

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009051049

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on November 10, December 14, and December 15, 2009, in Los Angeles, California.

Student's mother (Mother) represented Student. Mother attended all three days of hearing, and Student attended on November 10 and December 15, 2009.

Patrick Balucan, Attorney at Law, represented the Los Angeles Unified School District (District). District representative, Sharon Snyder, Due Process Specialist, attended all three days of hearing, with the exception of the afternoon of November 10, 2009. Sue Talesnick, Due Process Specialist, attended the hearing in Ms. Snyder's absence.¹

Student filed his request for due process hearing (complaint) on May 18, 2009. On July 9, 2009, for good cause shown, OAH granted District's request for resetting the 45-day timeline for issuance of a decision in this matter, to commence on June 26, 2009.

¹ Armando Inclan, a newly hired Due Process Specialist with the District, attended the hearing on November 10, 2009, with the permission of Mother. Mr. Inclan attended for observational purposes only.

On August 18, 2009, OAH issued an order granting Student's August 10, 2009 request to amend his complaint, and reset the applicable timelines to commence on August 18, 2009. On October 6, 2009, for good cause shown, OAH issued an order granting District's request to extend the procedural timelines, to commence on October 14, 2009.

On the first day of hearing, District advised that, on November 5, 2009, it filed a Motion to Dismiss four of the six issues set forth in the Order Following Prehearing Conference, alleging that Student could not raise those claims as they were either barred by the statute of limitations, barred by a settlement agreement containing a waiver of all claims, or barred because OAH lacked jurisdiction to hear the claims. At hearing, Mother presented an oral opposition to District's motion to dismiss. ALJ Garrett took the matter under submission, and advised the parties that the issue would be addressed in the Decision in this matter.

On December 15, 2009, at the close of the hearing, the parties were granted permission to file written closing arguments by January 15, 2010. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

ISSUES²

1. Are Student's claims that he was denied a free and appropriate public education (FAPE) in his April 2007 Individualized Education Program (IEP), barred by the waiver of claims set forth in the October 28, 2008 settlement agreement, or by the two-year statute of limitations?

² The ALJ has rephrased the issues for clarity and chronological order. In addition, the ALJ has added issues, enumerated here as Issue One and Issue Two, addressing the contentions set forth in District's Motion to Dismiss.

2. Does OAH have jurisdiction to decide Student's claim that District denied Student a FAPE by failing to conduct a speech and language assessment and timely convene an IEP as agreed in the October 28, 2008 settlement agreement?

3. Did District deny Student a FAPE by failing to offer Student an appropriate placement in the least restrictive environment in the April 2007 IEP?

4. Did District deny Student a FAPE by failing to offer Student speech and language services in the April 2007 IEP?

5. Did District deny Student a FAPE by failing to conduct a speech and language assessment and timely convene an IEP as agreed in the October 28, 2008 settlement agreement?

6. Did District deny Student a FAPE in the 2007-2008 school year by failing to convene an annual IEP?³

7. Did District deny Student a FAPE by removing Student from his language composition class, a core academic class, and by placing him in a computer class?

8. Did District violate Parents' procedural rights by unilaterally terminating Student's annual IEP meeting held on April 15, 2009, because District lacked sufficient knowledge of Student's program?

9. Did District violate Parents' procedural rights in the April 15, 2009 IEP meeting by not permitting parents to provide input or an opportunity to participate in the decision-making process regarding Student's program, curriculum, and services by:

(a) failing to revise, review, or amend the April 15, 2009 IEP; and

(b) failing to provide Student with the IEP?

³ At hearing, Mother withdrew Issue Six. As such, the decision will not address the merits of this claim.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND INFORMATION

1. Student is a 20-year-old young man, who, at all relevant times, resided in the District, and was eligible for special education under the eligibility category of specific learning disability.

2. Student was diagnosed with asthma when he was a young child. His asthma progressively worsened over the years, requiring occasional hospitalization. In addition, Student was, and still is, required to receive breathing treatments on an as-needed basis. Student also has hypertension and allergies. These conditions have sometimes prevented Student from attending school.

3. In February 2007, Mother enrolled Student at Crenshaw High School (Crenshaw) in the District. Student was placed in the general education environment with resource support.

4. On March 8, 2007 and April 12, 2007, District conducted Student's speech and language assessment. The results of the assessment indicated that Student's speech articulation skills, voice, and fluency were in the average range, and that his oral/motor structure and function were adequate for speech production. The assessment report also noted that Student's receptive language and receptive vocabulary skills were significantly delayed. In addition, his expressive language skills were significantly below average range, while his pragmatic language skills were within the average range. Additionally, Student's classroom teacher found Student's speech easy to understand, although Student rarely participated in classroom discussions. The teacher also expressed concern about Student's frequent absences. The report concluded that Student did not have speech delays that interfered with his ability to progress in the general curriculum; however, Student did have language delays that impacted his educational functioning. Specifically, Student rarely spoke in class, which affected his participation in oral language activities. The report concluded that Student's language

deficits could be addressed in the context of a language-based special day program, and recommended that teachers encourage Student to participate in classroom discussions. Finally, the report indicated that Student did not meet the eligibility criteria for speech and language impairment, but was silent as to whether speech and language services were appropriate for Student.

5. On April 19, 2007, the IEP team met for Student's triennial review. The team discussed Student's present levels of performance. Student had deficits in reading, writing, and math due to his specific learning disability. The team developed behavioral support, math, reading, writing, and vocational goals. District offered Student continued placement in the general education environment with resource support services and instructional accommodations, such as one-on-one instruction, extended time to complete assignments, vocabulary strategies, a dictionary, a thesaurus, a calculator, a graphic organizer, and varied teaching strategies. Speech and language services were not offered. The IEP also included an Individual Transition Plan (ITP) indicating that Student's goals were to obtain his high school diploma, associate degree, and his undergraduate degree. Mother consented to the April 19, 2007 IEP.

6. On February 20, 2008, Mother, on behalf of Student, filed a due process complaint (complaint) against District (OAH Case No. 2008030370),⁴ alleging that Student failed to make adequate progress under his April 2007 IEP, and that District failed to identify and address all areas of Student's suspected disability. Mother also alleged that District failed to offer Student an appropriate placement in the least restrictive environment, and that Student suffered a loss of academic benefit resulting from procedural violations at the April 2007 IEP.

⁴ The ALJ has taken administrative notice of the content of this pleading, as well as the subsequent pleadings and orders filed in connection with OAH Case No. 2008030370.

7. In March 2008, Student took the California High School Exit Examination (CAHSEE), but did not pass the English/Language Arts portion of the exam.

8. On April 28, 2008, the IEP team met for Student's annual review. The team discussed Student's present levels of performance. Teachers observed that Student was easily distracted, scattered, and unfocused, and had to be reminded to stay on task. Student had limited comprehension skills, which made it difficult for him to complete assignments. The IEP team concluded that Student's disability interfered with his ability to access the curriculum, even with the use of supplementary aids and services. Consequently, the IEP team developed math, reading, writing, and vocational goals. District offered Student placement in the Special Day Class Program (SDC), including the extended school year (ESY) and intersession periods, and offered in-school and after-school tutoring. Student was projected to participate in high school graduation/culmination exercises on June 22, 2009. Also, the IEP included an Individual Transition Plan which indicated that Student should focus on attending a community college, including investigating the admissions requirements and locations in his area. Mother did not consent to the April 28, 2008 IEP.

9. In May 2008, Student retook the English/Language Arts portion of the CAHSEE, but did not pass.

10. On May 6, 2008, Mother filed an amended complaint in OAH Case No. 2008030370 on Student's behalf, alleging that Student was denied a FAPE because: (1) Student received an improper speech and language assessment prior to April 2007; (2) Student's placement failed to meet his speech and language and medical needs; (3) Student's services were not in conformity with his IEP in that Student was not taught by highly trained instructors; (4) the April 19, 2007 IEP meeting did not include the presence of a general education English teacher; and (5) District's implementation of an April 26, 2007 IEP was without parental consent.

11. On October 28, 2008, Mother and Sharon Snyder, Due Process Specialist of the District, entered into a Final Settlement Agreement and Release (settlement agreement) regarding OAH Case No. 2008030370, which provided, among other things, that District would conduct another speech and language assessment of Student, and would convene an IEP meeting within 60 days to review the results of the assessment. The settlement agreement also provided one hour per week of speech and language services, to be provided by a certified non-public agency (NPA), until August 30, 2009. The settlement agreement stated that all services District agreed to provide did not constitute an admission that those services constituted a FAPE for Student, and included language fully releasing and discharging the parties from all claims, both known and unknown. Specifically, the settlement agreement constituted a full and final resolution of all claims and issues arising from Student's educational program through October 28, 2008. Finally, the settlement agreement provided that the District would implement the April 28, 2008 IEP.

12. Student began attending the SDC shortly after Mother and District entered into the settlement agreement. Mother explained at hearing that the other students in the SDC were approximately four years younger than Student, suffered from more severe disabilities than Student, and many could not read. As a result, Student felt self-conscious and stigmatized. Also, Student felt unchallenged, and, as a result, began to withdraw and lose interest in class.

13. On November 11, 2008, Mother signed an assessment plan indicating that District would be assessing Student in the areas of speech function, academic performance, health and development including vision, and career and vocational abilities.

14. District never conducted a speech and language assessment, as set forth in the October 28, 2008 settlement agreement or in the assessment plan signed by Mother on November 11, 2008.

15. In February 2009, Student received his report card for the 2009 fall semester. He received a grade of "D" in his computer class, and the teacher's comment section indicated that Student had been absent twelve times, and tardy eight times. At hearing, Mother explained that, in his computer class, Student tried everything possible to communicate with the skills he had, including writing notes to the instructor. In addition, Student routinely completed wrong assignments, as he was often confused about what the teacher wanted.

16. Student's February 2009 report card also revealed the following:

<u>Course</u>	<u>Grade</u>	<u>Absences</u>	<u>Tardies</u>
Amer. Democracy	C	4	32
U.S. History	A	6	4
Algebra	C	4	2
Expository Comp	C	4	9
English	A	5	2
Essential Standard English	B	8	2

17. At the beginning of the second semester of the 2008-2009 school year, Crenshaw placed Student in a painting class. On February 18, 2009, pursuant to Mother's request, Crenshaw removed student from the painting class, and placed him in Algebra class.

18. In March 2009, Student received a progress report card. The progress report showed that Student received a "D" in his Algebra class, and was absent five times, and tardy once. Mother explained at hearing that Student would routinely complete the wrong assignments, would interpret information incorrectly, and would not understand when exams were scheduled. The March 2009 progress report did not include any grades for Modern Literature, Economics, Vocational ENS, and Band.

19. In March 2009, Student retook the English/Language Arts portion of the CAHSEE, but did not pass.

20. In April 2009, Student received his midterm report card for the spring semester of 2009. Although Student was enrolled in Modern Literature, the report card

did not reflect a grade. Student's Modern Literature teacher was Kamela Willard. Ms. Willard, who testified at hearing, has worked for the District for seven years, the last two and one-half as a special education teacher at Crenshaw. Prior, she was a special education aid. She earned her bachelor's degree in 2005 in interdisciplinary studies, and has a provisional credential to teach special education. Ms. Willard is currently working on her credential, and expects to earn it, as well as her master's degree, in June 2010. At Crenshaw, she teaches the SDC in the areas of government, expository composition, modern literature, and economics. Ms. Willard explained that Student's report card should have reflected that Student had earned a "C" in Modern Literature, was absent eleven times, and tardy twelve times. Ms. Willard also taught Economics, where Student received a "C." In Economics, Student was absent six times and tardy thirteen times. Ms. Willard did not observe or experience any communications issues with Student. She observed Student talking to his peers, and no one complained of any speech issues concerning Student.

21. Similarly, Ethel Early, special education bridge coordinator at Crenshaw, and one of Student's former teachers, testified at hearing. Ms. Early has been employed with the District for 14 years, and is currently a special education teacher and a special education bridge coordinator. As a bridge coordinator, she oversees IEP meetings. She has been a special education teacher for nine years, and a bridge coordinator for three years. She has been working at Crenshaw for four years. She received her associate's degree in 1998 in interdisciplinary studies, received her bachelor's degree in 2000 in liberal arts, and received her master's degree in special education in 2002. Ms. Early has a teaching credential in special education. Ms. Early explained that Student could be easily understood, and detected no defects in Student's speech or language.

22. The midterm report card also showed the following:

<u>Course</u>	<u>Grade</u>	<u>Absences</u>	<u>Tardies</u>
Vocational	B	5	0
Algebra	D	8	2

Student's Algebra teacher noted on the report card that Student's excessive absences and tardies could result in Student failing the class.

23. In April 2009, District sent Mother a notice to participate in an IEP meeting to discuss the three-year review of Student's IEP, and to develop, review and/or revise Student's Individual Transition Plan. District scheduled the meeting for April 15, 2009. On April 14, 2009, Mother advised District that she would participate in the IEP meeting.

24. On April 15, 2009, the IEP team met. Student, Mother, and Student's father were present at the meeting, as well as Ms. Willard, who not only participated as Student's SDC teacher, but also served as the IEP meeting coordinator. Also present at the meeting were Angela Burns, the special education teacher's aid, Clarence Harley, the school counselor, and Diane Crocker, the transition teacher.⁵ Ms. Willard brought to the meeting a draft copy of the IEP that the District had prepared prior to the meeting, with the intent of using it to develop a final draft at the meeting. The draft copy stated, among other things, that Student was projected to earn his high school diploma by June 22, 2009. When the meeting began, Mother expressed dissatisfaction with how Crenshaw had developed Student's class schedule. Specifically, Mother complained that Student had not been properly placed in an English class, and that she had to make the school change Student from a painting class to an Algebra class. Mother also expressed concern about Crenshaw's failure to conduct a speech and language assessment, pursuant to the terms of the October 28, 2008 settlement agreement, and the

⁵ At hearing, Ms. Willard testified that Ethel Early, special education bridge coordinator, also attended the April 15, 2009 IEP meeting. However, Mother testified that Ms. Early was not present at that meeting, and Ms. Early testified that she had no recollection of being at the April 15, 2009 meeting. Whether Ms. Early attended or not is not relevant to the issues involved in this matter.

assessment plan signed on November 11, 2008. Mother also advised the team that, following the assessment, Student's IEP was to be reviewed, and if necessary, revised accordingly. Ms. Willard explained to Mother that she did not know anything about the settlement agreement, the assessment plan, or reviewing and revising Student's educational program. Given these factors, Ms. Willard felt uncomfortable proceeding any further with the meeting, and consequently terminated it. The entire meeting lasted approximately ten minutes. The IEP team did not have an opportunity to develop a final IEP before Ms. Willard terminated the meeting, and Mother did not receive a copy of the draft IEP. Mother asked Ms. Willard to reschedule the IEP meeting so that the team could discuss the speech and language assessment issues. The meeting was never rescheduled.

25. In May 2009, Student received his 15-week report card for the spring semester of 2009:

<u>Course</u>	<u>Grade</u>	<u>Absences</u>	<u>Tardies</u>
Modern Lit.	C	14	22
Economics	C	6	19
Vocational	B	8	0
Algebra	D	1	3

26. In May 2009, Student retook the English/Language Arts portion of the CAHSEE, but did not pass.

27. In June 2009, Student received his final report card for the spring semester of 2009:

<u>Course</u>	<u>Grade</u>	<u>Absences</u>	<u>Tardies</u>
Modern Lit.	C	18	24
Economics	C	8	19
Vocational	B	9	0
Algebra	D	1	3

28. Student completed all graduation requirements, except for passing the English/Language Arts portion of the CAHSEE. As a result, Student did not graduate in June 2009.

29. Student did not return to school for the 2009-2010 school year. Mother did not permit Student to return because she was concerned about Student, as a 20-year-old, being around teenage girls. Mother has been home-schooling Student since.

30. At hearing, Ms. Snyder, a former speech and language pathologist, who has been a Due Process Specialist for four years, explained that pursuant to the District's offer of speech and language services by an NPA, as set forth in the October 28, 2008 settlement agreement, District provided Mother with a list of NPA providers. Despite selecting an NPA, Student never attended any speech and language sessions provided by the NPA.

31. At hearing, Mother explained that Student should receive a number of remedies, as proposed in Student's due process complaint, for District's failure to provide Student a FAPE. Specifically, Mother testified that Student requires an independent educational evaluation (IEE) in the areas of speech and language, auditory functioning, and vision. Mother believes an IEE to assess Student's auditory functioning is necessary, because "he seems to be in another world a lot," signifying that Student may have a hearing deficit. She believes an IEE to assess Student's vision is necessary, because Student has trouble tracking with his eyes, and has blurred vision as a result of Student's high blood pressure. In addition, Mother explained that Student needs an academic assessment, because she questions the validity of the grades Student has received at Crenshaw. Also, Mother believes that Student should continue to be home-schooled, and participate in the Sylvan tutoring program, as it has one-on-one instruction. In addition, Mother explained that Student would need a large chalkboard, a laptop computer with internet access, and a one-to-one aide as part of Student's home-schooling program. Finally, Mother explained that Student requires occupational and

physical therapy to address his asthma issues, particularly therapy to help Student exercise his lungs.

LEGAL CONCLUSIONS

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

ISSUE ONE: WAIVER OF CLAIMS AND STATUTE OF LIMITATIONS

2. Student contends that he was denied a FAPE, because in his April 2007 IEP, District did not offer Student an appropriate placement and speech and language services. District disagrees and contends that all claims arising from the April 2007 IEP were resolved in the October 28, 2008 settlement agreement, which expressly granted the parties a mutual release and discharge of all claims and issues through the date of that settlement agreement. Moreover, District contends that Student's claims relating to the April 2007 IEP occurred more than two years prior to the May 18, 2009 filing of the due process complaint in this matter, and, as such, are barred by the statute of limitations.

3. Under the IDEA, eligible children with disabilities are entitled to a FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.)

4. A special education settlement agreement is considered a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3rd Cir. 1977) 109 F.3d 896, 898.) In California, contracts are interpreted based on principles set forth in the Civil Code. (Civ. Code § 1635.) These statutory principles require a contract to be "interpreted...to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) If the language is clear and

explicit, the language governs the interpretation of the contract. (Civ. Code, § 1638.) When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. (Civ. Code, § 1639.)

5. A request for a due process hearing “shall 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 of the request.” (Ed. Code, § 56505, subd. (I).) This time limitation does not apply to a parent if the parent was prevented from requesting the due process hearing due to either: (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) the withholding of information by the local educational agency from the parent that was required to be provided to the parent under special education law. (*Ibid.*, see U.S.C. § 1415(f)(3)(D).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*P.P. ex rel. Michael P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661, 662.) A claim accrues for purposes of the statute of limitations when a parent learns of the injury that is a basis for the action, i.e., when the parent knows that the education provided is inadequate. (*M.D. v. Southington Board of Ed.* (2d Cir. 2003) 334 F.3d 217, 221.) In other words, the statute of limitations begins to run when a party is aware of the facts that would support a legal claim, not when a party learns that it has a legal claim. (See *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1016, 1039.)

6. Here, Student’s allegations stemming from the April 2007 IEP were resolved in the October 28, 2008 settlement agreement. California law provides that the clear and explicit language of a contract governs the interpretation of the contract. The plain language of the settlement agreement provided that it would constitute a full and final resolution of all claims and issues related to Student’s educational program up to and including the execution date of the settlement agreement. This included issues related to Student’s April 2007 IEP, as well as claims raised in the February 20, 2008

complaint, and in the May 6, 2008 amended complaint. Consequently, claims raised in Student's present complaint concerning Student's April 2007 IEP are barred in these proceedings. As such, this Decision will not address the merits of Student's claims set forth in Issues Three and Four related to Student's April 2007 IEP. In light of the full release set forth in the settlement agreement concerning the April 2007 IEP, there is no need to address the statute of limitations argument raised by District. (Factual Findings 1 - 6; Legal Conclusions 2 - 6.)

ISSUE TWO: JURISDICTION TO DECIDE STUDENT'S CLAIM

7. District contends that OAH has no jurisdiction to resolve the issue concerning District's failure to comply with the terms of the October 28, 2008 settlement agreement. Specifically, District argues that OAH only has jurisdiction to hear due process claims arising under the Individuals with Disabilities Education Act (IDEA), and not those seeking enforcement of settlement agreements. Student disagrees, contending that his claim concerning District's failure to conduct a speech and language assessment, as provided in the October 28, 2008 settlement agreement, was not raised for the purpose of enforcing the settlement agreement. Rather, Student argues that District's failure to comply with this term of the settlement agreement resulted in a denial of a FAPE. As such, Student contends that OAH may determine the issue. As discussed below, OAH has jurisdiction to decide whether District's failure to comply with a term of a settlement agreement resulted in a denial of a FAPE.

8. The philosophy of the IDEA is that individuals are required to "utilize the elaborate administrative scheme established by the IDEA before resorting to the courts to challenge the actions of the local school authorities." (*School Board of Lee County, Florida v. M.M. ex rel M.M.* (11th Cir. 2009) 2009 WL 318297, 109 LRP 63187, citing *N.B. v. Alachua County Sch. Bd.* (11th Cir. 1996) 84 F.3d 1376, 1378.) A parent's claim that a school board breached provisions of a settlement agreement reached in connection

with an IDEA due process proceeding, is primarily a challenge relating to the provision of a FAPE, and, as such, must first be addressed administratively. (*Ibid.*) Similarly, in *Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007) 2007 WL 949603, the Court held that OAH has jurisdiction to adjudicate claims alleging a denial of a FAPE resulting from a failure to comply with the terms of a mediated settlement agreement. However, a “mere breach” of a settlement agreement, without a claim alleging a denial of a FAPE, should be addressed by the compliance complaint procedures of the California Department of Education.

9. Here, Student’s claim that District’s failure to comply with a provision of the October 28, 2008 settlement agreement is a challenge relating to a provision of a FAPE. Specifically, Student has alleged that District’s failure to conduct a speech and language assessment, pursuant to the terms of the settlement agreement, resulted in educational harm to Student. While OAH lacks jurisdiction to enforce settlement agreements, Student’s issue is properly within the jurisdiction of OAH, as it has been raised for the purpose of addressing an alleged denial of a FAPE, and not for the purpose of enforcing the settlement agreement. (Factual Findings 1 - 14; Legal Conclusions 7 - 9.)

ISSUE FIVE: FAILURE TO CONDUCT SPEECH AND LANGUAGE ASSESSMENT

10. Student contends that District’s failure to conduct a speech and language assessment, as required by the October 28, 2008 settlement agreement, denied him a FAPE, because it resulted in Student not receiving speech and language services. Student further contends that speech and language services would have helped Student address his receptive language difficulties, which could have made him more successful in understanding and completing school assignments, as well as in passing the English/Language Arts portion of the CAHSEE. Moreover, speech and language services could have addressed Student’s mumbling, drooling, and enunciation issues. District

disagrees and contends that there is no evidence that, had District conducted a speech and language assessment pursuant to the terms of the settlement agreement, Student would have qualified to receive speech and language intervention. District's speech and language assessment conducted in March and April of 2007, though determining Student's receptive language skills were below average, indicated that Student's speech delays did not interfere with his ability to progress in the general curriculum. District further argues that Student's teachers and peers found no difficulty in understanding Student. In addition, District contends that Student has not shown that his claimed difficulty in understanding and completing school assignments, as well as his inability to pass the English/Language Arts portion of the CAHSEE, was related to speech and language issues, as opposed to issues related to Student's specific learning disability. Finally, District argues that, despite the lack of evidence demonstrating that Student required speech and language services, it offered Student speech and language services in the October 28, 2008 settlement agreement, but Student never attended any speech and language sessions. As discussed below, Student has failed to demonstrate that District's failure to conduct a speech and language assessment resulted in a denial of a FAPE.

11. California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) A FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with

exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (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).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

12. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (“*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.)

13. 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 District* (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.*)

14. Here, while District did breach the settlement agreement by failing to conduct a speech and language assessment, the question is whether that breach resulted in a denial of a FAPE. The settlement agreement specifically stated that the services offered in the settlement agreement did not constitute an admission that District denied Student a FAPE. Student has not offered any proof demonstrating that a speech and language assessment was necessary to assist Student in benefiting from his special education. Student offered no expert testimony, or any other evidence, to support his contention that, had District conducted the speech and language assessment, it would have resulted in a recommendation that District provide Student with speech and language services. In fact, the evidence demonstrates that Student did not require speech and language services. Ms. Willard and Ms. Early offered credible testimony that Student's speech was easy to understand in the classroom setting, and that Student communicated, without difficulty, with his peers. In addition, the speech and language assessment conducted by District in March and April of 2007, to which Student offered no evidence invalidating its findings, indicated that, while Student's receptive skills were below average, his delays did not interfere with his ability to access the curriculum. In fact, the evidence suggests that Student had been performing reasonably well in school, without any speech and language intervention, despite his excessive absences and tardies. Specifically, the evidence shows that, since the execution of the settlement agreement on October 28, 2008, and the subsequent implementation of the April 28, 2008 IEP, Student received two grades of "A", four grades of "B", nine grades of "C", and five grades of "D",⁶ as evidenced by his progress reports and report cards. Mother presented no evidence suggesting that the grades were incorrect or invalid. Finally, even if Student had made a showing that he required speech and

⁶ With the exception of one computer class, Student received his marks of "D" in his Algebra classes.

language intervention in order to receive a FAPE, the evidence shows that District offered Student speech and language services in the October 28, 2008 settlement agreement, up to and including August 30, 2009, but Student never attended any speech and language sessions. Student has failed to demonstrate that District's failure to conduct a speech and language assessment resulted in a denial of a FAPE. (Factual Findings 1 - 28; Legal Conclusions 10 - 14.)

ISSUE SEVEN: CLASS SCHEDULING

15. Student contends that District denied Student a FAPE in 2009 by removing Student from his language composition class and placing him in a computer class, and by removing Student from a core academic class.⁷ District disagrees and contends that, at all relevant times, it provided Student with a FAPE. As discussed below, Student failed to meet his burden of demonstrating that District denied him a FAPE as it related to his class schedule.

16. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) A FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) (*See* Legal Conclusion 11, incorporated by reference.)

17. As discussed above, *Rowley* held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services

⁷ It is unclear to which core class Student refers, as Student presented insufficient evidence regarding this issue.

which are individually designed to provide educational benefit to” a child with special needs, and reasonably calculated to “confer some educational benefit” upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) (*See* Legal Conclusion 12, incorporated by reference.)

18. Student provided no evidence demonstrating that District denied him a FAPE as it related to his class schedule. Despite Student’s contentions that District had removed Student from his language composition class, as well as from a core academic class, Student presented no persuasive evidence that it had. Even if District had, indeed, removed Student from his language composition class or any other class, Student presented no evidence showing how the alleged removal resulted in any educational harm to Student. As such, Student failed to meet his burden of demonstrating that District denied him a FAPE. (Factual Findings 1 - 17; Legal Conclusions 11 - 12, 15 - 18.)

ISSUES EIGHT AND NINE: APRIL 15, 2009 IEP MEETING

19. Student contends that District’s termination of the April 15, 2009 annual IEP meeting violated his parents’ procedural rights, as District failed to complete the April 15, 2009 IEP. Student further contends that District’s early termination of the April 15, 2009 meeting interfered with parents’ right to provide input or otherwise participate in the decision-making process regarding Student’s educational program, including discussions addressing past changes to Student’s class schedule, as well as the review and revision of Student’s educational program and curriculum. District acknowledges that the April 15, 2009 IEP was inappropriate, but denies that the procedural violation impeded Student’s right to a FAPE, Parents opportunity to participate in the decision-making process regarding the provision of a FAPE, and did not amount to deprivation of educational benefit. As discussed below, District violated Parents’ procedural rights by depriving them an opportunity to fully participate in the IEP process, and by failing to offer Student an educational program. As such, Student is entitled to relief.

20. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) A FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) (*See* Legal Conclusion 11, incorporated by reference.)

21. A procedural violation constitutes a denial of a FAPE if it impeded the child's right to a FAPE, significantly impeded the parents' 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].)

22. School districts are required to have an IEP in place for each eligible child at the beginning of each school year. (34 C.F.R. 300.323(a); Ed. Code, § 56344, subd. (c).) An IEP must be reviewed at least annually to determine whether the annual goals are being met, and at that time, the school district must revise the IEP as appropriate to

address any lack of expected progress, new assessments, information provided by parents, the child's anticipated needs, or any other matter. (34 C.F.R. 300.324(b)(1); Ed. Code, § 56343, subd. (d).) 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).)

23. 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].)

24. 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.*)

25. Here, District procedurally violated Student’s right to parental participation in the IEP process by terminating the April 15, 2009 IEP meeting after Mother presented her grievances regarding District’s failure to comply with the October 28, 2008 settlement agreement. In addition, District did not offer Student an educational program prior to its unilateral disbanding of the meeting, and failed to offer an educational program at any time subsequent to the meeting. To date, Student has been without an updated academic program for nearly ten months. As such, Student is entitled to a remedy of an appropriate education. Specifically, Student requires intensive academic instruction to assist him in meeting his immediate goals of earning his high school diploma, attending community college, and earning an associate’s degree. In order to do this, Student must first pass the CAHSEE. The evidence showed that, at a minimum, Student should have received weekly specialized instruction designed to prepare Student for the English/Language Arts portion of the CAHSEE, as well as instruction to prepare Student for admission into an associate’s degree program at a community college. Such instruction would likely have been at least two hours per day, and the District has not offered an educational program beginning April 15, 2009. From April 15, 2009, through the week of February 18, 2010, 22 weeks have passed. Accordingly, Student is entitled to receive the equivalent of 22 weeks of intensive academic instruction, at ten hours per week, for a total of 220 hours. In his complaint, Student requested intensive academic instruction at Sylvan Learning Center (Sylvan). Student may receive his intensive academic instruction at Sylvan, including any initial academic assessments conducted by Sylvan designed to prepare a program to meet Student’s academic needs. In the alternative, Student may receive intensive academic instruction

at a facility that offers services comparable to Sylvan, including any initial assessments. The cost of any initial assessment shall not exceed \$300 and the rate per hour for tutoring services shall not exceed \$60. Student is not entitled to any other requested relief (i.e., an IEE in the areas of auditory and vision functioning; therapeutic recreation in occupational therapy and physical therapy; home-schooling; a one-to-one aide; a large chalk board; and a laptop computer with internet service to facilitate home-school instruction), as Student presented no evidence establishing a need for such services. For the reasons stated above, Student has demonstrated that District denied him a FAPE by unilaterally terminating the April 15, 2009. Accordingly, Student is entitled to the relief outlined above. (Factual Findings 1 - 31; Legal Conclusions 11, 19 - 25.)

ORDER

Within 45 days of the date of this decision, District shall contract with Sylvan Learning Center or any comparable provider of Student's choice to provide a total of 220 hours of intensive academic instruction, plus any necessary initial academic assessments at a rate not to exceed \$300 for an initial assessment and \$60 per hour for tutoring. Student must complete his 220 hours of intensive academic instruction within one year of the date of this decision, or the services will be forfeited.

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. Student prevailed on Issues Two, Eight, and Nine. District prevailed on Issues One,⁸ Five, and Seven.

⁸ As a result of District prevailing on Issue One, Student's Issue Three and Four were dismissed.

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: February 11, 2010

CARLA L. GARRETT

Administrative Law Judge

Office of Administrative Hearings