

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH CASE NO. 2010020271

PARENTS ON BEHALF OF STUDENT,

v.

ROSEDALE UNION ELEMENTARY SCHOOL
DISTRICT.

DECISION

June R. Lehrman, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on May 24, 25, 26 and 27, 2010, in Bakersfield, California.

Student was represented by his Mother. Student's Father also attended the hearing on all days.

Stacey Inman, Attorney at Law, represented Rosedale Union Elementary School District (District). Danielle Hester, District Special Education Coordinator, attended the hearing on all days.

Parent filed the Due Process Hearing Request (complaint) on February 8, 2010. On March 29, 2010, OAH ordered the hearing continued for good cause. Sworn testimony and documentary evidence were received at the hearing. At hearing, the parties were granted a continuance to file written closing arguments by June 14, 2010. The parties each timely filed their closing briefs by that date. Upon receipt of the written closing arguments, the record was closed and the matter was submitted.

ISSUES¹

1. Did District deny Student a free appropriate public education (FAPE) in the 2009-2010 school year because the offer in the May 4, 2009 Individualized Education Program (IEP) and subsequent addenda, up through and including February 5, 2010, was not for placement in the least restrictive environment (LRE)?
2. Did District deny Student a FAPE in the 2009-2010 school year because the May 4, 2009 IEP and subsequent addenda, up through and including February 5, 2010, failed to offer Applied Behavior Analysis (ABA) one-to-one aide support?

FACTUAL FINDINGS

BACKGROUND

1. Student is a six-year-old boy who resides with both Parents within District's boundaries. Student is eligible for special education as a student with autistic-like behaviors, with a secondary eligibility category of mental retardation.

2008-2009 PRE-SCHOOL

2. During the 2008-2009 school year, Student attended a private parent cooperative pre-school with 23 non-disabled peers. Student received ABA-trained one-

¹ At hearing, Mother also sought findings on procedural issues not raised in the complaint: (1) Did District convene the May 4, 2009 IEP meeting without Parents, and the May 12, 2009 IEP meeting without Student's ABA service provider despite Parent's specific request; and (2) Did District predetermine the goals and offers in the May 4, 2009 IEP and subsequent addenda, up through and including February 5, 2010? Pursuant to Education Code section 56502, subdivision (i), these are not within the scope of this hearing. The findings in this Decision do not determine these allegations.

to-one aide support from the Center for Autism and Related Disorders (CARD), a non-public agency (NPA). District funded 86 hours per month of Student's one-to-one aide support.²

3. CARD employee Marci Shockley was Student's case supervisor. She has a BA in psychology. Ms. Shockley has neither the bachelor's-level ABA certification (BCABA) nor the master's-level Board-Certified Behavior Analyst (BCBA) certification. She works under the supervision of a BCBA. She has been working in the ABA field for fifteen years.

4. Ms. Shockley observed Student once or twice for about one hour each time in his pre-school setting. In Ms. Shockley's opinion, it was important for Student to have an ABA-trained one-to-one aide who was familiar with his strengths and deficits, and who could prompt him when appropriate, and fade into the background when intervention was unnecessary. Student made progress in pre-school meeting his CARD-generated goals, benchmarks and objectives. CARD goals included both social interaction and academic subjects such as numbers and letters.³

5. Student's experience at pre-school was positive. Student's activities were facilitated as necessary by Mother and his one-to-one aide. He was especially successful in social interactions with peers, for example playing with water guns and games such as "duck-duck-goose" with minimal prompts. Non-disabled peers sought him out for social interaction. He developed a relationship with a best friend. The pre-school teacher Melissa Smith was pleased with Student's progress and reported that Student did not

² The evidence did not establish whether the District-funded NPA hours were pursuant to an IEP or some other agreement between the parties.

³ The evidence did not establish whether CARD's goals were generated pursuant to an IEP meeting.

require excess teacher attention. Although Student had in the past engaged in self-injurious and aggressive behaviors such as biting, scratching and slapping, Ms. Shockley was not concerned about his engaging in such behaviors while at pre-school.

6. In Ms. Shockley's opinion, by the end of pre-school, letters and reading were emerging skills for Student, who showed readiness for general education academics by matching objects with prompting by his one-to-one aide. Ms. Shockley admitted that she never worked with Student on any of the State standard kindergarten curriculum subject areas. These included science (e.g. knowing physical properties of objects, characteristics of life forms, physical characteristics of the earth); reading/language arts (e.g. describing people and objects, reciting stories and songs, relating an experience, using letters and sentences appropriately); history (e.g. knowing the events memorialized in holidays); and mathematics (e.g. counting and comparing amounts). She was unable to estimate Student's readiness and could not state what degree of prompting he would require if he were to attempt these subjects.

APRIL 2009 ASSESSMENTS

7. On February 26, 2009, Parents consented to District psycho-educational and speech and language assessments.

8. School Psychologist Jocelyn Hively conducted the psycho-educational assessment in April 2009. Ms. Hively has a master's degree in school psychology. She assessed Student using the Universal Nonverbal Intelligence Test (UNIT), the Adaptive Behavior Assessment System, Second Edition (ABAS-2), and the Gilliam Autism Rating Scale, Second Edition (GARS-2). She observed Student, interviewed Parent, and reviewed Student's records. Her findings were summarized in her April 30, 2009, Psycho-educational Evaluation Report.

9. The UNIT is an instrument used to assess cognitive ability. It was designed to provide a fair assessment of intelligence for individuals who have speech, language or

hearing impairments, different cultural or language backgrounds, as well as those who are verbally uncommunicative. Student scored under the first percentile, or “very delayed,” in his scores for memory, reasoning, symbolic and non-symbolic understanding, and full-scale IQ.

10. The ABAS-2 provides a comprehensive norm-referenced assessment of adaptive skills in the conceptual domain (including communication and functional academics), the social domain, and the practical domain. It resulted in a total score called the General Adaptive Composite. Student’s results fell in the “extremely low” range in all domains.

11. The GARS-2 utilizes a parent interview format to assess behaviors that are symptomatic of autism. Student’s results indicated a “very likely” probability of autism.

12. Special education teacher Ashley Hukill administered a portion of the psycho-educational assessment in April 2009. Ms. Hukill has a master’s degree in special education, and teaching credentials for both mild-to-moderate and moderate-to-severely-disabled children. She administered the Brigance Diagnostic Inventory of Early Development, Second Edition (IED-II). The IED-II is an instrument that assesses many domains including fine and gross motor skills, receptive and expressive language skills, academic/cognitive skills, social/emotional functioning, daily living skills, and adaptive functioning. It is criterion-referenced for the purpose of curriculum development and ongoing assessment. It is norm-referenced for children from birth to age seven, comparing subjects to others their same age. Ms. Hukill assessed Student in his home over a ten-to-twelve-hour period. Her findings were summarized by Ms. Hively in the April 30, 2009 Psycho-educational Evaluation Report.

13. Student’s total adaptive and domain-specific abilities fell within the “significantly below average” range in comparison with same-age peers in all domains evaluated by the IED-II. He did not communicate wants and needs consistently through

verbal language. He spoke words with prompting. At the time of the assessment, Student was at the level of prompt and response, where he could repeat words when prompted, but Ms. Hukill did not observe him using language spontaneously. He was very compliant academically. He worked best when prompted using verbal, gestural, or physical prompts. He was able to perform most living skills functions with prompting and supervision. Student was able to cut paper with supervision, and hold a writing utensil to make marks on paper. He could run, jump and climb.

14. Most significantly, Student did not appear to understand that pictures, words or images on paper had meaning. Although not in the assessment summary, at hearing Ms. Hukill recalled that during the assessment process Student was unable to recognize Mother. The inability to recognize familiar adults could pose significant safety concerns.

15. The April 30, 2009 Psycho-educational Evaluation Report recommended eligibility for special education under the category of autistic-like behavior, finding that Student "continues to exhibit a combination of the following: an inability to use oral language for appropriate communication, a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood, and self-stimulating, ritualistic behaviors." It also found that Student should be classified as mentally retarded, finding that Student "continues to demonstrate significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior, which adversely affect his educational performance."

16. The report concluded that Student "can continue to progress and benefit from instruction in a specialized school setting with appropriate services, materials and supervision. Additionally, instruction in a school context can provide [Student] access to non-disabled peers and the general education curriculum to the maximum extent

appropriate." It recommended a small, self-contained specialized classroom with modified curricula and adapted materials.

17. On May 8, 2009, Ms. Hively completed an Addendum to the April 30, 2009 Psycho-educational Evaluation Report to reflect observation of Student in his pre-school setting, and to review additional information obtained from the family. Ms. Hively's observations of Student in the pre-school setting included: Student could cut construction paper into a shape, choose a crayon from a tray, and color and tape his cut-outs, all with hand-over-hand assistance from his one-to-one aide; he transitioned activities without agitation; he oriented towards and reached out and touched another boy in the class; with hand-over-hand assistance from Mother, he reciprocated a social interaction initiated by the other boy; he played along with songs and games with modeling and assistance from Mother and his aide; and Student engaged in hand-flapping once during the observation. The pre-school teacher reported that Student interacted well with other students and said "hi," "bye" and gave high-fives. Ms. Hively concluded that Student was compliant, smiling and attentive to other children, oriented toward participation in activities, and responsive to modeling and visual cues. He was able to complete some tasks with modeling and hand-over-hand assistance that could be faded. He required assistance, supervision and prompting to complete most tasks.

18. District Speech Pathologist DeAnn Sanders assessed Student's speech and language skills. Ms. Sanders has a master's degree in speech pathology and is certified by the American Speech-Language Hearing Association. She used the Goldman Fristoe Test of Articulation, Second Edition, and the Preschool Language Scale, Fourth Edition (PLS-4) including Caregiver Questionnaire. She summarized her results in a report dated April 29, 2009.

19. The Goldman Fristoe Test of Articulation provides a means for assessing a child's articulation of sounds. Student was found to be able to correctly articulate most

sounds, and had fair speech intelligibility. He could imitate words, but he did not spontaneously name target words.

20. The PLS-4 is used to assess receptive and expressive language. Student scored in the approximate range of the typical one-and-one-half-year-old child, four years behind his age bracket. He was in the very low range normed for his age. The test results indicated severe language delays in both receptive and expressive language skills. Student could not pick out pictures nor identify "ball," "block," "blue," or "car." He could not identify body parts nor form simple sentences. Ms. Sanders observed that Student had a vocabulary of no more than fifteen words. The typical five-year-old has a vocabulary of at least 2,000 words, and learns three to four new words weekly.

MAY 4, 2009 IEP MEETING

21. The participants at the May 4, 2009 IEP meeting were Ms. Hukill, Ms. Hively, Ms. Sanders, Ms. Hester, a general education teacher, and Kern County Superintendent of Schools Principal Angela Bertran-Harris. Neither Parent attended; this meeting was convened in Parents' absence solely in order to comply with the procedural requirement to hold an IEP meeting within 60 days of Parents' consent for assessment. This procedure was with Parents' consent, on the condition that no substantive discussion occur on May 4, 2009. The IEP team complied with this condition. The IEP team convened the meeting and informed the participants that Parents could not attend and, therefore, the meeting would be reconvened. The participants signed in and the meeting was immediately closed.

MAY 12, 2009 AND MAY 29, 2009 IEP MEETINGS

22. IEP team meetings were held on May 12, 2009, and May 29, 2009. The participants at both were: Mother, pre-school teacher Melissa Smith, Ms. Hukill, Ms. Hively, Ms. Sanders, Ms. Hester, a general education teacher, Ms. Bertran-Harris, and

District Director of Pupil Services Dr. Thomas Ewing. Ms. Shockley did not attend on May 12, 2009, but did attend on May 29, 2009.

23. At these meetings, the IEP team discussed Student's present levels of performance, as viewed by Mother and Ms. Shockley, and as determined by District's assessments. Mother disputed Ms. Hively's findings on the GARS-2, because that instrument was based on parent response and the questionnaire had asked her only whether Student had "ever" exhibited the referenced behaviors (sniffing of objects, hand-flapping, high-pitched vocalizations, use of gestures instead of speech, and repetitive ritualistic behaviors), not whether he currently or continued to do so. Mother disputed Ms. Hively's categorization of Student as mentally retarded and asked that the mental retardation category be removed.

24. The team discussed seventeen proposed goals and objectives that Ms. Hukill had drafted in collaboration with Ms. Sanders: (1) to match stimulus pictures to target pictures with 90% accuracy for three out of four trial days as measured by staff; (2) to identify spatial concepts such as "in," "out of," "on" and "off" with 90% accuracy for three out of four trial days as measured by staff; (3) to state needs and wants verbally using "I want, I need, or I have" with 90% accuracy for three out of four trial days as measured by staff; (4) to name 20 new objects or pictures with 90% accuracy for three out of four trial days as measured by staff; (5) to include final sounds in ten single-syllable words with 90% accuracy for three out of four trial days as measured by staff; (6) to demonstrate understanding of common words by pointing to the pictures they depict with 90% accuracy for nine out of 10 trials as measured by staff; (7) to correctly pick out three common objects from a group of 50 with 90% accuracy for three out of four trial days as measured by staff; (8) to join with peers in singing songs and lyrics in nine out of 10 trials as measured by staff; (9) to point to 10 body parts when named with fewer than two prompts, in nine out of 10 trials as measured by staff; (10) to

participate in games for five minutes with fewer than two prompts, in nine out of 10 trials as measured by staff; (11) to cut a piece of paper independently with fewer than two prompts, in nine out of 10 trials as measured by staff; (12) to classify objects by attribute such as color, shape and type with 90% accuracy for nine out of 10 trials as measured by staff; (13) to identify quantities such as "one," "more than one," etc. with 90% accuracy for nine out of 10 trials as measured by staff; (14) to respond appropriately when asked: "what do you want" with words like "eat" and "drink" with fewer than two prompts, in nine out of 10 trials as measured by staff; (15) to hold and use a writing utensil without prompts, in 90% of 10 trials as measured by staff; (16) to identify the source of common sounds with 90% accuracy for nine out of 10 trials as measured by staff; and (17) to identify pictures depicting common activities with fewer than two prompts, in nine out of 10 trials as measured by staff.

25. In Ms. Hukill's and Ms. Sanders' opinions, these goals were appropriate for Student given his present levels of performance. Mother requested additional, more challenging academic goals including learning letters, shapes and colors. The IEP team did not add more challenging academic goals into the IEP. Student did not at that time have the necessary precursor skills to make Mother's proposed academic goals appropriate for him.

26. Dr. Ewing reviewed the continuum of options; however, the Special Day Class (SDC) for severely handicapped children at Winglund Elementary School was the only option fully discussed. Winglund was a placement that used methods appropriate for students with autism: sensory integrated activities, a highly structured classroom using ABA principles and methods, including visual prompts with reinforcement, correction and redirection. The classroom used a small-group structure with a low student-to-staff ratio. In May 2009, the population of the Winglund class was seven children with one teacher and four teacher's aides. The teachers and aides were trained

in autism spectrum disorder. Although the aides were not ABA-trained, they had undergone a 20-hour behavior course, and were trained by the teacher in data-collection methods.

27. Ms. Hively, Ms. Sanders, Ms. Hukill, Ms. Hester, and Ms. Bertran-Harris thought that a structured environment such as this, with a low student-to-teacher ratio, an individualized program such that the pacing of learning was tailored to Student, and aides trained in autism and behavior, was the appropriate placement for Student.

28. The IEP team discussed Mother's desire for placement in the general education setting, but did not offer that placement. The IEP team considered Mother's request for a general education setting to be inappropriate for Student. Student required too much prompting, was not very communicative, and his academic functioning was too low. The IEP team's opinion was not altered by Mother's arguments concerning Student's successes at pre-school with a one-to-one aide in a general education classroom with 23 typically developing peers. District's assessments indicated that Student functioned at a lower level than Mother believed. In addition, the State standard kindergarten curriculum was at a higher academic level than pre-school. The IEP team did not agree with Mother that the general education kindergarten program could be sufficiently modified to accommodate Student.

29. In Ms. Hively's opinion, a general education setting would not have been appropriate. Without further development of basic skills, she thought Student would not be able to obtain educational benefit from a general education setting. Student's deficits were pervasive and encompassed more than one area of functioning including motor skills and speech and language. Student had difficulties with imitation, which he could not do without prompting and reinforcement. He had yet to learn that symbols have meaning. Thus, while he might have been able to match items at pre-school with aide supervision, he did not understand the connections between matched items, a

prerequisite before learning can progress. In Ms. Hively's strongly-held opinion, general education was inappropriate for Student, as the pacing of a general education kindergarten setting would overwhelm him.

30. Based on her assessment, Ms. Hukill had a similar opinion. Student had significant delays. Ms. Hukill agreed with the mental retardation categorization due to Student's assessment results and IQ scores, as well as his adaptive levels of functioning and his self-help skills, which were "really quite low." Even with modifications and accommodations, Ms. Hukill's opinion was that Student could not engage in a general education kindergarten classroom that followed State kindergarten curriculum standards. First, Student would have to obtain symbolic understanding, before he could attain language and learn to read and write, which was the ultimate goal of kindergarten. In addition, during her assessment Ms. Hukill observed that Student's attention span was approximately three seconds, which was inappropriate for general education where attentiveness to books and papers was a prerequisite skill. Ms. Hukill did not believe that there was any degree of modification of the general education kindergarten curriculum that would permit Student to obtain educational benefit in that setting. Ms. Hukill acknowledged that Student was compliant and had made great improvements while in pre-school, where he had good social interactions. He demonstrated many positive behaviors including a generally happy demeanor, responsiveness to caregivers, showing interest in the examiner, and mimicking modeled behaviors. However, these successes did not change her opinion about his inability to obtain educational benefit in a general education setting. Ms. Hukill did not believe that a one-to-one aide would alter Student's basic inability to obtain educational benefit in the general education kindergarten setting. He would not be able to work on the same concepts as the class, nor use the same materials and have them be academically

meaningful. Except for socialization, he would not be working on anything resembling the same academic curriculum.

31. Between the May 12, 2009 and May 29, 2009 IEP meetings, Mother and Ms. Shockley observed the proposed placement at the SDC at Winglund and did not believe this placement was appropriate for Student. They had several concerns. Ms. Shockley observed a lack of follow-through with behavioral interventions. She observed a student having a tantrum because he did not want to come inside from recess, in response to which he was left outside in 90-degree heat due to this noncompliance. In Ms. Shockley's professional opinion, this would have the effect of reinforcing the noncompliance. She also observed another child sitting alone in a sandbox, sifting through sand and placing items into his mouth. Mother also observed the Winglund special education teacher keeping students away from a general education awards ceremony, stating "these kids are not going to win any awards, anyway." Mother had heard prior allegations of abuse and harsh restraint at Winglund, which greatly concerned her. She presented her objections at the May 29, 2009 IEP meeting.

32. At the May 29, 2009 IEP meeting, the IEP team offered placement at the SDC at Winglund for the 2009-2010 school year. The IEP team agreed that Student should be mainstreamed for socialization purposes. The offer included a "General Education Participation Plan" for socialization purposes that provided for 65 minutes daily mainstreaming into the general education environment, accompanied by a paraprofessional, for lunch, recess and for special school activities and assemblies. The IEP team also offered the following fade-out plan for the 86 monthly hours of one-to-one aide support that were District-funded: 14 hours in week one; 7 hours in week two; and no hours in week three and thereafter. Mother did not consent to this offer. As a result, during the current 2009-2010 school year, Student has been home-schooled.

District has continued to fund 86 hours per month of Student's one-to-one aide support through CARD.

SEPTEMBER 21, 2009 ADDENDUM IEP MEETING

33. An addendum IEP meeting was held on September 21, 2009. Mother and Ms. Shockley stated their concerns about possible regression and increase of maladaptive behaviors if Student were deprived of one-to-one aide support. Mother restated her requests for a general education placement as the LRE, with one-to-one aide support, and presented reasons why in her view the IEP team offer was not appropriate. Mother was concerned about safety at Winglund. The IEP team reiterated its offer of the Winglund SDC with one-to-one aide support faded out over a two-week period. Mother did not consent.

FEBRUARY 5, 2010 ADDENDUM IEP MEETING

34. An additional IEP meeting was held on February 5, 2010. By this time, the previously-offered SDC placement at Winglund was no longer available due to limits on class size.

35. At the February 5, 2010 IEP meeting, Ms. Shockley presented approximately 26 CARD-generated goals for Student including learning letters, shapes and colors. The IEP team did not agree that these proposed goals were appropriate for Student. There was disagreement over whether Student was at the stage of acquiring the skills to identify ABC's, shapes and colors. The IEP team continued to believe that Student needed to acquire precursor skills before attempting such goals.

36. Mother's desire for placement in the general education setting with a one-to-one ABA-trained aide was again discussed, but not offered. Based on the assessors' views of Student's lower functional levels, the IEP team did not agree with Mother that the general education kindergarten program could be sufficiently modified to

accommodate Student. The IEP team's opinion was not altered by Mother's arguments concerning Student's successes at pre-school with a one-to-one aide.

37. The IEP team offered placement in another SDC at Standard Elementary School. Ms. Bertran-Harris administered the Standard placement as well as the Winglund placement. The Standard classroom served kindergarten and first grade students, ages five to seven. It too used methods appropriate for students with autism: a highly structured classroom, using ABA principles and methods, including visual prompts with reinforcement, correction and redirection. The structure was small-group. There were six children in the class, a teacher plus two aides. The school day went from 8:00 a.m. until 2:00 p.m. The subject areas covered were the same as in general education kindergarten, however at a slower pace because of the need to have more opportunities to redirect students.

38. As before, the offer included a "General Education Participation Plan" for socialization purposes that provided for 65 minutes daily mainstreaming into the general education environment, accompanied by a paraprofessional, for lunch, recess and for special school activities and assemblies. It also offered the same fade-out plan for the 86 monthly hours of one-to-one aide support that were District-funded, as follows: 14 hours in week one; 7 hours in week two; and no hours in week three and thereafter. Mother did not consent.

39. At hearing, Ms. Sanders' opinion was that Student must first acquire more language before attempting any more ambitious goals. At hearing, Ms. Hively's opinion was that before identifying letters, Student would need to know that each letter corresponds to a sound, and before that he would need to understand that two items can correspond one to the other, a symbolic and representational link he had not yet made in his understanding at the time he was assessed. Also in Ms. Hively's opinion, Student could not yet imitate on his own without prompts, the building block of any skill

acquisition. Ms. Hively testified that according to her assessment observations, Student was motored through tasks at pre-school by Mother and his aide, but was merely following prompts and not actually performing the actions on his own.

40. At hearing, Ms. Bertran-Harris opined that it would be inappropriate for Student to be in a general education classroom, sitting alone with a one-to-one aide, working on an entirely separate curriculum. The SDC placement that the IEP team offered was the appropriate placement to provide Student with educational benefit in the LRE, because of the low student-to-teacher ratio, and a class where all students worked together on academics as a group doing the same work. In Ms. Bertran-Harris' opinion, this offer of placement at Standard would have provided educational benefit to Student. Standard offered an appropriate placement where Student's goals and objectives could be worked on throughout the school day in a learning environment giving him numerous opportunities to generalize learning at each "teachable moment."

41. At hearing, Ms. Shockley disagreed with the IEP team's proposed fade-out plan for Student's one-to-one aide support. Her recommendation was that Student's one-to-one aide support at school should be gradually diminished by half-hour increments each week, with reassessment every two weeks and further reductions only if appropriate.

LEGAL CONCLUSIONS

BURDEN OF PROOF

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

ISSUE 1: LRE

2. Student contends that District denied him a FAPE in the May 4, 2009 IEP and subsequent addenda, up through and including February 5, 2010, by not offering kindergarten placement for the 2009-2010 school year in the LRE. Specifically, Student contends that he could thrive in the kindergarten general education environment with substantially modified curriculum and the assistance of a full-time one-to-one aide throughout the school day. He contends that the SDC placement that the IEP team offered was not the LRE. District asserts that there was no level of supplemental aids or services that reasonably could permit Student to receive academic benefit from full inclusion in general education classes, leading to a conclusion that a self-contained SDC was a more appropriate placement. District asserts that Student's deficits were severe enough to render him unable to participate in the general education curriculum even with modifications and one-to-one aide support. It contends that the offer of a SDC constituted a FAPE.

DEFINITION OF FAPE IN THE LRE

3. Under both State law and the federal Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a FAPE. (20 U.S.C. §1400; Ed. Code, § 56000.) FAPE 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 IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "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); Ed. Code, § 56363, subd. (a) [In California, related services are called "designated instruction and services"].)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) 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. (*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 LRE. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

5. School districts are required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student’s disabilities is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).)

6. The term “supplementary aids and services” means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate in accordance with the LRE mandate. (20 U.S.C. § 1401 (33).)

7. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

8. In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, the court established a four-part test that provides guidance on the question of whether a placement is in the LRE. The four factors are: 1) the educational benefits of placement full-time in a regular class; 2) the non-academic benefits of such placement; 3) the effect the child will have on the teacher and children in the regular class; and 4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402

[applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. (*Daniel R.R. v. State Bd. of Educ., supra*, 874 F.2d at p. 1048.) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.)

9. Student has not established the educational benefits of placement in a regular education kindergarten classroom. District's assessors Hively, Hukill and Sanders credibly opined that Student did not have the precursor skills necessary to attempt the academic goals of a general education kindergarten classroom. Without further development of basic skills, Student would not be able to obtain educational benefit in that placement. Student did not use language spontaneously. Student did not understand that pictures, words or images on paper had meaning. Student was "very delayed," in his scores for memory, reasoning, and symbolic and non-symbolic understanding. He had a vocabulary of no more than fifteen words as compared to the 2,000-word vocabulary of a typical five-year-old. Student was at the level of prompt and response. Student could not yet imitate on his own without prompts, the building block of any skill acquisition. Before he could attain language and learn to read and write, which was the ultimate goal of kindergarten, Student would need to obtain symbolic understanding. Before identifying letters, Student would need to know that each letter corresponds to a sound, and before that he would need to understand that two items can correspond one to the other, a symbolic and representational link he had not yet

made. Student's attention span was approximately three seconds, which was inappropriate for general education where attentiveness to books and papers is a prerequisite skill. The pacing of a general education kindergarten setting would overwhelm him. State standard kindergarten curriculum included science, reading/language arts, history and mathematics. Student did not establish readiness with respect to any of them. No degree of modification of the general education kindergarten curriculum would permit Student to obtain educational benefit in that setting. (Factual Findings 6-20, 25-30, 35-36, 39-40; Legal Conclusions 1-8.)

10. The opinions of District's experts Hively, Hukill, Sanders, Hester and Bertran-Harris regarding the inappropriateness of general education for Student were more credible than Mother's or Ms. Shockley's. Although Mother's beliefs were sincere, they were not persuasive when compared to the testimony of Student's assessors, who persuasively testified that general education kindergarten would be too challenging for Student, regardless of curricular modification or one-to-one aide support. District experts had more background in evaluating children with disabilities placed in regular classrooms and SDCs than did Mother or Ms. Shockley. Their opinions were more credible than Ms. Shockley's opinion that Student exhibited readiness for letters and reading skills during pre-school by engaging in matching of objects with prompting by his one-to-one aide. No evidence was presented regarding the educational material or curriculum being taught at pre-school. Ms. Shockley admitted never having worked with Student on any of the State standard kindergarten curriculum prerequisite skills. She was unable to estimate his readiness with respect to any of them, and could not state what degree of prompting he would require if he were to attempt them. Ms. Hively credibly opined from her observations of Student at pre-school that he was being motored through tasks by Mother and his aide, following prompts but not actually

performing the actions on his own. (Factual Findings 6-20, 25-30, 35-36, 39-40; Legal Conclusions 1-9.)

11. Student has not established the educational benefits of placement full-time in a regular class. Thus, Student did not establish the first *Rachel H.* factor.

12. Student has not established that the non-academic benefits to him of a general education kindergarten placement would outweigh those of the SDC. Student presented his social successes at pre-school as proof that the non-academic benefits of general education would surpass those of the SDC. However, no evidence was presented to indicate that Student's social benefits were restricted to the general education setting, or could not be equally achieved in the SDC. To the contrary, Ms. Bertran-Harris credibly opined that placing Student in general education, where the academic level would be so much higher than Student's abilities, would have the opposite of the desired effect and would isolate him from his peers, while the SDC placement would allow Student to interact with his peers during academic instruction. Student did not meet his burden of showing that there were non-academic benefits to Student from placement in general education. Thus Student did not establish the second *Rachel H.* factor. (Factual Findings 5, 17, 26-30, 35-37, 39-40; Legal Conclusions 1, 8-10.)

13. The third *Rachel H.* factor, classroom impact, does not shift the weight of the evidence here. Student was happy and compliant overall. In pre-school, he transitioned activities without agitation; he reciprocated social interactions and played along with songs and games. He interacted well with other students. Although Student had in the past engaged in self-injurious and aggressive behaviors such as biting, scratching and slapping, no evidence indicated any continuing concern regarding such behaviors. Student had no ongoing behavior issues, an overall pleasing effect on his pre-school peers and teacher, and would not be disruptive. However, Student would be

segregated with his aide and would require a substantially modified and entirely separate academic program if he were to be placed within a general education kindergarten classroom. Student would not work on the same concepts nor use the same materials. This would have a negative effect on the classroom, and take up the general education teacher's time to the detriment of other children. Despite Student's benign presence, he did not establish the third *Rachel H.* factor. (Factual Findings 5, 7-20, 25-30, 35-36, 39-40; Legal Conclusions 1, 8-12.)

14. No evidence was presented regarding the cost of the proposed one-to-one aide, the fourth *Rachel H.* factor.

15. The determination of whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact-specific inquiry. Here, the evidence established that receiving instruction in the general education class would isolate Student and would not be reasonably calculated to allow him to receive educational benefit. Student did not meet the burden of showing that general education was appropriate under *Rachel H.* (Factual Findings 5-20, 25-30, 35-37, 39-40; Legal Conclusions 1-14.)

16. The placement offer mainstreamed Student to the maximum extent that was appropriate in light of the continuum of program options. The IEP team agreed that Student should be mainstreamed for socialization purposes. The IEP team's offer included a "General Education Participation Plan" for socialization purposes. This provided 65 minutes daily mainstreaming into the general education environment, accompanied by a paraprofessional, for lunch, recess, assemblies and special activities with the general education kindergarten through third grade population. The IEP team's offer included mainstreaming Student during all primarily social, non-academic activities. (Factual Findings 32, 38; Legal Conclusions 1-8.)

17. In conclusion, the SDC that the IEP team offered was the appropriate placement for Student and was reasonably calculated to allow Student to receive educational benefit in the LRE. The SDC used methods that were appropriate for Student: sensory integrated activities, ABA principles and methods, including visual prompts with reinforcement, correction and redirection. The teacher and teacher's aides were trained in autism spectrum disorder and in behavior. The subject areas covered were the same as in general education kindergarten, however at a slower pace because of the need to have more opportunities for redirection. This self-contained and structured environment, with the pacing of learning tailored to the students, was the appropriate placement for Student. Student's goals and objectives could be worked on throughout the school day, giving him numerous opportunities to generalize learning. Participating in a group setting, as opposed to by himself with an aide in a modified curriculum general education setting, would teach Student group classroom skills and better prepare Student for group instruction. Thus, the evidence showed that the SDC was appropriate and that Student was mainstreamed to the maximum extent appropriate. (Factual Findings 5-20, 25-30, 35-37, 39-40; Legal Conclusions 1-16.)

ISSUE 2: ABA ONE-TO-ONE AIDE SUPPORT

18. Student contends that one-to-one aide support was necessary for him to participate in the general education kindergarten environment. He did not contend, nor did the evidence establish, that one-to-one aide support was necessary to receive a FAPE in the SDC environment. District contends that the intensive behavioral intervention program from CARD was not necessary in order for Student to access the educational curriculum or to make progress toward his educational goals.

19. As stated above in Legal Conclusions 3 and 4, FAPE 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 IEP. "Related

services” are developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. 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.

20. As stated above in Legal Conclusions 3 and 4, 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. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the educational services and/or placement must only 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.

21. No evidence was presented, and Student made no contention, that if the SDC were determined to be the LRE, a one-to-one aide would still be required. The services that CARD provided were the same services that the SDC offered: to prompt Student using visual prompts with reinforcement, and correction and redirection. A structured environment such as this, with a low student-to-teacher ratio, and an individualized program such that the pacing of learning was tailored to the students, provided the same type of services that Student contends were provided by his one-to-one aide. Providing such services through the SDC rather than via CARD, although not preferred by Mother, did not deny Student a FAPE. Student also did not establish that the District's fade-out plan was inappropriate, given the services that would be offered as part of the SDC placement itself. (Factual Findings 4-6, 16, 25-27, 32-33, 37, 41; Legal Conclusions 1-17.)

22. Under these facts, Student failed to meet his burden of proof on this issue. (Factual Findings 4-6, 16, 25-27, 32-33, 37, 41; Legal Conclusions 1-17.)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this case.

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 (90) days of receipt of this Decision. (Ed. Code, § 56505, subd.(k).)

Dated: June 29, 2010

_____/s/_____

JUNE R. LEHRMAN

Administrative Law Judge

Office of Administrative Hearings