

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

MONTECITO UNION ELEMENTARY
SCHOOL DISTRICT & SANTA BARBARA
COUNTY EDUCATION OFFICE.

OAH CASE NO. 2009050484

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), State of California, heard this matter in Montecito, California, on September 14, 15, 16, 17, 2009. The hearing was open to the public at parent request. A telephonic status conference was held on September 21, 2009.

Attorney Kathy Greco represented Student. Student's Mother attended the majority of the hearing. Student and his Father attended for half a day of hearing.

Attorney Laura Schulkind represented Montecito Union Elementary School District (District) and the Santa Barbara County Education Office (County). District principal Kristin Bergstrom (Principal Bergstrom) and County Special Education Coordinator Kathleen Gulje (Gulje), attended the hearing on all days.

Student's Request for Due Process Hearing was filed on May 11, 2009. The matter was continued for good cause on June 15, 2009. At the close of hearing, the parties requested, and were granted, a continuance until October 9, 2009 to file written closing arguments. The record was closed and the matter was submitted upon receipt of written closing arguments on October 9, 2009.

ISSUES¹

- 1) Did the District and County deny Student's parents meaningful participation in the development of Student's educational program by predetermining the offer of a free appropriate public education (FAPE) prior to IEP team meetings on April 10 and 20, 2009?
- 2) Did the District and County fail to offer Student a FAPE for the extended school year (ESY) 2009 by offering instructional aide services to be delivered by District and County staff rather than by a non-public agency?
- 3) Did the District and County fail to offer Student a FAPE for the 2009-2010 school year by offering instructional aide services to be delivered by District and County staff rather than by a non-public agency?

FACTUAL FINDINGS

1. Student was eleven years old at the time of hearing. At all relevant times, Student lived within the boundaries of the District and was eligible for special education as a child with autism.

2. Consistent with autism, Student had unique needs in the areas of communication, attention, social skills, behavior and sensory processing. In the area of communication, Student had very limited expressive speech. Instead, Student communicated by using a letter board, which was generally a laminated sheet of paper with letters and numbers on it. Student would point to a letter or number, either to spell out a word or sentence, or to indicate yes, no, or the letter or number answer to a

¹ The issues in Student's Due Process Hearing Request have been re-ordered to address procedural issues first.

question. From the time Student was in second grade in another school district, Mother used a technique called Rapid Prompt Method (RPM). RPM was developed by the mother of a child with autism. RPM operated on the theory that with rapid prompting for answers and visual and auditory cueing techniques to sustain attention, non-verbal children with autism could respond correctly to questions during the short periods when the child's attention was not diverted by uncontrollable self-stimulatory activity.

3. The County provided all special education services for District. District had just one elementary school.

4. During Student's third grade year (2006-2007), County special education teacher Tony Paulsen worked with Student using the letter board. Paulsen watched videotapes of RPM being used with Student and consulted with Mother about how to communicate with Student.

5. Student was not enrolled in the District elementary school for most of his fourth grade year (2007-2008).

6. In October of 2008, District, County, and Student entered into an unambiguous settle agreement to resolve student's due process hearing request in OAH case number 2007080292 (Settlement Agreement). The Settlement Agreement contained a clause limiting its terms to the written document and excluding any oral understandings between the parties. The parties expressly agreed that "for assessment purposes only," using a "response to intervention methodology," Student would receive a one-to-one aide for 30 hours a week from Inclusive Education and Community Partnership (IECP), a non-public agency.² The Settlement Agreement expressly recited that the IECP services were not for purposes of providing FAPE, and would not be Student's "stay put" placement in the event of a dispute about Student's program at the end of the 2008-2009 school year.

² IECP was referred to in the agreement as "Rick Clemens," the owner.

Although IECP was required to provide periodic progress reports to the IEP team, nothing in the Settlement Agreement provided that IECP would train District or County staff in any particular methodology they used with Student, or provide specific training to District or County staff about how to work with Student. Pursuant to the settlement agreement, an IEP dated June 10, 2008 would be in effect for the school year, as modified by the services provided by the Settlement Agreement. Nothing in the Settlement Agreement can be interpreted as an understanding between the parties that the IECP aide services would be faded out during the 2008-2009 school year and replaced by one-to-one aide services provided by District or County personnel. To the contrary, the Settlement Agreement expressly provided that the parties would meet prior to May 15, 2009 "to review the information gathered so far during the assessment process" and "to develop an appropriate IEP for the 2009-2010 school year." Neither the Settlement Agreement, nor the attached IEP expressly stated the amount of supervision hours to be provided by IECP.

7. County assistant superintendent Florene Bednersh (Bednersh) signed the settlement agreement for the County. Bednersh understood at the time of the settlement agreement that County staff would provide the services at the expiration of the settlement agreement if the methodologies were working. Bednersh believed at the time she executed the Settlement Agreement that it was intended to provide a seamless transition between IECP's services and County services. At hearing, Bednersh was unable to point to any language in the Settlement Agreement that was consistent with her interpretation. Bednersh identified a requirement in Student's IEP that IECP work collaboratively with District and County as memorializing her understanding of the Settlement Agreement. Bednersh's interpretation is rejected because it is inconsistent with the plain meaning of the settlement agreement.

8. County special education coordinator Kathy Gulje (Gulje) was responsible for supervising and coordinating the delivery of designated instruction and services provided

by the County. Gulje was involved in implementing the Settlement Agreement and was a member of Student's IEP team. Gulje was familiar with Student because she had provided speech therapy services to him during the 2005-2006 school year. In Gulje's mind, the entire purpose of the 2008-2009 school year program under the Settlement Agreement was to transition Student from IECF services to services provided by the County. Gulje did not solicit input from IECF at any time regarding how to fade out IECF services, nor did Gulje develop a fade-out plan for IECF services, because to Gulje this was happening throughout the 2008-2009 school year.

9. Elementary school Principal Kristen Bergstrom (Bergstrom) also believed at the time of the Settlement Agreement that one of its purposes was to train County and District personnel in the techniques being used by IECF. Bergstrom's recollection of the first meeting between District and County personnel and Kimberly Rubenstein (Rubenstein), a supervisor from IECF, was that Rubenstein stated that the intent of the IECF services during the 2008-2009 school year was for County personnel to assume responsibility for providing services at the end of the school year. At no time did Bergstrom discuss with Rubenstein whether Rubenstein had an opinion about whether the District and County were ready to take over provision of one-to-one aide services.

10. Rubenstein was the program supervisor from IECF for the 2008-2009 school year. Rubenstein first met Student in 2007, when she provided behavior support for Student in the home using ABA methodologies. Rubenstein was a credentialed teacher with training in behavior intervention strategies such as applied behavioral analysis (ABA) and discrete trial teaching (DTT). Rubenstein also had seven years experience working with RPM and had trained with the developer of RPM. Rubenstein generally supervised IECF staff and coordinated with school sites as part of IECF's mission to ensure student inclusion in general education school programs. Rubenstein provided direct hands-on feedback to IECF staff on how to work with clients. Rubenstein's work with Student under the

Settlement Agreement consisted of observations, recommendations, supervision of her staff, meeting with District and County personnel, developing data sheets, and tracking Student's progress.

11. The IECF employees who worked as aides at school sites were required to have a bachelor's degree and attend two, three day trainings. The three day trainings covered crisis behavior intervention, non-crisis positive behavioral support techniques, accommodations and modifications, social skills, sensory needs, professionalism, assistive technology, and client perspectives. In addition, training was offered every quarter with incentives for attendance. Rubenstein provided ongoing training and evaluation of IECF aides.

12. Rubenstein first started working with Student in the District elementary school in March of 2008. Rubenstein recalled her first meeting with Principal Bergstrom and County Coordinator Gulje during that month. At the meeting, Bergstrom and Gulje both expressed an intention that IECF aide services be transitioned to an aide provided by the County. At the time, Rubenstein told Gulje and Bergstrom that she could not yet say whether such a transition was appropriate for Student. Rubenstein's version of events is more persuasive than that of Principal Bergstrom given that the Settlement Agreement contained no provision regarding training County personnel and included a clause stating that an IEP meeting would be held at the end of 2008-2009 school year. Moreover, it makes sense that Rubenstein could not have had an opinion about transitioning Student's services to County employees at a time when IECF's in-school services had just begun.

13. Rubenstein did not recall any other discussion with Gulje and Bergstrom about transitioning Student's aide services to County employees other than an email request to hold a training about working with Student.

14. As of March of 2008, when IECF began working with Student, Student would fall to the floor and cry at school 15-17 times a day. IECF initiated a behavior program to

expand Student's attention span before he received a sensory break to use a fidget toy and/or sit in a bean bag chair.

15. IECP staff also assisted Student with using his communication method, which was the combination of RPM and prompting used by Mother. Rubenstein explained that she and the IECP staff did not facilitate Student's responses using the letter board by substituting their own responses, but instead physically and verbally prompted Student to respond for himself. Rubenstein believed that the responses she obtained from Student using this communication method were his own.

16. In October of 2008, special education teacher Paulsen assisted the IECP aides by helping to supply them with letterboards, a timer, and fidget objects for Student's breaks. Paulsen also provided information about curriculum and school activities. Paulsen was not Student's special education teacher after December of 2008. Paulsen was not a member of Student's IEP team during any relevant time period. Paulsen did not attend any trainings put on by IECP.

17. During the 2008-2009 school year, Rubenstein met at least monthly with Mother, Gulje, Bergstrom, the assigned special education teacher (Paulsen prior to December of 2008, Patricia Caron (Caron) after December of 2008), and the providers of speech therapy, occupational therapy and adapted physical education services. The meetings were to discuss and coordinate IECP's work with Student. The County instructional assistants and IECP aides were not part of the meetings.

18. County instructional assistant Joe Hulsizer, and another aide who no longer worked for the County at the time of hearing, sometimes worked with Student during the 2008-2009 school year while an IECP one-to-one aide was taking a half hour lunch. County instructional assistants were hired based on a test and oral interview. Prior experience with special education students or its equivalent was required. Instructional assistants were trained in behavior management, communication differences, inclusion,

and cultural differences. None of the County staff assigned to work with Student for the few minutes that IECP staff was on break had any training in RPM from the District or County.

19. Student's fifth grade teacher, Patty Walpole (Walpole), explained at hearing that she had no training in facilitated communication, had no idea what the IECP aide did with Student, and that meetings she attended with Rubenstein from IECP were a review of activities with Student.

20. Student's music teacher, Pamela McLendon (McLendon) similarly demonstrated that she had no understanding of the communication methodology being used with Student. McLendon testified that she had no knowledge of facilitated communication. McLendon had stated in a progress report that Student's one-to-one aide had taken a test for him.

21. Credentialed special education teacher Caron taught Student from December of 2008 through June of 2009. Caron worked collaboratively with the general education teacher and worked individually with Student for approximately one hour per week. While assigned to Student, Caron observed the IECP aides working with Student. Caron attended the two trainings put on by Rubenstein of IECP. Caron could not recall the specific dates of the trainings. Caron communicated with Student using his letterboard by holding it in one hand while holding Student's right arm just above the elbow. Using this method, Student communicated the answers to yes/no or multiple choice questions. According to Caron, IECP aide Stromberg had given her some instruction on how to use the letterboard with Student. Caron also saw County aide Hulsizer work with Student while Stromberg was present.

22. Kent Stromberg (Stromberg) was Student's IECP aide for three days a week during the 2008-2009 school year. Stromberg had a bachelor's degree and a master's degree in psychology. At the time of hearing, Stromberg was also working on a doctoral

degree in psychology. Stromberg denied having any training in facilitated communication and denied using it with Student. Stromberg unequivocally denied typing Student's answers for him on the letter board. Instead, Stromberg explained that he at most physically prompted Student to make a response by nudging Student's elbow toward the letter board. At hearing, Stromberg was not familiar with the term "facilitator effect," a term describing a phenomenon where the facilitator consciously or unconsciously substitutes his or her own communication for that of the autistic person being facilitated.

23. Stromberg's testimony that he did not substitute his answers for those of Student was persuasive because it appeared sincere and was not contradicted. Rubenstein explained that during the 2008-2009 school year, in response to concern from the District and County, she had compared Stromberg's work product with Student with that of the other IECF aide. Rubenstein found that the responses attributed to Student, even responses to open-ended questions, were consistent. Rubenstein also had worked with Stromberg on his technique in order to minimize any concern that he was moving the letter board as part of a facilitator effect. Although Gulje, Bergstrom and Bednersh were all skeptical of whether Student's academic performance was a result of a facilitator effect, the District and County did not do any systematic assessment of the accuracy of Student's communications. No systematic assessment was ever done even though County employees like special education teachers Caron and Paulsen had communicated with Student by using a letter board. Undermining the validity of the skepticism of Gulje, Bergstrom and Bednersh toward Student's communication through IECF aides was their irreconcilable contrary opinion at hearing that County staff were capable of implementing Student's communication system because they had observed and emulated IECF aides like Stromberg.

24. During the 2008-2009 school year, Student's attention to task without interfering behaviors such as falling to the floor and/or crying increased to a span of 18

minutes. A timer was used with Student and he was offered an opportunity to take a break to sit in a bean bag chair with a fidget object at the end of the time period.

25. For the 2008-2009 school year, the District reported Student's academic progress as approaching or meeting grade level standards in all areas. Student's results on state standards testing were near "basic" in English-Language Arts and Science, and "proficient" in Mathematics. All testing was done with an IECF aide assisting Student to use the letter board. Student also made progress socially during the 2008-2009 school year, as shown by his use of the letter board to exchange greetings with typical peers.

26. In March of 2009, Mother orally asked County coordinator Gulje for additional assessments in speech and language, occupational therapy, and adapted physical education. An assessment plan was developed and Mother was informed that she could pick it up at the school office. Mother did not pick up the assessment plan due to a death in the family, but did not do anything further to obtain the assessment plan.

27. On March 26, 2009, Parents privately obtained a speech and language re-evaluation from Susan Fosnot, Ph.D. at a cost of \$1,500. Also in March of 2009, Parents privately obtained an occupational therapy re-evaluation from Stephanie Afshar at a cost of \$145.

28. IECF prepared a report dated April 6, 2009 in preparation for Student's IEP team meeting on April 10, 2009. Consistent with Rubenstein's testimony, the report noted that IECF assisted Student with communication using RPM and facilitated communication in conjunction with a letter board. IECF Program Supervisor Rubenstein drafted proposed goals for purposes of the IEP team meeting and recommended: 1) continued use of RPM and facilitated communication; 2) an assistive technology assessment; 3) "priming" of school work and/or new activities; 4) one-to-one aide support for communication, behavior, and social skills development; and 5) program supervision. Rubenstein's recommendation assumed that IECF would continue to serve Student and as such, she did

not make recommendations regarding a transition or fade-out plan for IECF services.

29. As part of the Settlement Agreement, Student's cognitive ability was assessed by Doug Moes, Ph.D. (Dr. Moes), who generated a report dated April 9, 2009. Dr. Moes did not testify at hearing, but his report was considered by the IEP team. Dr. Moes was unable to successfully complete the Leiter International Performance Scale – Revised (Leiter-R), a non-verbal cognitive test, even with use of verbal and gestural prompts. Dr. Moes noted that Student's reported academic performance in school was based on use of the letter board with a one-to-one aide, which was not permitted as part of the Leiter-R. Dr. Moes made recommendations about how to get a better understanding of Student's cognitive ability for purposes of improving his educational program. Dr. Moes concluded his report by raising a concern that Student's mode of communicating through a letter board with adult prompting could be subject to a "facilitator effect," meaning that the responses generated were those of the adult facilitator and not Student. Dr. Moes recommended that Student's educational program focus on developing self-initiated communication and improving Student's ability to respond with various communication modes to multiple cues. Dr. Moes also recommended that Student's mode of communication using the letter board and adult facilitation should be systematically studied to determine if Student's responses were indeed his own.

30. IEP team meetings were held on April 10 and 20, 2009 for purposes of developing Student's program for the 2009 ESY and 2009-2010 school year. The private speech and occupational therapy assessments obtained by Mother were provided to District and County. The IEP team discussed whether fading Student's facilitator would improve his spontaneous communication. There was no discussion at either meeting regarding the qualifications of County personnel to work with Student or whether it would be appropriate for County personnel to provide the one-to-one aide services that IECF had provided during the 2008-2009 school year.

31. In math, Student's present level of performance stated that Student required both "physical and verbal prompts to initiate all responses using AAC system [the letter board]." Student's math goal expressly called for the use of alternative communication for Student's responses with a one-to-one aide holding Student's letter board. The math goal also contained a goal that Student would self-initiate at least three out of ten responses. As written, this goal required the continued use of RPM/facilitated communication.

32. In the area of communication, Student's present level of performance stated that "communication with adults and peers require both verbal and physical prompts to initiate a response." Student's goal in this area was to use the letter board, with two verbal prompts to respond to a peer question. As written, this goal required the continued use of RPM/facilitated communication.

33. In the area of written language, Student's goal was written to require the use of the letter board to complete grade-level written assignments with 80 percent accuracy. As written, this goal required the continued use of RPM/facilitated communication.

34. The IEP team meetings on April 10 and 20, 2009 resulted in the following offer of placement and services for the 2009 extended school year (ESY): 1) placement at a YMCA program for four weeks, four hours per day; 2) one-to-one instructional support provided by the County for the day; 3) 60 minutes per week of individual speech therapy provided by the County; and 4) 20 minutes per week of individual occupational therapy provided by the County; and 20 minutes per week of adapted physical education provided by the County.

35. The IEP team meetings on April 10 and 20, 2009 resulted in the following offer of placement and services for the 2009-2010 school year: 1) placement in regular education for 89 percent of the school day, with removal from the classroom for designated instruction and services; 2) one-to-one instructional support provided by the County for the entire six and one half hour school day; 3) two hours per week of individual

“pull out” speech therapy provided by the County plus 30 minutes per week of speech therapist consultation services; 4) 30 minutes per week of adapted physical education provided by the County, plus 45 minutes per month of consultation with the general education physical education teacher; and 5) 30 minutes per week of individual “push in” occupational therapy provided by the County, plus 60 minutes per month of consultation.

36. The April of 2009 IEP offer included a recommendation for an alternative technology assessment (that Mother stated she would not consider until September), as well as goals related to having Student spontaneously communicate.

37. Although the April of 2009 IEP indicated that a behavior support plan (BSP) was attached to the IEP, none was produced at hearing. Gulje unequivocally testified that no BSP was developed because Student’s behaviors were under control at the time of the IEP.

38. IECF supervisor Rubenstein provided two “in service” trainings to District and County employees during the 2008-2009 school year. Rubenstein was not certified to train others in RPM. The first training, which occurred in March of 2009, was intended by Rubenstein to be an overview of RPM and facilitated communication. The training focused more on RPM because there was a lot of material to cover.

39. The second IECF training for District and County employees was held on May 29, 2009, after the District had made its IEP offer of aide services provided by the County. The second training was specifically about how to work with Student. At no time did Rubenstein provide training to District or County personnel with Student present for demonstration and feedback on specific techniques. Rubenstein’s recollection of the dates of the trainings was credited because, as the person who gave the training, she was more likely to remember the date. Moreover, none of the District or County witnesses was able to provide a specific date that the training occurred.

40. At no time was Rubenstein asked to provide training to District or County personnel regarding how to take over the implementation and supervision of Student's IECF program. Rubenstein explained that she could have done so if asked, however, at all times her recommendation was that IECF continue to serve Student. Rubenstein described her monthly meetings with District and County personnel as collaboration meetings, not as training sessions. Rubenstein did not believe that at the time of the April of 2009 IEP team meetings that Student was ready to transition from IECF support to that of County personnel, particularly when no formal training of County personnel had occurred. At the time of hearing, Stromberg and one other IECF aide were available to work with Student if needed.

41. On July 28 and 29, 2009, Student was independently examined at parent's expense by Ann Simun, Psy.D. (Dr. Simun). Dr. Simun was a well-credentialed, California-licensed psychologist with a background in school psychology. Dr. Simun conducted a battery of assessments over an eight hour period, reviewed Student's school records, interviewed Mother, and observed Student at school for approximately 45 minutes. Dr. Simun was able to complete various non-verbal cognitive tests including the Test of Non-verbal Intelligence, Third Edition, the Leiter, and the Children's Category Test. Overall, Student demonstrated cognitive abilities in the average to impaired range. Consistent with autism, Student demonstrated cognitive rigidity when the demands of the test changed, i.e., he continued to answer problems the same way even after the test question required a different method of response.

42. Parents did not consent to implementation of the April of 2009 IEP. Student did not enroll in the District elementary school after the IECF services ended by operation of the Settlement Agreement in June of 2009.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (Schaffer v. Weast (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

ISSUE ONE – PREDETERMINATION

2. Student's first contention is that he was procedurally denied a FAPE because prior to the April of 2009 IEP team meetings, the District and County predetermined that County personnel would be offered to meet Student's behavioral and communication needs rather than IECF personnel. District and County contend that Student did not demonstrate predetermination because the parties had agreed to having Rubenstein from IECF assess Student prior to the IEP team meetings, Rubenstein participated in developing Student's goals, and at the IEP team meetings Rubenstein could have, but did not, further discuss her recommendation that IECF continue serving Student. Alternatively, District contends that no procedural violation occurred because Student was not substantively denied a FAPE. For the reasons set forth below, Student met his burden of proof by a preponderance of the evidence.

3. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means 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. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. There are two parts to the legal analysis of whether a school district complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (Board. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690] (Rowley).)

5. A procedural violation constitutes a denial of FAPE 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.) If a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (Amanda J. ex rel. Annette J. v. Clark County School Dist. (9th Cir. 2001) 267 F.3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; Target Range, supra, 960 F.2d at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

6. In general, when developing an IEP, the IEP team must consider: the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) If a pupil's behavior impedes his or her learning or that of others, the IEP must consider "the

use of positive behavioral interventions and supports, and other strategies, to address that behavior.” (Ed. Code, § 56341.1, subd. (b)(1).) If, after considering the above factors, the IEP team determines that to provide a FAPE a child needs a particular device, service, intervention, accommodation or program modification, in order to make progress on annual goals, make progress in the general education curriculum or be educated with other students, the program modifications must be listed in the child’s IEP. (Ed. Code, §§ 56341.1, subd. (c) & 56345, subd.(a)(4).)

7. The parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings. (34 C.F.R. § 300.501(a) & (b) (2006); Ed. Code, §§ 56500.4, 56341, subd. (b), 56341.5, subds. (a) & (b).) “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan.” (Amanda J., *supra*, 267 F.3d at p. 882.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meeting, expresses disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (N.L. v. Knox County Schools (6th Cir. 2003) 315 F.3d 688, 693; Fuhrmann v. East Hanover Bd. of Educ. (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

8. An education agency’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.) Predetermination occurs “when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.” (H.B., et al. v. Las Virgenes Unified School Dist. (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, Ms. S. ex rel G. v. Vashon Island Sch. Dist. (9th Cir. 2003) 337 F.3d 1115, 1131 [“A school district violates IDEA procedures if

it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification.” (citing Target Range, supra, 960 F.2d at p.1484)].)

9. Here, Student demonstrated that the District and County predetermined the related services needed to address Student’s behavior and communication needs. County Assistant Superintendent Bednersh and Coordinator Gulje testified unequivocally that at all times prior to the April of 2009 IEP team meetings they believed that they were already involved in the process of transitioning Student’s services from IECP to the County. Principal Bergstrom testified similarly. The testimony of Gulje and Bergstrom was consistent with Rubenstein’s account that at the very first meeting with IECP in March of 2008, District and County were discussing their intent that County personnel take over the provision of services at the expiration of the Settlement Agreement. It was apparent from their testimony that Gulje, Bednersh and Bergstrom all believed that the Settlement Agreement provided for a transition from IECP to County personnel. The fact that the Settlement Agreement is devoid of such an important term demonstrates that Gulje, Bednersh and Bergstrom had predetermined Student’s placement prior to the IEP meetings and were unwilling to consider other alternatives.

10. Further demonstrating predetermination was the fact that the second IECP “training” of District and County personnel did not occur until May of 2009, after the IEP offer of County services. At the time of the IEP meetings in April, District and County could not have had a meaningful discussion about whether it was appropriate for the County to provide services if County employees had not even completed the “training” with IECP. Moreover, Rubenstein credibly explained that the monthly meetings between her, Bergstrom and Gulje were not intended to be training sessions. Rubenstein was credible on this point given that at no time did these meetings involve any supervision of District or County staff in directly working with Student and the monthly meetings did not include

County instructional assistants such as Hulsizer. Similarly, predetermination is shown by the fact that IEP team members Gulje and Bergstrom did not discuss with Rubenstein at any time after March of 2008 whether it was appropriate to transition Student from IECF services to County services, and if so, how. Consistent with a predetermination that IECF services would end by June of 2009, the District and County never undertook any formal study of whether there was a “facilitator effect,” despite Gulje, Bergstrom and District teachers expressing skepticism of the communications attributed to Student. If the District and County had an open mind about whether IECF or the County should provide services to Student, it would have been important to collect and compare data about Student’s letter board communications with IECF aides and County personnel. In sum, Student demonstrated by a preponderance of the evidence that he was procedurally denied a FAPE based on predetermination of the offer of services prior to the April of 2009 IEP team meetings. (Factual Findings 1-42; Legal Conclusions 1-10.)

ISSUES TWO AND THREE

11. In Issues Two and Three, Student contends that the offer of FAPE for ESY 2009 and the 2009-2010 school year did not substantively offer him a FAPE. In light of the legal conclusion that Student was denied a FAPE because the April 2009 IEP team meetings were procedurally flawed by a total denial of parental participation in the IEP process, this Decision need not reach the issue of whether the District’s offer was substantively appropriate. (See Legal Conclusion 5.)

REMEDY

12. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (Student W. v. Puyallup School District (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (Id. at p. 1496.) These

are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (Id. at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (Reid ex rel. Reid v. District of Columbia (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (Ibid.)

13. Here, although Student presented evidence that Student’s parents spent money on independent speech and occupational therapy assessments, reimbursement for these expenses is not an appropriate remedy. Student did not expressly raise any issue in the due process hearing request that the District failed to assess him in all areas of suspected disability prior to the April of 2009 IEP team meetings. Moreover, the evidence showed that the District had been willing to provide the requested assessments in March of 2009. Similarly, the evidence at hearing focused on Student’s communication and behavior needs more than occupational therapy, speech therapy, and adapted physical education. No evidence was presented regarding any impact on Student from not having received the occupational therapy, speech therapy, and adapted physical education specified in the April of 2009 IEP. Accordingly, compensatory education for speech therapy, occupational therapy or adapted physical education missed while Student was not enrolled is also denied.

14. Should Student chose to enroll in the District elementary school after the date of this order, IECp services are an appropriate remedy for the predetermination of Student’s IEP. The denial of the fundamental procedural right of parental participation in the IEP team justifies modification of the IEP to reflect the program parents preferred at the time of the April of 2009 IEP team meetings, particularly where the evidence at hearing showed that Student received educational benefit from 30 hours per week of service from

IECP aides, both in reduction of maladaptive behavior and in successful academic and social communication. Further, the evidence at hearing did not demonstrate that the County or anyone else is currently capable of providing the services IECF had been providing. Moreover, the District's general education teaching staff who had worked with Student had no practical understanding of Student's unique communication needs. Thus, should Student choose to enroll at the District elementary school, the April of 2009 IEP shall be modified as follows: 1) The "specialized academic instruction" listed on page 29 shall be provided by IECF with a frequency of six hours per day, 30 hours per week; 2) Page 29 shall be modified to include "supervision of specialized academic instruction" by IECF in the same amount of hours per month used by Rubenstein to supervise the Settlement Agreement; and, 3) As modified by this order, the April of 2009 IEP shall constitute Student's stay put placement in the event of any future dispute between the parties regarding the provision of FAPE to Student. As further compensatory education, District shall provide Student with 30 hours of IECF specialized academic instruction and supervision per week in the same amounts specified above through the end of the regular school year in June of 2010. In addition, as compensatory education for the predetermination of services for the 2009 ESY, District and County shall provide Student with up to 80 hours of specialized academic instruction from an IECF instructional assistant, plus sixteen hours of supervision by an IECF supervisor, to be used by Student during any time that the District elementary school is not in session between the date of this Decision and August 30, 2010. The 80 hours of IECF specialized instruction is intended to be a "bank" of make-up hours equal to the 2009 ESY, which Student and IECF will be able to use during school holidays or during the summer of 2010. (Factual Findings 14, 15-28, 31-35, 37, 40, 42; Legal Conclusions 7, 12.)

ORDER

1. If Student chooses to re-enroll in the District elementary school, the April 10 and 20, 2009 IEP shall be modified as follows:
 - a. The “specialized academic instruction” listed on page 29 shall be provided by IECF with a frequency of six hours per day, 30 hours per week. A County instructional aide or designated instruction and service provider may work with Student during the remaining 30 minutes of the school day.
 - b. “Supervision of specialized academic instruction” by IECF shall be added to page 29, in the same amount of hours per month used by Rubenstein to supervise the Settlement Agreement.
2. Provided Student is enrolled in the District elementary school during the 2009-2010 school year, the District shall provide Student with IECF services and supervision in the amounts listed in the paragraph above through the last regular day of school in June of 2010.
3. As modified by this order, the April 10 and 20, 2009 IEP shall constitute Student’s stay put placement.
4. The District shall provide Student with up to 80 hours of specialized academic instruction from an IECF instructional assistant, plus up to 16 hours of supervision by an IECF supervisor, to be used by Student during any time that the District elementary school is not in session between the date of this Decision and August 30, 2010.

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. By prevailing on the predetermination issue, Student prevailed on all 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: November 4, 2009

/s/

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings