' non-cooperation prevented District from providing and paying for Student's placement.

18. Therefore, Student did not meet his burden by a preponderance of the evidence that District denied him a FAPE by failing to offer an appropriate placement for Student from September 28, 2016 to January 11, 2017.

Issue 2(b) – Transportation

19. Legal Authorities and Conclusions12 and 13are incorporated by reference.

20. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006).)

21. A school district must provide transportation to disabled students if it provides transportation to non-disabled students. If a school district does not provide transportation to non-disabled students, "the issue of transportation to students with disabilities must be decided on a case-by-case basis. If a [school district] determines that a disabled student needs transportation to benefit from special education, it must be provided as a related service at no cost to the student and his or her parents." (*Letter to Smith*, (23 IDELR 344 [23 LRP 3398].)

22. Although the Ninth Circuit has not specified criteria for determining whether a child needs transportation as a related service, other Circuits have indicated some guidelines that are useful in evaluating this case. Relevant factors include, at least, (1) the child's age; (2) the distance the child must travel; (3) the nature of the area through which the child must pass; (4) the child's access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit. (*Donald B. By and Through Christine B. v. Board of School Com'rs of Mobile County, Ala.* (11th Cir. 1997)117 F.3d 1371, 1375 (*Donald B.*).) The Eighth Circuit has twice considered requests for transportation for students with disabilities and twice concluded that "a school district may apply a facially neutral transportation policy to a disabled child when the request for deviation from the policy is not based on the child's educational needs, but on the parents' convenience or

preference." (*Fick ex rel. Fick v. Sioux Falls School Dist. 49-5* (8th Cir. 2003) 337 F.3d 968, 970, citing *Timothy H. v. Cedar Rapids Cmty. School Dist.* (8th Cir. 1999) 178 F.3d 968, 973; see also *Anchorage School Dist. v. N.S. ex rel. R.P.* (D. Alaska, Nov. 8, 2007) 2007 WL 8058163, at *10 [district responsible for pushing student's wheelchair from the curb to the front door of his home because door-to-door service was not "based on the guardians' mere convenience of [sic] preference" where "[b]oth guardians work full time . . . and are unavailable to push [the student] up the ramp at the end of his day."].)

23. Student did not present any evidence proving that District did not offer transportation, or reimbursement for private transportation, to Student from September 28, 2016 to January 11, 2017. District offered transportation to Winston in the September 28, 2016 settlement agreement. After Winston rejected Student, District offered Student the San Diego Center for Children as placement, but Parents did not agree to that placement offer. Student offered no evidence supporting a finding of whether or not District offered transportation to San Diego Center for Children. District offered Student bus transportation to Mardan. When Parents did not accept bus transportation and asked for reimbursement for two roundtrips for transporting Student to Mardan, District agreed to reimburse Parents. The evidence supported that District offered Student transportation to Mardan, even though that school was outside of the District.

24. Student did not meet his burden by a preponderance of the evidence that District denied him a FAPE by failing to offer appropriate transportation to Student from September 28, 2016 to January 11, 2017.

Issue 2(c) –Speech and Language Services

25. Legal Authorities and Conclusions 12and 13 are incorporated by reference.

26. A child who demonstrates difficulty understanding or using spoken language, to such an extent that it adversely affects his or her educational performance

and such difficulty cannot be corrected without special education services, has a language or speech impairment or disorder that is eligible for special education services. (Ed. Code, § 56333.)

27. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821.) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.)" [T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail."(*Id.* at p. 822.) "We also emphasize that nothing in this opinion weakens schools' obligation to provide services "in conformity with" children's IEPs."(*Id.* at p. 822.)

28. Student did not present any evidence supporting a finding that District was required to offer speech and language services as a FAPE. The only evidence Student presented regarding speech and language services was that Parents believed Student needed the private speech and language services they paid for during the period from September 28, 2016 to January 11, 2017. The relevant inquiry was not whether the services Parents preferred and paid for were appropriate, but whether District's offer constituted a FAPE.

29. On October 11, 2016, as part of the home-study package, District offered Student30 minutes of individual speech and language services per school week until the parties agreed upon a non-public school placement for Student. Student did not present any evidence that the speech and language services District offered as a part of the home-study package were not a FAPE. Although District did not offer Student speech and language services from September 28, 2016 to October 10, 2016, Student did not present any evidence supporting that speech and language services were

necessary for a FAPE. Even assuming that speech and language services were required for a FAPE, Student did not present any evidence supporting that District was required to offer them during the 12 days, while District was attempting to find an alternative and mutually agreeable non-public school for Student, was more than a minor discrepancy to provide Student a FAPE.

30. In conclusion, Student did not meet his burden by a preponderance of the evidence that District denied him a FAPE by not offering appropriate speech and language therapy services from September 28, 2016 to January 11, 2017.

ORDER

1. All of Student's requests for relief are denied.[7]

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party as to Issues 1, 2(a),(b), and (c).

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to

[7] This decision does not decide whether District was obligated to reimburse Parents for placement at, or transportation to and from, Mardan under contractual or equitable principals as a result of the September 28, 2016 settlement agreement, which is outside of OAH jurisdiction. (*Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd.(k).)

DATED: April 5, 2017

/s/

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings