

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT on behalf of STUDENT, v. EETER UNION SCHOOL DISTRICT ,	OAH CASE NO. 2009081099
EETER UNION SCHOOL DISTRICT, v. PARENT on behalf of STUDENT.	OAH CASE NO. 2009040443

DECISION

Administrative Law Judge Gary A. Geren, Office of Administrative Hearings (OAH), heard this matter in Exeter, California, on November 3 and 4, 2009.

Student was represented by Drew Massey, Attorney at Law, Adams and Associates. Student's mother (Mother) was present throughout the hearing. Student was not present for the hearing.

The Exeter Union School District (District) was represented by Stacy L. Inman, Attorney at Law, Schools Legal Services. Renee Whitson, District Superintendent, was present throughout the hearing.

At hearing, oral and documentary evidence were received. The matter was continued until November 24, 2009, to allow the parties to file closing briefs. Both parties timely filed their briefs, which were marked for identification in the jointly

filed Exhibit binder as Exhibit 56 (Student's Brief) and Exhibit 57 (District's Brief).^{1 2}

On April 8, 2009, the District filed a request for due process hearing. This matter was designated by OAH as Case No. 2009040443. On April 22, 2009, the case was continued by OAH based on the stipulation of the parties. On August 28, 2009, Student also filed a request for due process hearing, naming the District as the responding party. This matter was designated Case No. 2009081099. On August 28, 2009, Student filed a motion to consolidate the two matters. On September 9, 2009, OAH granted Student's motion and the matters were consolidated.

Prior to hearing, the parties settled all issues raised by their respective complaints, except for the issues set forth below.

ISSUES

DISTRICT'S ISSUE

Did the District offer an appropriate behavioral support program (BSP) at Student's October 7, 2008 Individualized Education Plan (IEP) meeting?

STUDENT'S ISSUES

1. Was the District's offer predetermined and selected without parental participation?

¹ Originally, the parties each submitted Exhibit binders; however, since the many of their Exhibits were the same, the parties consolidated their Exhibits into a single binder.

² Student submitted a request to take official notice along with his closing brief. That request was denied in an order issued by OAH on December 3, 2009.

2. Was the transition plan from one BSP to another appropriate?
3. Were the personnel designated by the District to oversee Student's BSP qualified?

REQUESTED REMEDIES

Student requests an order requiring the District to continue using Student's current BSP provider.

District requests an order declaring that its offer was appropriate.

FACTUAL FINDINGS

BACKGROUND

1. Student is an 11-year-old boy who resides with his parents within the District. Student has received special education services from the District since 2002. In June 2002, he was determined to be an individual with exceptional needs under the category of autism. During his most recent school year, Student attended Rocky Hill Elementary School. Because of his behavioral issues, Student requires a BSP, and concomitant supervision, both at school and at home.

On May 28, 2008, the District held student's triennial IEP meeting. This meeting was reconvened on June 2, September 8, and October 7, 2008. Student's mother and her attorney attended each meeting. At these meetings, the IEP team developed Student's IEP, which is 60 pages long. The IEP thoroughly addresses Student's present levels of performance and sets forth approximately 50 goals. Student's goals were developed after he was thoroughly and comprehensively assessed. His IEP also includes a 12-page "Total Service Plan."

Supervision of Student's behavioral services has been provided by a nonpublic service agency (NPA) named ACES. ACES provided Student's behavioral intervention and supervision services both at school and at home through an

arrangement between the District and the regional center. At the IEP meeting on October 7, 2008, the District proposed to change Student's educational provider from ACES to a program that was collaboratively developed between the District and County.³ Parents' refusal to accept this offer and their desire to have Student receive services from ACES is the gravamen of this dispute.

STUDENT'S BEHAVIORAL SUPERVISION AND INTERVENTION SERVICES BY ACES

2. Student's behavioral supervision has been provided by ACES since approximately 2006. It is undisputed that Student has made progress with ACES. However, by October 2008, the District had become concerned about ACES meeting its contractual obligations. With respect to Student's IEP, the District believed that ACES failed to provide the amount of services it had committed to provide under his IEP; failed to follow its own training protocols; failed to provide the appropriate supervision over services it had agreed to perform; did not make its staff available to attend Student's IEP meetings; and did not provide Student with a consistent applied behavior analysis (ABA) supervisor. In November 2008, the District decided to not renew its contract with ACES, which also provided behavioral support services to other students within the District.

Although the District did not renew its contract with ACES, Student

³ Both ACES the District program used the same framework: An aide or paraprofessional would accompany Student through-out the majority of his school day. A behavioral supervisor would oversee the aide; and a senior behavioral supervisor would oversee the junior behavioral supervisor.

continued to receive ACES' services. Despite not renewing the contract, the District continued paying for the services ACES provided Student. Accordingly, Student's parents did not incur any costs related to these services.

DISTRICT'S PROPOSED BEHAVIORAL SUPERVISION PROGRAM

3. Under the District program, Katherine Wu, a District school psychologist, and Ron Pekarek, a County-employed board-certified behavior analyst (BCBA), would provide Student's behavioral supervision services. The District program included the following services:

Intensive individual instruction (Instructional Behavior Support) each day for 315 minutes;

Behavioral intervention services, including ABA supervision of Student's program by Katherine Wu.

Breaks in the intervention services, including 15 minutes between 9:00 to 9:40 a.m. and during meal/cafeteria time;

Behavior intervention services one time per month for 60 minutes wherein an ABA supervisor would attend a monthly clinic meeting;

Behavior intervention services for Student one time per week for 60 minutes, which would be supervised by a County ABA service provider, Ron Pekarek;

Behavior intervention transition services provided by ACES with the District or the Special Education Local

Plan Area (SELPA) providing for the transfer of information from the NPA to Katherine Wu;

Behavior intervention transition services by ACES under contract with the SELPA or District for 345 minutes to transfer information, train and observe Student with Katherine Wu;

Behavior intervention transition services for 60 minutes between ACES and Katherine Wu.

TESTIMONY OF DISTRICT'S PRINCIPAL WITNESSES

Renee Whitson

4. For 15 years, Renee Whitson has been the District's Superintendent; as such she is responsible to see that the District meets the needs of students under the Individuals with Disabilities Education Act (IDEA). She holds a bachelor of arts degree in Communicative Disorders; a master's degree in Audiology/Deaf Education; a special services credential; a resource specialist certificate of competence; a pupil personnel services credential; and Tier I and II administrative credentials. She has worked as a school psychologist, resource specialist, director of special programs, assistant principal, director of federal projects, and Deputy Superintendent. Since 1995, she has been the District Superintendent for both the Exeter Union and Exeter Union High School Districts.

5. The District is a small school district with approximately 2,000 students. As a consequence, Ms. Whitson is aware of those students with special needs and she has a general understanding of what their individual needs are. Ms. Whitson is keenly aware of Student's needs because there have been approximately

seven due process complaints filed by either the District or Student's Mother, as well as four California Department of Education (CDE) compliance complaints filed by Mother against the District. Ms. Whitson first became aware of Student's special education needs when he was approximately three years old and was enrolled in a preschool program funded by the District.

6. Until recently, the District lacked the personnel to provide for the behavioral supervision needs of its students. Therefore, the District contracted with NPAs. Since 2002, four NPA providers have provided Student's behavioral support services, the last being ACES. Prior to the Fall of 2008, the District encountered administrative problems with ACES, as were more particularly set forth in Factual Finding 2.

7. District's need to provide BSP services to students increased. As a result, it developed its own behavioral supervision program in cooperation with the County. Ms. Whitson expressed great confidence in the District's ability to meet Student's needs. In large part, her opinion is based on the competencies of Mr. Pekarek and Ms. Wu.

8. Ms. Whitson has come to know Mr. Pekarek through her interactions with the County Office of Education. She has known Mr. Pekarek for approximately three years. Ms. Whitson had met with Mr. Pekarek on approximately 20 occasions to discuss various educational matters, including matters where Mr. Pekarek was providing behavioral supervision over students' IEPs. Ms. Whitson believes Mr. Pekarek to be a highly competent educational professional.

9. Ms. Whitson expressed great confidence in Ms. Wu's capabilities, as well. Ms. Whitson has known Ms. Wu virtually "all of her life," as Ms. Wu and one of Ms. Whitson's children attended school together. Ms. Wu first worked for the District approximately three years ago as a "very accomplished intern." Ms. Wu was

thereafter hired by the District as a school psychologist in 2007. Ms. Wu's performance evaluations prepared by her supervisors noted the quality of her work as being "exemplary." Ms. Whitson expressed no reservation about Ms. Wu's abilities to provide competent supervision.

10. Ms. Whitson persuasively opined that the District program could serve Student's unique behavioral needs. By October 7, 2008, the IEP team had comprehensively assessed Student. The District worked collaboratively with ACES to gather insight into Student's behavioral supervision needs. As part of the District program, the District intended to use the same eclectic methodologies that ACES used, as well as the same data collection procedures and forms. Except for the changes in personnel, the District offered essentially the same type of behavioral support ACES provided. Ms. Whitson compared the qualifications of the ACES personnel to those of Mr. Pekarek and Ms. Wu, and concluded that they were equally, if not more qualified than their counterparts at ACES. Ms. Whitson was also aware that ACES behavioral supervisor, Carrie Hicinbothom, would be taking maternity leave in October 2008. Therefore, Student was going to undergo a transition of supervisors even if he continued to receive supervision through ACES.

11. Ms. Whitson is a highly qualified, dedicated and credible witness. Her testimony established that she holds excellent insight into the details of Student's needs and the appropriateness of the District's offer to meet them. While testifying, Ms. Whitson's demeanor, manner and attitude exhibited qualities of candor and truthfulness. Her answers were thorough and appropriate. Accordingly, her testimony is afforded substantial weight in deciding this matter.

Ron Pekarek

12. Mr. Pekarek holds a bachelor of arts degree in Psychology; a master's degree in Counseling/Marriage and Family Therapy; and is a BCBA. He is certified by

the Autism-Crisis Prevention Institute and holds a pupil personnel services credential in School Counseling and an autism competency certification issued by the County.

13. Mr. Pekarek's relevant work experience includes three years as a behavioral specialist for a nonprofit school; one year as a mental health clinician with the Fresno County's Children and Family Services program; two years as a Behavioral Intervention Specialist with the Kings Office of Education; five years as a program specialist in the County Behavioral Services Department, and three years as an Adjunct Professor with the Fresno Pacific University BCBA Certification Program.

14. Mr. Pekarek's experience in the field of behavioral analysis is impressive. At Fresno Pacific University, he instructs the following courses: BCBA Supervision; Advanced Behavior Change and Support; Advanced Behavior Assessment--Application to Autism; Early Intervention and Behavioral Assessment; and Behavioral Research/Single-Subject Design. He has 10 years of experience working with children who are either autistic or who exhibit autistic-like behaviors.

15. Mr. Pekarek has presented numerous professional workshops related to behavioral science, including: Evidence-based Practices for Autism; Addressing Challenging Behavior in the Classroom; Behavioral Teaching Techniques; Behavior Support for Special Education Students; Applied Behavioral Analysis: Evidence--based Practices/Classroom Implementation; Applied Behavioral Analysis: Strategies for the Classroom; Behavior Intervention Case Manager Training; Special-Education Transportation in Student Behavior; Applied Behavioral Analysis; and Applied Behavioral Analysis Training for Paraprofessionals.

16. By October 7, 2008, Mr. Pekarek had supervised the behavioral intervention programs of approximately 100 to 150 children, approximately 60

percent of whom had disabilities involving autism.

17. Mr. Pekarek assessed Student to develop a detailed and comprehensive understanding of his behavioral needs. On April 24, 2008, Mr. Pekarek prepared a Functional Behavioral Assessment Report (FBA) of Student. The purpose of the FBA states:

[Student] was referred by his educational team for a functional behavioral assessment. The purpose of the assessment was to: 1) address concerns regarding behaviors that [Student] was exhibiting within the school setting (i.e., perseverative and off-task behavior); and 2) make recommendations to assist in the determination of appropriate educational goals and services.

18. Mr. Pekarek's FBA included a review of Student's records and interviewing the following people: Student's instructional assistant, Student's District psychologist, Student's in-home ABA providers; Student's County speech/language provider; and Student's classroom teacher. He also conducted six hours of unaccompanied observation of Student and reviewed all of his behavioral logs. As part of his work with the classroom teacher, Mr. Pekarek conducted two formal assessments: the Motivational Assessment Scale, as well as Sections K-N of the Assessment of Basic Language and Learning Skills-Revised Protocols. The FBA included: identification of antecedent, individual and consequence variables; hypothesized functions of challenging behaviors; and assessment of basic learning and language skills-revised. Mr. Pekarek's report makes the following recommendations:

Based on the results of this assessment it is recommended that [Student's] educational team consider the following:

Utilize self-monitoring and differential reinforcement procedures (in conjunction with free access to existing replacement behavior strategies), to reduce the frequency of perseverative behaviors. It is recommended that the intervention begin during an initial in-class academic period (e.g., reading mastery) and then systematically be expanded across the day.

Incorporate a system to reinforce independent work completion. Establish a baseline of completed assignments during a targeted work period, have the classroom teacher or instructional assistant clearly delineate work to be done during the specific period (verbally and visually), and reinforce increasing amounts of independent work with access to preferred items or activities. Gradually expand the use of the procedure across additional academic periods throughout the day.

In addition to the use of existing visual supports, have the teacher or instructional assistant establish a daily written schedule with [Student] (both across and within task) to facilitate independent transitions

between, and clarify expectations within academic activities.

Provide "hands-on" materials to the whole class that correspond with existing academic lessons during group instruction whenever possible in order to increase engagement and make learning an active process.

Intersperse alternative methods of writing "output" during academic work tasks (e.g., typing on the computer, dry erase boards, etc.) in lieu of repetitive paper and pencil tasks to increase engagement in the activity and reduce protest behavior.

Incorporate the use of DVD/videos for modeling appropriate social skills (e.g., listening to the teacher, showing interest in others, maintaining conversations, etc.)

Adopt behavioral goals geared at increasing skills as well as reducing challenging behavior (i.e., improving play and leisure skills, social interactions, the ability to engage during group instruction and follow the daily classroom routine).

Consolidate the amount of data collection required by classroom staff, focusing on the most salient aspects

of the challenging behavior, to allow more time for effective intervention.

Continued behavioral services to develop proposed interventions, consult with school staff, and monitor student progress.

19. Mr. Pekarek attended Student's May 20, 2008 IEP meeting and presented his findings. He again presented his report to the 19-member IEP team at the October 7, 2008 IEP meeting, which included Student's mother and her attorney; Jennifer Sutera, ACES Area Director (who appeared telephonically); and Carrie Hicinbothom (ACES Supervisor).

20. At the October 7, 2008 IEP meeting, Mother, her attorney and Mr. Pekarek discussed the details of his findings. They also engaged in a lengthy discussion about how data collection would be performed by the District. Mr. Pekarek's opinion regarding data collection differed from the opinions of the ACES staff, Mother and her attorney. Essentially, Mr. Pekarek thought that ACES data collection procedure was too detailed because it involved taking data on each of Student's goals. Mr. Pekarek's concern was that he aide would be too busy collecting data and, therefore, not be able to provide appropriate behavioral intervention. Despite Mr. Pekarek's well-reasoned concern, the District members of the IEP team assented to Mother and her attorney's demands to keep the ACES data collection procedure in place, if and when the District's program was to be implemented. With this change, the District program mirrored the details of the behavioral services provided by ACES, including the same number of hours of supervision and intervention student would receive. The fact that the District's members agreed to take more data than they originally thought was appropriate,

established that Mother's concerns were taken seriously and that she meaningfully engaged in the decision making process.

21. Also at the October 7, 2008 IEP meeting, Mr. Pekarek explained Ms. Wu's credentials and her work experience to Mother and her attorney. He knew of Ms. Wu's competency because he supervised her work on other cases as part of his job with the County, and also because he was one of her instructors at Fresno Pacific University (where Ms. Wu has nearly completed her BCBA program). Toward the conclusion of the October 7, 2008 IEP meeting, Mother and her attorney asked to meet Ms. Wu. A District IEP team member telephoned Ms. Wu and instructed her to join the IEP meeting, which she did. Obliging this request also shows active and meaningful participation by Mother in the IEP process. While there was differing testimony regarding how long Ms. Wu was at the meeting, she attended the meeting between 30 minutes to one hour. Either time interval provided Mother and her attorney with sufficient time to inquire about Ms. Wu's qualifications. Furthermore, the meeting was adjourned at the request of Student's attorney, and not by the District, another fact establishing Mother's active participation in the IEP process.

22. Mr. Pekarek's testimony regarding the appropriateness of the District's offer was persuasive. He consulted with school personnel, Student's mother and attorney, and the other members of the IEP team, including ACES staff. Together they developed a transition plan that would have provided for the orderly transfer of behavioral support services from ACES to the District program.

23. Mr. Pekarek testified in a calm and confident fashion. He was an articulate and knowledgeable witness. He conveyed a sense of candor, professionalism and dedication generally, and to Student's needs in particular. Therefore, Mr. Pekarek's testimony is afforded significant weight in deciding this

matter.

Katherine Wu

24. Ms. Wu also testified in this matter. She has a bachelor of science degree in psychology and a master's degree in Education. She holds a school psychologist credential. She has completed specialized Autistic Spectrum Disorder training courses, including Educating Children with High Functioning Autism; Applied Behavior Analysis and the Autism Diagnostic Observation Schedule Clinical Workshop. As a school psychologist, Ms. Wu assesses children who may be eligible to receive services under the IDEA. She has conducted approximately 50 such assessments. She presently works as a behavioral intervention case manager overseeing FBAs; facilitating meetings; performing various behavioral related assessments; creating Behavioral Intervention Plans (BIPs); developing data collection plans; and monitoring students' progress and tracking of their behaviors. Lastly, Ms. Wu has experience overseeing the administration of students' with ABA-based programs.

25. By October 7, 2008, Ms. Wu had completed four of the five courses necessary to allow her to take the BCBA examination. Her completed coursework included: Behavior Assessment Intervention; Early Intervention and Developmental Assessment; Advanced Behavioral Assessment-Autistic Spectrum Disorder; and Advanced Procedures for Behavioral Change. By October 7, 2008, she had completed 63 of the 75 hours of supervision necessary for her to obtain her BCBA. As of October 7, 2008, Ms. Wu had supervised the data collection for five children with autism.

26. Ms. Wu credibly testified in detail about Student's transition plan from ACES to the District program. The proposed transition plan included:

ACES and Ms. Wu were to meet for 345 minutes on the first day of the

transfer, in what Ms. Wu called an "information transferring" meeting. This included Ms. Wu and ACES meeting Student at his school and jointly conducting observations; reviewing data collection binders; reviewing IEP goals and objectives; reviewing the supports and interventions used by ACES; interviewing school personnel; consulting with Student's aides and classroom teachers about behavioral supports implemented by ACES; and determining how ACES personnel collected data. Additionally, the proposed transition plan provided 360 minutes to complete the "information transfer" between ACES and Ms. Wu over the following four weeks. During these four weeks, Ms. Wu would observe student at various times throughout his school day to identify behaviors and address them.

As part of Student's transition, Mr. Pekarek was assigned to spend 360 minutes of supervision on the first day of the transfer, and to provide additional time over the following four weeks.

Lastly, the transition plan included a "clinic meeting." The "clinic meeting" was to include the following members: Student's general education teachers; Student's aides; all behavioral service providers, including ACES; Student's parents; and Mr. Pekarek. The participants were to discuss Student's progress; identify effective strategies; identify new behaviors that occurred either at home or at school and develop strategies to address them; and continue exchanging information to provide continuity between Student's school and home providers. Ms. Wu testified that only after the "clinic meeting" would ACES transfer Student's behavior supervision services to the District program.

27. While Ms. Wu was at the October 7, 2008 meeting, she observed the proposed transition plan being discussed and Mr. Pekarek answering questions posed by Student's attorney regarding the District program. This discussion included a request to describe Mr. Pekarek and Ms. Wu generically in the IEP, rather

than listing them only by name. This request stemmed from Mother's concern that if Mr. Pekarek and Ms. Wu became unavailable, then a generic description would ensure that someone with similar credentials could replace them. The District members of the IEP team agreed to use these generic descriptions, again showing Mother's meaningful participation in the October 7, 2008 IEP meeting.

28. Ms. Wu persuasively testified that because there was great cooperation between her and the staff of ACES, the proposed transition plan would likely result in a successful transfer. She characterized ACES methodology as an "eclectic approach." Ms. Wu did not intend to change this methodology.

29. Ms. Wu was a credible and persuasive witness. Accordingly, her testimony is given substantial weight in deciding this matter.

30. The collaborative effort of Mr. Pekarek and Ms. Wu, as well as ACES and Mother, resulted in the development of an appropriate transition plan. The combined testimony of Ms. Whitson, Mr. Pekarek and Ms. Wu persuasively established that the offer made by the District at the October 7, 2008 IEP meeting regarding Student's behavioral supervision was not predetermined and parental input was considered and, in fact, included in the offer.

TESTIMONY OF EACH OF STUDENT'S WITNESSES

Mother

31. Mother established that she requested ACES to provide services for Student in 2006 because she had heard "good things" about them. During 2008, Jennifer Sutera was Student's behavioral supervisor. For reasons not explained in the record, she held that position until the Fall of 2008, when Carrie Hiconbothom took over her role. Later in the Fall of 2008, Amber Botello took over for Ms. Hiconbothom, who left on maternity leave. Mother did not recall what qualifications

these ACES personnel held. Accordingly, Mother could not meaningfully compare the qualifications of ACES staff against the qualifications of Mr. Pekarek and Ms. Wu. Her contention they were unqualified, therefore, is not well-reasoned

32. Mother confirmed that at the October 7, 2008 IEP, a discussion occurred between her, her attorney and Mr. Pekarek regarding the data collection that the District program would use. She also recalled her attorney asked Mr. Pekarek many questions about Ms. Wu's qualifications. Again, evidencing meaningful participation.

33. During cross-examination while testifying in rebuttal, Mother testified that her only concern about the District program offered at the October 7, 2008 IEP meeting was the qualifications of Mr. Pekarek and Ms. Wu.

Carrie Hiconbothom

34. Ms. Hiconbothom is a coordination supervisor with ACES. She has worked for ACES since June 2007. Previously, from 2003 through 2007, she worked for Tulare County, in a position she did not describe with greater detail. She holds a level I, moderate to severe credential issued by CDE. She obtained her BCBA in May 2009 through an online program. She began providing Student with behavioral supervision services in February 2008. Her work included class inclusion and training of Student's aides. She provided eight hours of supervision services per month. In her opinion, she believed Student made progress, particularly in the area of peer interaction.

35. Ms. Hiconbothom's work with Student, as well as the work of Ms. Sutura and Ms. Botello, was supervised by a senior BCBA, in the same way that Mr. Pekarek was designated to supervise Ms. Wu. Ms. Hiconbothom did not recall the number of hours she received supervision. Nor, could she recall if ACES held all required monthly clinic meetings or whether ACES provided Student all of the

behavioral support service hours required under his IEP.

36. Ms. Hicinbothom participated in the October 7, 2008 IEP meeting. However, she could not differentiate between what was discussed at the four IEP meetings held in 2008. For example, she vaguely recalled a discussion of Student's transition plan taking place at the October 7, 2008 IEP meeting; however, she could not recall any details of what was discussed. Ms. Hiconbothom did, however, confirm making the statement attributed to her regarding the transition plan, which notes, "Carrie stated that transitioning between agencies takes about a month."

37. Ms. Hicinbothom testified she was "sure [Mother] asked questions during the [October 7, 2008] IEP meeting," and that [Mother] and her attorney's practice were to "frequently speak up at IEP meetings," thus confirming Mother's participation in the IEP process.

38. Ms. Hiconbothom's last day providing behavior supervision to Student before taking her maternity leave was October 15, 2008. Thereafter, Amber Botello assumed her role. Ms. Hiconbothom confirmed that Ms. Botello was not a BCBA at the time she began serving Student.

39. Ms. Hiconbothom's testimony addressed another one of Mother's concerns. Mother testified that she was worried about how "fidelity" of services could be maintained between two entities. Mother's concern was that two separate providers--one at school, and the other at home--might cause an escalation in Student's behaviors. However, in Ms. Hiconbothom's experience at ACES, it is customary for students to receive educational behavioral supervision services from one entity while the student is at school, and by another when the child is at-home. Partly based on her experience working with Mr. Pekarek on two cases involving children with autism, Ms. Hiconbothom believed that the District program and ACES could work collaboratively to ensure "fidelity."

Sharon Kerr

40. Ms. Kerr is the Clinical Director for ACES. She has a bachelor of arts degree in Psychology; a master's degree in Psychology; and a PhD. She obtained her BCBA in 2007. She has conducted approximately 50 behavioral assessments of children, most of whom were on the ASD.

41. Ms. Kerr criticized the transition plan because it lacked a "contingency plan." Ms. Kerr failed to explain in any detail what such a "contingency plan" should entail, or why one was necessary to meet Student's needs. Nor did Ms. Kerr explain what, if any, "contingency plan" ACES had in place when it transitioned Ms. Botello to Ms. Hiconbothom's position. Ms. Kerr avoided answering several questions by deferring to Ms. Hiconbothom, who Ms. Kerr described as the ACES employee with the most information about Student.

42. Despite Ms. Kerr's qualifications, she was not a persuasive witness in this matter. Over the objection of the District, Student's last-minute motion to allow Ms. Kerr to testify telephonically was granted. However, Ms. Kerr did not have the evidence binders that each of the other witnesses had available to them, which limited her ability to respond to questions. Ms. Kerr had some documents about Student that were provided to her by her private counsel. On cross-examination, Ms. Kerr disclosed that she was testifying on a cell-phone from the back seat of a taxi cab. As a consequence, her testimony was fragmented and disjointed. Despite every reasonable effort to make a clear record, some of Ms. Kerr's testimony was entirely unintelligible. Ms. Kerr's testimony did not support any of the issues raised by Student, and was of little probative value.

43. Student's witnesses were less persuasive than the District's witnesses. Collectively, they lacked sufficient knowledge of the salient facts raised by this matter. Their testimony did not adequately support any of the issues raised by

Student. To the contrary, much of their testimony confirmed that the District's offer was made after meaningful participation by Mother and her attorney, as well as input by ACES staff. The District's offer was reasonably calculated to meet Student's needs. None of the testimony provided by the Student's witnesses casted any doubt about the qualifications and competencies of Mr. Pekarek and Ms. Wu.

LEGAL CONCLUSIONS

1. The party petitioning for relief has the burden of proving the essential elements of his or her claim. Here that burden rested with the District as to the overall issue, and with the Student on his issues (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

2. Under the IDEA, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d).) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the State educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(8).) "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).) "Related services" or designated instructional services means transportation and other developmental, corrective and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(22); Cal. Educ. Code § 56363(a).)

3. 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 (cited as *Rowley*).) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the

child to receive educational benefit, and comported with the child's IEP. (Rowley, 458 U.S. at 206-07.)

4. In the Rowley, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (M.L. v. Federal Way Sch. Dist. (9th Cir. 2004) 394 F.3d 634, 646; W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484.)

5. Regarding procedural requirements, both State and federal law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code §§ 56304, 56342.5; 34 C.F.R. § 300.501(a), (c).) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP meeting, and that does not constitute predetermination of the IEP. (Roland M. v. Concord Sch. Comm., 910 F.2d 983, 994 (1st Cir. 1990)); aff'd, 361 F.3d 80 (1st Cir. 2004).) However, when a school district predetermined the child's program and did not consider the parents' requests with an open mind, the school district denied the parents their right to participate in the IEP process. (Deal v. Hamilton County Bd. of Education (6th Cir.2005) 392 F.3d 840, 858.)

6. In Rowley, the Supreme Court determined that 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. (458 U.S. at 198-200.) The Court stated that school districts are required to

provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (458 U.S. at 200.)

7. 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, 195 F.3d at 1149 (citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

THE DISTRICT'S OFFER WAS NOT PREDETERMINED, NEITHER WAS IT PREPARED WITHOUT PARENTAL PARTICIPATION

8. As set forth in Factual Findings 20 through 23, 27 through 30, 32, 36 through 37 and 43, and Legal Conclusions 1 through 7, the District did not predetermine the offer it made at the October 7, 2008 IEP meeting and parent's input was meaningfully considered. The evidence established that the District members of the IEP team engaged in open dialogue with Mother and her attorney during the IEP meeting on October 7, 2008. Their input, for example in the instance of data collection, was not only considered, but it was incorporated into Student's IEP.

STUDENT'S TRANSITION PLAN WAS APPROPRIATE.

9. As set forth in Factual Findings 2 through 30, 36, and 41 through 43, and Legal Conclusions 1 through 7, the transition plan developed by the IEP team was appropriate. The expert testimony of Mr. Pekarek and Ms. Wu established that Student's transition plan followed a comprehensive assessment. The thirty-day transition period was consistent with what ACES recommended via Ms.

Hiconbotham's statement at the October 7, 2008 IEP meeting.

RON PEKAREK AND KATHERINE WU ARE QUALIFIED TO ACT AS STUDENT'S BEHAVIORAL SERVICE PROVIDERS.

10. As set forth in Factual Findings 4 through 25, 29, 36 and 43, and Legal Conclusions 1 through 7, Ron Pekarek and Katherine Wu are qualified to perform behavioral supervision for Student. They have the appropriate training and credentials to work in the capacities spelled-out in the IEP offer. Their testimony in this matter conveyed a sense of competency and dedication.

THE DISTRICT'S OCTOBER 7, 2008 IEP OFFER CONSTITUTED AN OFFER A FAPE

11. As set forth in Factual Findings 1 through 30, 36 and 43, and Legal Conclusions 1 through 7, the District's offer made during the October 7, 2008 IEP meeting would have provided Student with a FAPE. The offer followed a thorough FBA, the District's observations of Student and the District's consultation with Student's teachers and ACES staff. The offer was made after meaningful parental participation, and was reasonably calculated to provide some meaningful educational benefit.

ORDER

The District's offer made at Student's October 8, 2008 IEP meeting was an offer constituted a FAPE.

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: District prevailed on each issue presented and heard.

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. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

DATED: December 7, 2009

_____/s/____

GARY A. GEREN

Administrative Law Judge

Office of Administrative Hearings