

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PANAMA-BUENA VISTA UNION  
SCHOOL DISTRICT and KERN COUNTY  
SUPERINTENDENT OF SCHOOLS,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009120030

PANAMA-BUENA VISTA UNION  
SCHOOL DISTRICT and KERN COUNTY  
SUPERINTENDENT OF SCHOOLS,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009120963

DECISION

Administrative Law Judge Rebecca P. Freie, Office of Administrative Hearings (OAH), heard this matter in Bakersfield, California, on February 22, 23 and 24, 2010.

Stacy L. Inman, Attorney at Law, appeared on behalf of the Panama-Buena Vista Unified School District (District) and the Kern County Superintendent of Schools (County Office).<sup>1</sup> Present throughout the hearing were Rita Pierucci, Director of Special Education for the District, and Julianna Gaines, one of two Special Education Directors for the County Office.

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<sup>1</sup> The Kern County Superintendent of Schools is also referred to as the Kern County Office of Education in some exhibits.

On the morning of February 22, 2010, Student was present and represented by her mother (Mother). Following the lunch break on February 22, 2010, Mother was present, accompanied by Student's five-year-old sibling. Student was not present. At approximately 4:00 p.m. on the first day of hearing, Mother and Student's sibling left the due process hearing. Mother stated that she no longer wished to participate in the hearing, and signed a statement disenrolling Student from the District. Mother and her children did not return to the hearing, nor did Mother contact OAH, the District, the County Office, or their attorney at any time during the hearing.

On December 1, 2009, the District and the County Office filed a Request for Due Process Hearing (complaint). On December 18, 2009, the District filed a second complaint. On January 14, 2010, OAH granted a motion to consolidate the matters filed by the District and the County Office, and ordered that both cases adhere to the timeline of the later-filed case. On January 20, 2010, the hearing was continued to February 22, 2010. On February 24, 2010, a continuance was granted to March 15, 2010, to permit the parties to file written closing arguments. Mother was sent an order on March 1, 2010, that listed the exhibits admitted into evidence, and specified the length and format for written closing arguments. Mother did not file a closing argument. Upon receipt of the District's closing argument on March 15, 2010, the record was closed, and the matter was submitted for decision.

## ISSUES<sup>2</sup>

1. Was Student denied a free appropriate public education (FAPE) because the District and the County Office failed to provide Student with a placement that was comparable to her placement in another school district when she moved into the

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<sup>2</sup> The issues have been consolidated, reworded and reordered for clarity from the Order Following Prehearing Conference (PHC) on January 20, 2010, and the order following supplemental PHC on February 18, 2010.

boundaries of the District, pursuant to Education Code section 56325, and failed to hold an IEP meeting within 30 days?

2. Was the County Office entitled to screen Student without parental consent on or about March 20, 2009, and May 4, 2009, to determine appropriate instructional strategies for curriculum implementation?

3. Is Student entitled to an independent educational evaluation (IEE) at the District's expense and, if so, did the District timely offer an IEE to Student?

4. Did the District and the County Office deny Student a FAPE by failing to invite or include all of the required members in the individualized education program (IEP) meetings held on May 12, 2009, September 25, 2009, October 7, 2009, and November 5, 2009?

5. Did District and the County Office offer Student a FAPE in the IEP dated September 25, 2009, and October 7, 2009?

## CONTENTIONS

The District and the County Office claim that they complied with the requirements of Education Code section 56325, when Student moved into the District's boundaries in 2009. Further, the County Office claims that it did not conduct assessments of Student without parental consent on March 20, 2009, or May 4, 2009. Rather, the County Office contends that Student's speech and language therapist was entitled to screen Student to determine appropriate speech and language services on March 20, 2009; this was not an assessment, so parental consent was not necessary. Further, the County Office claims that Student's classroom teacher was also entitled to screen Student without parental consent on or about May 4, 2009, to assist her in determining appropriate goals to draft for the upcoming IEP meeting; parental consent was not required for this screening. Personnel from the County Office conducted formal assessments of Student in several areas during September 2009. The District and the County Office contend that each assessment met the requirements of Education Code

section 56320. Nevertheless, the District and the County Office claim that they offered to pay for an IEE when Mother challenged some or all of the assessments. However, after rejecting the District's proffer of two different entities who could conduct an IEE, Mother did not provide the District or the County Office the names of other assessors who might conduct an IEE.

The District and the County Office contend that all the required members of the IEP team attended the IEP meetings of May 12 and November 5, 2009. In addition, the District and the County Office argue that although an IEP meeting was held on September 25, 2009, without Mother's presence, the meeting was merely convened by the County Office and the District to meet a statutory requirement for an IEP meeting to be held within 60 school days after Mother consented to have the assessment. The District and the County Office claim that the participants of the team signed the attendance sheet for being present on that date, but nothing substantive transpired. The District and the County Office further contend that Mother briefly appeared at the IEP meeting location on October 7, 2009, informed the facilitator that she would not be attending the meeting, but gave her consent for the meeting to go forward in her absence. Finally, the District and the County Office claim that the IEP that was developed at the IEP meeting on October 7, 2009, offered Student a FAPE.

Mother claimed that Student was not placed in a classroom that was comparable to the classroom in her previous school district when she began attending school as a student in the District.<sup>3</sup> Mother also claimed that Student was available for IEEs after the

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<sup>3</sup> Mother made an opening statement at the beginning of the hearing and also testified. She was the first witness called by the District and the County Office. The attorney for the District and the County Office was in the middle of her direct examination when Mother left the hearing. Mother did not submit a written closing brief. Therefore, Student's contentions have been gleaned from Mother's opening statement and testimony.

District offered to pay for them. She did not explain why she did not respond to the District when it offered to pay for an IEE by a provider chosen by her. Mother said she believed that the screenings conducted by the teacher and speech therapist were assessments, and she had not consented to them. Mother also contended the District and the County Office did not provide her with all of Student's records when she requested them. Because she did not have all of the records, she felt she could not meaningfully participate in the IEP meetings, and that is also why she did not attend two IEP meetings. Mother did not provide any information about why she did not think the County Office's offer in the IEP dated September 25, 2009, and October 7, 2009, was a FAPE.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student is four years old and resides with Mother within the boundaries of the District. She was already receiving special education and related services from her previous school district when she moved into the District in February 2009.

### RELATIONSHIP BETWEEN THE DISTRICT AND THE COUNTY OFFICE

2. A local educational agency (LEA) is the responsible entity for providing special education services to eligible individuals with exceptional needs residing within the boundaries of the LEA.<sup>4</sup> A special education local plan area (SELPA) is, generally, the local service area covered by a local plan designed to coordinate responsibility for the special education services among the school districts which comprise its membership.<sup>5</sup>

3. The District is one of 46 school districts and two charter schools in Kern County that belong to a SELPA administered by the County Office. Although most of the

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<sup>4</sup> Ed. Code, §§ 56300-56302.

<sup>5</sup> Ed. Code, § 56195 et seq.

school districts in the SELPA have their own special education programs and classrooms, the County Office, as a SELPA, offers programs and services for students whose individual needs cannot be met by their school districts of residence.

#### STUDENT'S TRANSFER INTO THE DISTRICT AND EDUCATIONAL PLACEMENT

4. When a child with an IEP transfers school districts within California in the same school year, the new district must provide the student with an interim program for a period not to exceed 30 days. At this time, the LEA shall either adopt the previously approved IEP, or develop, adopt and implement a new IEP. The interim program must provide the student with a FAPE and services comparable to those described in the previous IEP. Students attending public schools in California are required to show proof of certain immunizations and a tuberculosis (TB) clearance as a prerequisite for attendance. However, state law permits waiver of that requirement based upon the parents' personal beliefs or for medical reasons.

5. An IEP is an educational program that must address all of a student's unique educational needs, including the student's academic, social, emotional, communicative, physical, and vocational needs. In order to provide a FAPE, the IEP must also be reasonably calculated to provide the student with some educational benefit.

6. When she was 22 months of age, Student began receiving special education and related services from Bakersfield City School District (BCSD) where she resided. BCSD found her eligible for special education as a child with autistic-like behavior and speech and language impairment. BCSD developed an IEP for her in May 2008, shortly before her third birthday. BCSD is a SELPA in its own right, and is not part of the County Office SELPA.

7. In July 2008, Student was assessed at the Autism Clinic at the Langley-Porter Psychiatric Institute at the University of California, San Francisco (Langley-Porter). The assessment resulted in a diagnosis of autism. At an IEP meeting in September 2008, Mother shared the Langley-Porter report with the team and asked BCSD to reassess

Student. In December 2008, following BCSD's new assessment, an IEP meeting was held, and Student's primary eligibility category for special education was determined to be autistic-like behavior, with a secondary disability of speech and language impairment. The IEP team recommended that Student be placed in a preschool classroom for children with autism for four hours a day, five days a week, and be provided with 20 minutes twice a week of direct speech and language services. The record does not show whether Student ever attended this program while enrolled in BCSD.<sup>6</sup>

8. Mother testified that she and Student moved into the boundaries of the District on or about February 4, 2009, a few months before Student's fourth birthday. On or about February 13, 2009, Mother went to the District's Special Services office to enroll Student. Because the District did not have a program in its own schools that would meet Student's unique needs, it immediately referred her to the County Office.

9. The County Office offers several classes and programs for children with special needs who are between the ages of three and five at the Claude Richardson Center for Early Education (Richardson). Richardson also has preschool classes for typically developing students, and early intervention programs for children under the age of three. The County Office determined that the most appropriate placement for Student would be at Richardson, and the referral was sent to Richardson's principal, Brian Cortez. He received the referral on or about February 18.

10. On February 23, 2009, Mr. Cortez spoke to Mother on the telephone. An IEP meeting was scheduled for February 25, 2009, at Richardson. However, on that date, Mother asked that the meeting be postponed, so it was rescheduled for March 2, 2009. The March 2, 2009 IEP states that Student would begin attending Richardson once proof of immunizations and a TB clearance were received. There was no evidence that Student

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<sup>6</sup> At least one exhibit shows that Student was attending a different school than the BCSD school that was recommended in the IEP of December 2008.

was available or able to attend an interim placement at either the District schools, or a County Office program prior to mid-March 2009, when she began attending Richardson.

11. Mother and Mr. Cortez attended the March 2, 2009 IEP meeting.<sup>7</sup> Prior to the meeting, Mother and Mr. Cortez toured Richardson so that Mother could see Richardson's classes and decide which would be most suitable for Student. Mother signed an IEP that placed Student in a special day class (SDC) at Richardson for students with moderate to severe impairments for four-and-a-half hours a day, five days a week. The IEP also provided that Student receive 40 minutes a week of direct and consultation services from a speech and language therapist. Attached to that IEP, and incorporated into it, are IEP documents from Student's previous school district which called for Student to be placed four hours per day in an SDC for children with autism, and to receive 20 minutes twice a week of speech and language services.

12. In March 2009, Student began attending a preschool SDC taught by Megan Harwell. Ms. Harwell has a Bachelor of Arts degree in child development and for three years has had a moderate to severe special education teaching credential. This is Ms. Harwell's third year teaching special education students for the County Office. Her classroom has approximately 15 students and she is assisted by two full-time instructional aides (IAs). The children in her classroom have a variety of disabilities, all in the moderate to severe range. The evidence established that Student was provided a FAPE in that classroom. Student was also provided with the speech and language services as specified in the IEP of March 2, 2009.

13. The evidence established that, when Mother approached the District seeking special education for Student, the District immediately referred Student to the County Office, and it, in turn, promptly referred her to Richardson. The Richardson

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<sup>7</sup> No finding is made as to whether all the appropriate parties participated in the IEP meeting of March 2, 2009, as the issue was not raised in either complaint, or the orders following the PHC and Supplemental PHC.

principal then contacted Mother three school days after receiving the referral. The IEP meeting was held within 30 days of Student's moving into the District. There may have been some delay in Student attending Richardson, but this was because Mother did not immediately provide Richardson with immunization/TB records.

#### MARCH 20 AND MAY 4, 2009 SCREENINGS

14. A school district must obtain parental consent before assessing a student for special education. However, a screening of a child by a teacher or a specialist to determine appropriate educational strategies is not considered to be an assessment that requires parental consent. A school district is required to provide a student with a FAPE, and teachers and other providers may need to screen a student to determine appropriate instructional strategies to provide a student with a FAPE.

15. Student began receiving speech and language services from Cynthia Adame when she began attending Richardson in March 2009. On March 20, 2009, Ms. Adame, a credentialed speech and language therapist employed by the County Office, utilized the Task Analysis Checklist (TAC) to help her to determine what type of speech and language services Student required, and how best to provide those services. The TAC is a checklist that lists various skills that are prerequisites for the acquisition of speech and language. Skills are grouped together according to the chronological age at which a typically developing child would demonstrate the skill. For example, a typically developing child at the age of 24 to 29 months would recognize and name objects in photographs, according to the TAC. Ms. Adame observed Student in the classroom, and also consulted with Ms. Harwell, using the TAC as a guide, to determine what speech and language skills Student had already acquired, and what skills Student was lacking. A checkmark was placed beside each skill Student had already acquired, and a "0" was placed by skills Student had not yet attained. Some skills were not marked at all.

16. Ms. Adame used the checklist as an "informal" guide to assist her in determining Student's current speech and language skills so she could develop an

individualized speech and language program for Student that would meet her unique needs, and provide her with educational benefit. Ms. Adame did not use the TAC as an assessment to determine whether Student was eligible for speech and language services because Student had already been found eligible in her previous school district. In other words, Ms. Adame used the TAC as a screening tool to determine instructional strategies for providing services to a student who had just been assigned to her caseload. Therefore, Ms. Adame did not require parental consent prior to observing Student and using the TAC to record her observations.

17. In May 2009, an IEP meeting was scheduled to determine Student's program for the next year, and Ms. Harwell, as Student's classroom teacher, was responsible for drafting several proposed goals for the IEP meeting. Goals must be based on a student's PLOPs. It would serve no purpose for the IEP team to adopt a goal to develop a skill that a student had already mastered. Likewise, it would be unrealistic to formulate a goal that required certain prerequisite skill levels that a student had not yet attained. On May 4, 2009, Ms. Harwell completed portions of several pages of the Brigance Inventory of Early Development, Second Edition (Brigance). She used the Brigance as a guide to determine Student's skill levels in several areas, such as how many colors she could recognize. Ms. Harwell did not administer the Brigance as a formal assessment. Several pages from the Brigance were admitted into evidence, including one page with instructions. Each page lists multiple skills for a specific domain, and some pages may contain dozens of skills. Skills that are mastered are to be circled. The instructions also require the person completing the Brigance to indicate how it was determined that the child had acquired the skill: whether the skill was directly observed, reported by a parent, or elicited in response to a request. Although the Brigance may be used as part of a formal assessment, Ms. Harwell did not use it in this manner. She did not follow the instructions. For example, several pages were left blank, and when skills were circled, only one of dozens of skills listed on a page was circled, although it was obvious that several other skills on the page would also have been mastered because

the circled skill had been attained. In addition, there was no indication as to how Ms. Harwell determined that Student had mastered each circled skill.

18. The evidence established that Ms. Harwell used the Brigance as a screening tool to assist her in determining Student's PLOPs so she could then develop appropriate goals to be reviewed at the upcoming IEP meeting. These goals would then be used by Student's teachers to determine instructional strategies to meet Student's educational needs during the upcoming school year. The evidence established that Ms. Harwell used the Brigance as a screening tool; it was not an assessment, so parental consent was not required.

#### INDEPENDENT EDUCATIONAL EVALUATION (IEE)

19. If a parent disagrees with an assessment conducted by a school district, the parent may request an IEE. The district may require the independent assessor to meet minimum qualifications as established by the district. In addition, if a parent disagrees with a district's assessment and requests an IEE, the district must respond to the request in a timely manner. If the district is unwilling to fund an IEE and believes its own assessment meets all of the statutory requirements, the district must timely file a due process request to establish that the assessment was appropriate.

20. On May 26, 2009, Mother requested an assessment of Student, and signed a consent for the County Office to conduct a comprehensive assessment of Student in the areas of academic performance; self-help, social and emotional status; motor ability; speech and language; general ability; and health, development, vision and hearing. Mother requested the assessment because she wanted the County Office to ascertain Student's current needs for special education and speech and language services.

21. The County Office conducted the assessments and provided copies of the written assessment reports to Mother. On October 7, 2009, Mother asked that the District or the County Office fund an IEE. It was not clear at that time which assessment or assessments Mother believed were inappropriate. However, after Mother discussed

the assessments with Dr. Pierucci, the District's Special Education Director, it became evident that Mother disagreed with the County Office's psychological assessment performed by Rebecca Payne.

22. A school district's assessments must be conducted by trained and knowledgeable personnel. Individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. In California, students who are African American may not be administered standardized tests that measure the student's intelligence quotient (IQ).

23. The school nurse who completed the health assessment testified, as did Caitlyn Chapin, Student's classroom teacher who completed the academic performance assessment, and the speech and language pathologist who completed the speech and language assessment. The evidence established that each of these assessments met all legal requirements.

#### THE DISTRICT'S PSYCHOLOGICAL ASSESSMENT

24. Ms. Payne is a school psychologist who obtained her Master of Arts degree in education in 1997, and received a Pupil Personnel Services credential as a school psychologist in 2005. Ms. Payne has several other teaching credentials, including one as a general education teacher and another as a special education teacher of moderate to severely impaired students. She has worked with children in several capacities for over 33 years, and has been employed by the County Office as a school psychologist since 2005.

25. Ms. Payne conducted a thorough psychological evaluation of Student, and wrote a lengthy report describing her evaluation of Student, and making recommendations for placement and services. She reviewed Student's extensive educational records, including the psychological assessment reports from BCSD, Langley-Porter, a recent independent psychological evaluation of Student that had been procured by Kern Regional Center (KRC), as well an older KRC evaluation. In addition, Valley Achievement Center (VAC), a non-public school for autistic children that provided Student with after-school care, had recently conducted an assessment of Student, and Ms. Payne also reviewed that report.<sup>8</sup> She reviewed all of Student's IEPs and conducted an extensive interview with Mother. Ms. Payne was already acquainted with Mother because Mother would often stop by her office when she came to Richardson. Ms. Payne interviewed Ms. Chapin and observed Student in Ms. Chapin's classroom, on the playground and at lunch on two separate days. Ms. Payne also observed Student at her after-school program at VAC.

26. The assessment process was somewhat complicated because Student developed a sporadic low-grade fever and was sent home from school on five occasions between August 24 and September 15, 2009. In addition, she was absent from school for one or more days following each of those occasions.

27. Ms. Payne administered testing to Student using a variety of formal assessment instruments: the Alternative Cognitive Assessment Tasks, Verbal, Nonverbal and Spatial Abilities; the Beery-Buktenica Development Test of Visual-Motor Integration, Fifth Edition (VMI-V); the Bracken Basic Concept Scale, Third Edition: Receptive (BBCS-III: R); the Childhood Autism Rating Scale (CARS); the Developmental Profile, Third Edition (DP-3); and the Gilliam Autism Rating Scale, Second Edition (GARS-2). Ms. Payne is trained to administer each of these instruments, and did so according to the instructions provided for each of them. The tests were administered in English, Student's primary

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<sup>8</sup> Neither the District nor the County Office were funding this program.

language. Each test has been validated for the specific purpose for which it was used, and the tests were selected and administered so as not to be racially, culturally or sexually discriminatory.

28. Since Student is African American, Ms. Payne used alternative assessments to determine her cognitive functioning. Student's chronological age was four years, three months when she was tested. The results of the Alternative Cognitive Assessment Tasks showed that Student was mildly to severely delayed in the areas tested. Her overall cognitive abilities were assessed as being moderately delayed.

29. The results of the BBCS-III showed that Student was very delayed in all areas. The DP-3 is an assessment tool which measures a student in several domains: physical, adaptive behaviors, social-emotional, cognitive, and communication; and is completed by interviewing persons well-acquainted with the student. Both Mother and Ms. Chapin were interviewed using this tool. The results of Mother's interview showed that Student had average to moderate delays. However, with the exception of her adaptive behaviors, which Mother rated Student as being at a level that was two months older than her chronological age, Mother's responses in other areas showed that Student was functioning between the ages of one year, six months, and three years, one month. Ms. Chapin's responses to the interview questions showed that Student was functioning at school at levels between one year, and two years, 11 months of age, with her delays reported as borderline to moderate.

30. The VMI-V measures a child's visual motor and perceptual motor integration. The results of the VMI-V showed that Student was in the first percentile in the area of visual-motor development, with an age equivalent of two years, seven months.

31. The results of the CARS, a survey completed by Mother and Ms. Payne, showed that Student was mildly to moderately autistic. The results of the GARS-2 showed that Student demonstrated behaviors that reflected a high probability of autism.

32. The evidence established that Ms. Payne's psychological evaluation met all legal requirements. Therefore, the County Office and the District were obligated to file a request for a due process hearing in a timely manner if they did not want to fund an IEE.

#### THE TIMELINESS OF DISTRICT'S OFFER TO PAY FOR IEEs

33. On October 1, 2009, Mother wrote in a letter to Dr. Pierucci that she had reviewed the "assessment results" with Student's doctor, and he believed that her assessment results were inaccurate because of her poor health at the time the testing was conducted. Ms. Payne's report demonstrates that she was aware that Student was having some health problems during the time period when she conducted her testing and observations. The report and her testimony show that Ms. Payne observed Student at Richardson on one day when she appeared to become ill after lunch and had a fever when her temperature was taken. However, Student's activity level and behavior prior to lunch was similar to that which she exhibited on other days when she was not ill. Ms. Payne did not conduct any formal testing of Student when she appeared to be ill.

34. After receiving Mother's written request for an IEE on October 7, 2009, Dr. Pierucci spoke to Mother and determined that she was primarily dissatisfied with the results of Ms. Payne's assessment. Dr. Pierucci wrote to Mother on October 19, 2009, informing her that the District and the County Office would fund an IEE, and would be contacting her within 10 days to explain the parameters of the IEE.

35. On October 29, 2009, Dr. Pierucci wrote to Mother and advised her that the District and the County Office were willing to fund an IEE by a clinical psychologist, and enclosed a copy of the psychologist's curriculum vitae. Dr. Pierucci also offered, in the alternative, to have Student assessed at the California Diagnostic Center in Fresno.

36. Following an IEP meeting on November 5, 2009, Mother and Dr. Pierucci talked in the parking lot. Mother stated that she would not agree to have the psychologist suggested by Dr. Pierucci conduct the IEE. She also would not agree to an evaluation by the Diagnostic Center because it was a public agency, and she did not

trust a public agency to do the evaluation. Dr. Pierucci had several other conversations with Mother after that date, and finally asked Mother to provide the District with a name or names of assessors of her choice who could perform the IEE if they met the District's criteria for assessors. Mother never responded to this request. On December 1, 2009, the District and the County Office filed their initial due process complaint asking that OAH resolve the dispute over the IEE.

37. The District and the County Office offered to fund an IEE 12 days after Mother's request on October 7, 2009. Dr. Peirucci repeatedly tried to get cooperation from Mother so that the IEE could be scheduled. Mother did not respond, other than telling Dr. Pierucci that she did not want either of the assessors suggested by her to perform the IEE. The evidence established that the District acted in a timely manner in response to Mother's request for the IEE.

#### PARTICIPANTS AT IEP MEETINGS

38. Each IEP meeting shall be conducted by an IEP team that includes at least one parent, or a representative of a parent; a regular education teacher, if the student may be participating in the regular education environment; at least one special education teacher of the student, or a special education provider for the student; and a qualified representative of the LEA who is knowledgeable about the programs and services that are available through the LEA. There is no requirement that a representative of the student's school district of residence attend an IEP meeting if another LEA is providing the student with educational placement and services. A member of an IEP team may be excused from attending if the parent consents to the excusal in writing. If a parent refuses to attend an IEP meeting, the LEA must document its attempts to provide notice of the meeting to the parent, and its efforts to persuade the parent to attend the meeting.

39. A procedural violation of the IDEA and related laws results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents'

opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits.

#### THE MAY 12, 2009 IEP MEETING

40. On May 12, 2009, an IEP meeting was conducted at Richardson. Mother, Ms. Harwell, and Ms. Adame attended the meeting. The meeting was facilitated by Greta Pretzer, a teacher at Richardson with both special education and general education teaching credentials who had been designated by Mr. Cortez to conduct the meeting. Ms. Pretzer was familiar with the County Office programs and services. Mother contends that a speech and language therapist did not attend the meeting. The evidence established that Ms. Adame attended and participated in the meeting, and provided a short report that was part of the IEP resulting from the meeting. A representative of the District did not attend the IEP meeting. There was no evidence that Mother requested that such a representative attend, nor was such attendance legally required since the SELPA, not the District, was providing Student with special education and related services.

41. At the IEP meeting on May 12, 2009, the team discussed placement of Student for the extended school year (ESY) and the 2009-2010 school year. The County Office team members recommended that Student begin attending an SDC for children with autism that had a smaller adult-to-student ratio in the classroom. The evidence established that Student would be unable to participate in a regular education program, even with support. The proposed SDC was in session four-and-a-half hours per day, five days a week. Student was to be provided with 40 weekly minutes of direct and consultative speech and language therapy. Student was to continue participating in recess on the Richardson playground with both special education and regular education students, and also would attend special school functions with both special and regular education students.

42. The IEP also contained 11 goals, eight of which were developed by Ms. Harwell in the areas of pre-academics, functional skills, motor skills and vocational skills. In addition, there were three goals in the area of language and communication that were developed by Ms. Adame. Mother did not agree to the proposed IEP at the meeting of May 12, 2009, stating that she wanted to review it with Student's father. There was no evidence that the team agreed to continue the IEP meeting to another date, nor was any notice sent to Mother that this meeting would be continued to a later date.

43. The evidence established that Mother, Student's teacher, Ms. Harwell, and her speech and language therapist, Ms. Adame, were present at the IEP meeting on May 12, 2009, as was a person familiar with the County Office programs and services, Ms. Pretzer.<sup>9</sup> Therefore, the IEP meeting of May 12, 2009, was not procedurally defective.

#### The September 25, 2009 IEP Meeting

44. After the 2009-2010 school year began on August 24, 2009, the County Office began its formal assessment of Student. The County Office was required to hold an IEP team meeting within 60 days after Mother signed the consent for assessment on May 26, 2009.<sup>10</sup> The County Office initially scheduled an IEP meeting to review the assessments for September 16, 2009. However, not all of the assessments were complete due to Student's frequent absences, so the IEP meeting was rescheduled for September 25, 2009. Mother then informed the District that she could not attend the meeting on that date because she wanted more time to review the District's written assessments that were provided to her on September 16 and September 23, 2009.

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<sup>9</sup> There was no requirement that a general education teacher be present, because Student cannot participate in general education programs, even with support.

<sup>10</sup> The 60-day time period was tolled during summer vacation in July and August.

45. Mr. Cortez convened the meeting on that date, with himself; Ms. Chapin, Student's classroom teacher; Dr. Pierucci; the school nurse who conducted the health assessments; Ms. Payne; and two speech and language pathologists.<sup>11</sup> The participants signed a document that all were present and able to attend an IEP meeting, but the meeting did not take place due to Mother's absence, and the parties agreed to reconvene the IEP meeting at a time that was mutually agreeable to everyone, including Mother. Although Mother was not present at this meeting, nothing substantive occurred due to Mother's absence. The meeting was convened on September 25, 2009, because an IEP meeting had to be held within 60 days after the consent to assess was signed.

46. A parent must be able to meaningfully participate in an IEP meeting, and if the parent is not allowed to do so, it is a procedural violation. A procedural violation may be excused if the violation did not result in the student being denied a FAPE. This IEP meeting was convened in Mother's absence, and therefore she was denied meaningful participation. However, Student was not denied a FAPE because nothing substantive occurred; there was no discussion about Student. Therefore, the procedural violation is excused.

October 7, 2009

47. On October 7, 2009, the IEP team gathered for the IEP meeting at the District's Special Services office. All of the same participants from the September 25, 2009 meeting were present, as well as Ms. Gaines, the County Office Special Education Director. The October 7 meeting had been scheduled by agreement with Mother. The County Office sent Mother a formal notice of the meeting on September 29, 2009.

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<sup>11</sup> Denise Harness conducted the speech and language assessment of Student, and Susan Wirth was the speech and language therapist who was providing Student with services in Ms. Chapin's SDC.

48. Mother was initially present for the October 7, 2009 meeting before it began, but she then asked to speak to Mr. Cortez privately. When they were alone in the parking lot, Mother gave him a note that stated, "Due to my daughter's illness I am unable to attend today's IEP meeting." The note then makes several requests that she wanted the IEP team to consider, and the note ended with a postscript that stated, "Please attach to IEP."

49. Mother reiterated most of the requests contained in the note. She told Mr. Cortez that she wanted an IEE, and she wanted Student to participate for four hours in the after-school program for children with autism that Student was currently attending at VAC. In addition, Mother told Mr. Cortez that she had concerns about the length of Student's bus ride to and from Richardson. She also expressed concerns about the screenings of March 20 and May 4, 2009, because she did not believe Student was in attendance at Richardson on those dates, and believed the records may have been altered. Mr. Cortez tried to persuade Mother to remain for the IEP meeting, but she refused.

50. In her opening statement, Mother claimed that she did not attend the IEP meetings in September and October 2009 because she did not believe she had all of the information she needed to meaningfully participate in the meeting. However, the evidence did not establish this.<sup>12</sup> Mother was mailed some of the assessment reports on

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<sup>12</sup> On January 19, 2009, Mother sent to OAH a request that OAH take "official notice" of an investigative report prepared by the California Department of Education (CDE) in response to a compliance complaint she had filed with CDE. Mother had complained that the District had failed to provide her with Student's records in a timely manner. This request was not addressed at the hearing due to Mother's abrupt departure. The request for official notice of this report pursuant to Government Code section 11515 is denied. The copy of the nine-page report submitted to OAH is missing

September 16, 2009, and she picked up copies of all the reports on September 23, 2009. Ms. Payne called Mother several times before the IEP meeting of October 7, 2009, and left messages that she would like to meet with Mother to review the report prior to the IEP meeting. Mother did not return the calls. In addition, when Ms. Payne saw Mother at Richardson during this time period, she personally asked Mother to meet with her to review the assessment, and Mother refused.

51. The IEP meeting on October 7, 2009, began after Mother left. Extensive notes were taken during the meeting. The team discussed each of the County Office's assessments, and the recommendations contained in the assessments. Goals that had been drafted by Ms. Chapin and Ms. Wirth were approved by the IEP team. Most of these goals were quite different than the goals created by Ms. Adame and Ms. Harwell, in May, and were less demanding. The IEP team recommended that Student be placed for four-and-a half hours each day in the SDC for autistic preschoolers with one-to-one instruction within an applied behavioral analysis-based (ABA-based) program. The team also recommended that speech and language services be increased to 50 minutes per week, with 30 minutes each week of direct services, and 20 minutes per week of consultation services. The team further recommended that Student be assessed by an occupational therapist. On October 9, 2009, Mr. Cortez sent the IEP documents to Mother.

52. The evidence established that Mother consented to the IEP meeting continuing on October 7, 2009, despite her absence. Mr. Cortez fully described Mother's concerns to the IEP team after he returned to the meeting following his conversation with her in the parking lot, and these concerns were considered by the IEP team in spite of Mother's absence. All of the required members of the IEP team, with the exception of Mother, were present. They included Mr. Cortez, who is knowledgeable about the

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three pages, and its relevance to the issues was not established. The report was not considered or admitted into evidence.

programs available to Student through the County Office, as well as the County Office Special Education Director, Ms. Gaines. Dr. Pierucci attended on behalf of the District, and, as Special Education Director, she is knowledgeable about the District's programs and services for students with special needs. Rebecca Payne, the school psychologist who assessed Student for the County Office, Ms. Chapin, Student's special education teacher at Richardson, and Susan Wirth, the speech pathologist who provided services to Student in Ms. Chapin's SDC were also present. In addition, Sharon Harness, the speech and language pathologist who assessed Student on behalf of the County Office, and Jennifer Culbertson, the school nurse who assessed Student, were present. Everyone actively participated in the discussion about Student and her needs. The evidence established that Mother voluntarily absented herself from the IEP meeting of October 7, 2009, and all other required team members were present.

November 5, 2009

53. Student last attended school at Richardson on September 14, 2009. After Student was sent home from school on September 14, 2009, with a fever, the school nurse advised Mother that she needed to take Student to a medical doctor to determine the cause of the fevers, and that she could not return to school without a doctor's release. Student has not attended any program at either the County Office or District schools since that time. At the end of October 2009, Mother provided the District with a medical release for Student to attend school that was sent to the County Office. However, Student did not return to school. Mother requested an IEP meeting.

54. On November 5, 2009, another IEP team meeting was held. Attending this meeting were Mother, Mr. Cortez, Ms. Chapin, Dr. Pierucci, Ms. Wirth, and a representative from KRC. According to Mr. Cortez's notes from the meeting, Mother requested the IEP meeting "to address [her] concerns regarding her daughter." During the two-hour meeting, there was little discussion about the proposed IEP from October 7, 2009. Mother spoke during the entire meeting. After two hours, the meeting ended

with the District and the County Office continuing to make the offer of the placement and services contained in the IEP developed on October 7, 2009. When the meeting ended, both the District and the County Office believed that Mother would return Student to preschool at Richardson. However, Student did not return.

55. There was no evidence that the purpose of the IEP meeting of November 5, 2009, was to review the County Office assessments, so it was not necessary to have Ms. Payne, the school nurse, or Ms. Harness at that meeting. The notice of this meeting that was sent to Mother did not list them as participants, and Mother raised no objection to their absence. The evidence established that the appropriate persons attended the November 5, 2009 IEP meeting, and that the meeting was not procedurally defective.

#### THE OFFER OF PLACEMENT AND SERVICES CONTAINED IN THE IEP DATED SEPTEMBER 25, 2009, AND OCTOBER 7, 2009

56. To determine whether the school district offered the student a FAPE, the focus is on the appropriateness of the placement offered by the district and not on the alternative preferred by the parents.

57. The assessments completed by the District established that Student's primary disability is autistic-like behaviors, and her secondary disability is mental retardation. In addition, based on her review of previous assessments, Ms. Payne found documentation of Student's high activity level and distractibility which suggested she might meet the criteria for attention deficit hyperactivity disorder (ADHD) in the future.

58. The IEP that was developed at the meeting of October 7, 2009, recommended placement in an SDC classroom at Richardson with an ABA-based program. The SDC preschool autism classroom at Richardson is staffed by Ms. Chapin, a credentialed special education teacher. Ms. Chapin has a Level I moderate to severe special education credential and is working towards her Master of Science degree in special education and a clear level II credential. She has been teaching special education

classes for severely disabled students since August 2005. Prior to obtaining her credential, she was an IA for the County Office for special education students for two years.

59. The SDC taught by Ms. Chapin is staffed with five IAs to assist her in providing instructional service. Seven students are currently placed in the class. The classroom program is a very structured ABA-based program, and the students are provided with one-to-one instruction using ABA methodology. Student would spend recess on the Richardson playground with children who are in regular education as well as with children with special needs, and she would participate in all-school functions with typically developing children. Student would be provided with transportation to and from Richardson.

60. Based on the results of the speech and language assessment by Ms. Harness, the County Office offered to provide Student with 30 minutes per week of direct speech and language therapy, and 20 minutes per week of consultation speech and language services to the SDC staff. Mother complained at the IEP meeting on November 5, 2009, that Student had developed behavioral issues since attending Richardson, but these behaviors were not observed at Richardson, and did not impede her access to the curriculum. The evidence did not establish that Student's issues were so extreme at Richardson that she required a behavioral support plan, or the services of a behaviorist. There was no evidence that Mother ever told the County Office or the District why she objected to the offer, or what she would prefer in the alternative.

61. The evidence established that the offer of placement and services contained in the IEP dated September 25, 2009, and October 7, 2009, would meet Student's unique needs, and was reasonably calculated to allow her to obtain some educational benefit. The goals were appropriate, and were based on the observations of Student's PLOPs by Ms. Chapin and Ms. Wirth at the beginning of the 2009-2010 school year, and the results of the assessments.

## APPLICABLE LAW AND LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The District filed the complaints in these matters, and, therefore, has the burden of persuasion.

### ELEMENTS OF A FAPE

2. A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, constitute an appropriate program, and conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56040.)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was

designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

## PROCEDURAL VIOLATIONS

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-206.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Issue 1: Was Student denied a FAPE because the District and the County Office failed to provide Student with a placement that was comparable to her placement in another school district when she moved into the boundaries of the District, pursuant to Education Code section 56325, and failed to hold an IEP meeting within 30 days?

6. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state, the LEA shall provide the child with a FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the LEA adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with the law. (20 U.S.C. §1414 (d)(2)(C)(i)(1); 34 C.F.R. § 300.323(e) (2006); Ed. Code, § 56325, subd. (a).) California law also requires that, for a student who transfers into a district not operating under the same SELPA, the

LEA shall provide the interim program "in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved [IEP] or shall develop, adopt, and implement a new [IEP] that is consistent with federal and state law." (Ed. Code, § 56325, subd. (a)(1).)

7. A student who cannot provide proof of immunization must be excluded from a school operated by a school district or county office of education, unless the student is exempted. (Ed. Code § 48216; Health & Saf. Code, §§ 120365 and 120370.)

8. As established by Legal Conclusions 2-7, and Factual Findings 2-13, the District and the County Office complied with the provisions of Education Code section 56325 when Student moved into the District. Student moved into the District on February 4, 2009, and was promptly referred to the County Office when Mother went to the District's Special Services office to enroll her in preschool on February 13, 2009. There was evidence that Student did not have current immunization records at this time, and she could not be placed in a public school until those records were provided. The IEP meeting of March 2, 2009, was held within 30 days of the date Student moved into the District. There was no evidence that there was any other delay in placing Student, once the immunization records were received. In addition, the County Office placed Student in an SDC preschool classroom that Mother visited prior to the IEP, and approved. This classroom provided Student with a FAPE, and was comparable to the classroom placement called for in her previous IEP from BCSD.

Issue 2: Was the County Office entitled to screen Student without parental consent on or about March 20, 2009, and May 4, 2009, to determine appropriate instructional strategies for curriculum implementation?

9. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and the district agree otherwise, but at least once every three years unless the parent and the district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related

services needs. (20 U.S.C. § 1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

Reassessments require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To obtain that consent, the district must develop and present an assessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) However, screenings by teachers and service providers to determine instructional strategies are not assessments. (20 U.S.C. § 1414(a)(1)(E); Ed. Code § 56321, subd. (f).)

10. As established by Legal Conclusion 9, and Factual Findings 14-16, the screening of Student by Ms. Adame on or about March 20, 2009, was not an assessment. Student was already eligible for speech and language services. Ms. Adame used the information she recorded on the TAC form to determine Student's speech and language levels so that she could provide her with appropriate speech and language therapy. The evidence established that Ms. Adame did not conduct a formal assessment using the TAC. Rather, she used the TAC to help her develop instructional strategies to use when she worked with Student. Parental consent was not required for this screening.

11. Similarly, as established by Legal Conclusion 9, and Factual Findings 14 and 17-18, the screening by Ms. Harwell on or about May 4, 2009, using the Brigance, was to assist her in determining Student's levels of performance. She needed to determine Student's PLOPs so she could draft proposed goals for the upcoming IEP meeting. Goals are used by service providers as a means of determining instructional strategies for students. The evidence established that Ms. Harwell did not formally administer the Brigance, and did not follow the instructions; she used it as a guide in determining Student's skill levels. She screened Student using the Brigance to assist her in developing goals which would assist service providers in developing instructional strategies. This was a screening, not an assessment, and parental consent was not needed for this screening.

Issue 3: Is Student entitled to an IEE at the District's expense and, if so, did the District timely offer an IEE to Student?

12. In evaluating a child for special education eligibility, a district must assess the child in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd.(f).) No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational programming. (34 C.F.R. § 300.304 (b)(2) (2006); Ed. Code, § 56320, subds. (c), (e).)

13. A school district's assessments shall be conducted by trained and knowledgeable personnel, such that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).) An IEP meeting must be conducted within 60 days after a parent requests an assessment. However, this time period is tolled during time periods between regular school session or vacations that exceed five school days. (Ed. Code, § 56043, subd. (f).)

14. Under certain conditions, the parents are entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1) (2006); Ed. Code, §§ 56329, subd. (b), 56506, subd. (c); see also, 20 U.S.C. § 1415(d)(2)(A).) An "independent

educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i) (2006).) To obtain an IEE, the parents must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1)(2006).) The public agency need not provide the IEE at its expense if it establishes in a due process hearing that the assessment with which the parents disagree was appropriate. (34 C.F.R. § 300.502(b)(2) (2006); Ed. Code, § 56329, subd. (c).) If an IEE is conducted at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parents’ right to an IEE. (34 C.F.R. § 300.502(e)(1) (2006).)

15. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2)(2006); Ed. Code, § 56329, subd. (c).)

16. Whether an LEA files a due process complaint without unnecessary delay is a fact-specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380) 47 IDELR 12, the court determined that the school district unnecessarily delayed filing its due process request. In total, the school district waited three months after the pupil first requested an IEE at public expense to file its request. The court held that the school district had thereby waived its right to contest the request for an IEE. However, in *J.P. v. Ripon Unified School Dist.* (E.D. Cal. April 14, 2009, No. 2:07-cv-02084) 52 IDELR 125, the court found that a delay of over two months was not unreasonable, because the district was able to produce a series of letters showing its attempts to resolve the matter with the parents, and because a final impasse was not reached until three weeks before the district filed for a due process hearing. In *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 30, 2007, No. 06-5172) 48 IDELR 244, the court held that a school

district's 10-week delay in filing a due process request was not a per se violation of the IDEA. The court emphasized that there was evidence of on-going efforts during that time to resolve the matter.

17. As established by Legal Conclusions 12-14, and Factual Findings 19-32, Ms. Payne's psychological assessment met all legal requirements. Ms. Payne was qualified to conduct the psychological assessment of Student as a school psychologist, and she complied with all legal requirements when conducting the assessment and writing her report.

18. As established by Legal Conclusions 14-16, and Factual Findings 33-37, the District was timely in responding to Mother's request for an IEE. Although Ms. Payne's assessment was appropriate, when Mother made her request for an IEE on October 7, 2009, the District notified Mother 12 days later that the District and the County Office would fund an IEE. On October 29, 2009, Mother was provided with the names of two proposed assessors. When Mother told Dr. Pierucci on November 5, 2009, that she did not want to have the IEE conducted by either assessor, Dr. Pierucci asked her to provide her with the name of an alternative assessor. When Mother did not do so, the District and the County Office filed its initial complaint about the IEE on December 1, 2009. The evidence established that the County Office's assessments were appropriate. But the District and the County Office elected to offer Mother an IEE, and they took timely action when Mother did not provide them with the name of an alternative assessor to conduct the IEE.

Issue 4: Did the District and the County Office deny Student a FAPE by failing to invite and/or include all of the required members in the IEP meetings held on May 12, 2009; September 25, 2009; October 7, 2009; and November 5, 2009?

19. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or

provider of the child; an individual who can interpret the instructional implications of any assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv)-(vi); Ed. Code, § 56341, subds. (b)(1), (5), (6).)

#### IEP MEETING OF MAY 12, 2009

20. As established by Legal Conclusions 2-5 and 19, and Factual Findings 38-43, the appropriate persons were at the IEP meeting of May 12, 2009. They were Mother, Student's teacher, her speech and language therapist, and a County Office representative who was familiar with its programs and services. There was no need for a regular education teacher because Student could not participate in a general education classroom, even with support.

#### IEP MEETING OF SEPTEMBER 25, 2009

21. The law requires that the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) 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. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the IEP meeting, parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

22. A district must notify parents of an IEP meeting "early enough to ensure that they will have an opportunity to attend", and it must schedule the meeting at a mutually agreed on time and place. (34 C.F.R. § 300.322(a)(2) (2006); Ed. Code, §§ 56043,

subd. (e); 56341.5, subds. (b),(c).) A district may not conduct an IEP team meeting in the absence of the parents unless it is “unable to convince the parents that they should attend”, in which case it must:

[K]eep a record of its attempts to arrange a mutually agreed on time and place, such as--

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents and any responses received; and
- (3) Detailed records of visits made to the parents’ home or place of employment and the results of those visits.

(34 C.F.R. § 300.322(d) (2006); Ed. Code, § 56341.5, subd. (h); *Shapiro v. Paradise Valley Unified School Dist., No. 69* (9th Cir. 2003) 317 F.3d 1072, 1077-1078.)

23. As established by Legal Conclusions 2-5, 19 and 21-22, and Factual Findings 38-39 and 44-46, Mother was absent from the IEP meeting of September 25, 2009, and it was a technical procedural violation for the IEP meeting to be convened without her. However, nothing substantive occurred at that meeting, and there was no evidence that the mere convening of this meeting in Mother’s absence denied Student a FAPE. Mother had requested that the County Office conduct assessments of Student on May 26, 2009, and the County Office was required to hold an IEP meeting within 60 days of Mother’s consent to assess, excluding school vacations. Mother was properly noticed for the IEP meeting of September 25, 2009. When Mother notified the County Office that she needed more time to review the recently completed assessments of Student, and would not be attending the meeting of September 25, the meeting was convened with the County Office personnel and Dr. Pierucci so that the County Office could comply with the 60-day timeline. Convening this meeting in Mother’s absence was a procedural lapse, because she could not meaningfully participate in the meeting.

However, nothing substantive occurred because Mother was not present. Further, there was no evidence that convening the IEP meeting of September 25, 2009, denied Student a FAPE. All the County Office IEP team members and Dr. Pierucci did was gather and sign that they were present to meet on that date. Any procedural lapse of convening this meeting in Mother's absence was not prejudicial and is excused.

#### IEP MEETING OF OCTOBER 7, 2009

24. Legal Conclusions 2-5, 19 and 22-22, and Factual Findings 38-39 and 47-52, establish that Mother knowingly waived her right to attend the IEP meeting of October 7, 2009, and her rights were not violated when the meeting proceeded in her absence. The meeting date and time were agreed to by Mother, and she was sent proper notice. However, Mother chose not to attend the meeting, and told Mr. Cortez that the meeting could continue without her presence. She asked him to relay her concerns to the IEP team as she left the meeting, and he did so. The letter she gave to Mr. Cortez at that time indicated that Mother wanted the meeting to continue without her, and there was no evidence that either the District or the County Office did anything improper during the meeting. They had current, thorough assessments about Student which provided them with sufficient information to develop and approve goals and determine an appropriate educational placement for Student. The assessments were reviewed and discussed by the team, goals were approved, and the educational placement was determined. Mother was sent a copy of the IEP two days later.

#### IEP MEETING OF NOVEMBER 5, 2009

25. As established by Legal Conclusions 2-5 and 19, and Factual Findings 53-55, all required participants were at the IEP meeting of November 5, 2009. The meeting was requested by Mother. In attendance were Mr. Cortez, the Richardson principal who facilitated the meeting; Student's currently assigned teacher from Richardson, Ms. Chapin, as well as her currently assigned speech and language therapist, Ms. Wirth; Dr. Pierucci from the District; and a representative of KRC. There was no evidence that the

purpose of that IEP meeting was to discuss the County Office assessments, and Mother did not request the presence of any assessors. Therefore, there was no need for someone who could explain the assessments at that meeting. Mother's procedural rights were not violated because the assessors were not present.

Issue 5: Did the District and the County Office offer Student a FAPE in the IEP dated September 25, and October 7, 2009?

26. An IEP is an educational package that must address all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

27. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, and must be reasonably calculated to provide the student with some educational benefit. (20 U. S.C. § 1401(9).) To determine whether the District offered Student a FAPE, the tribunal must focus on the appropriateness of the placement offered by the District and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) "In striving for 'appropriateness', an IEP must take into account what was, and was not, objectively reasonable ... at the time the IEP was drafted." (*Adams, supra*, 195 F.3d at p. 1149, quoting *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

28. As established by Legal Conclusions 2-5 and 26-27, and Factual Findings 5 and 56-61, the offer to place Student in an SDC for autistic preschoolers, with 50 minutes per week of speech and language services, would provide Student with a FAPE. The offer was developed after the IEP team carefully reviewed the recent formal assessments, which accurately portrayed Student's unique needs and PLOPs. With that in mind, the team then developed the goals, and in keeping with those goals,

determined that the SDC placement and speech and language services would provide Student with a FAPE. The offer thus addressed Student's unique needs and was reasonably calculated to allow her to achieve some educational benefit.

## ORDER

1. The District and the County Office complied with the requirements of Education Code section 56325 when Student moved into the District.
2. Parental consent was not required before the screenings of March 20, 2009, and May 4, 2009, were conducted.
3. The County Office assessments were appropriate, and the District and the County Office are not required to provide Student with an IEE.
4. The required participants were present at the IEP meetings of May 12, 2009, and November 5, 2009. Mother was properly noticed for the IEP meetings of September 25, 2009, and October 7, 2009. Any procedural violation of Mother's rights at the IEP meeting of September 25, 2009, is excused. Mother knowingly waived her presence at the IEP meeting of October 7, 2009.
5. The offer of placement for Student for the 2009-2010 school year that was made at the IEP meeting of October 7, 2009, was appropriate and would provide her with a FAPE.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues heard and decided.

## RIGHT TO APPEAL

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 90 days of receipt

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

Dated: March 24, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings