

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

POWAY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009100310

DECISION

Administrative Law Judge (ALJ) Bob N. Varma, Office of Administrative Hearings (OAH), heard this matter in San Diego, California, on April 21 and 22, 2010.

Justin Shinnfield, Attorney at Law, appeared on behalf of the Poway Unified School District (District). Emily Shieh, Assistant Director of Special Education, was present throughout the hearing on behalf of District. Student's Father represented Student. Mother was present throughout the hearing, but left before the conclusion of the proceedings on each day of the hearing. Student was not present at the hearing.

On October 5, 2009, District filed a request for due process hearing. On November 3, 2009, the parties requested and received a continuance of the hearing dates.¹ At the close of the hearing, the matter was continued to May 10, 2010, so the parties could file

¹ The due process hearing initially began on April 19, 2010, with ALJ Darrell L. Lepkowsky presiding. Prior to the taking of any testimony or admitting of any evidence, ALJ Lepkowsky determined and disclosed that she had been the mediator in a prior case involving Student. Upon motion of District, ALJ Lepkowsky recused herself and the hearing was continued to April 21, 2010.

written closing arguments. The record was closed and the matter was submitted for decision on May 10, 2010.²

ISSUE

Did the August 18, 2009 individualized education program (IEP) offer Student a free appropriate public education (FAPE) for the 2009-2010 school year (SY)?

PROPOSED REMEDY

District requests a finding that it offered Student a FAPE for the 2009-2010 SY and that it be allowed to implement the August 18, 2009 IEP should Student return to the public school setting.

PRELIMINARY MATTERS

STUDENT'S MOTION TO DISMISS

1. On April 21, 2010, prior to the start of the hearing, Student moved to dismiss District's case. On July 10, 2009, OAH issued a written decision in *Student v. Poway Unified School District* (July 10, 2009) Cal.Offc.Admin.Hrngs. Case No. 2009020454 (prior case). The prior case involved the same parties as the current matter. Student has filed an appeal of the decision in the prior case. Student asserts that he is entitled to stay put in his current placement during the pendency of the appeal and District seeks to modify that stay put by pursuing the current action. Student is currently placed at a non-public private school, at Parent's expense, which is not his stay put placement because it is not the parties' last agreed-upon and implemented educational program. District seeks a finding that it

² To maintain a clear record, the closing briefs have been marked as exhibits. Student submitted two closing briefs, and while they appear to be identical, they are marked as Exhibits B and C. District's brief has been marked as Exhibit 16.

offered Student a FAPE for the 2009-2010 SY and that District be allowed to implement the August 18, 2009 IEP should he return to public school. Accordingly, District does not seek an order requiring Student to leave his private placement. Furthermore, Education Code sections 56346, subdivision (d), and 56501, subdivision (a), do not prohibit a school district from filing for a due process hearing even when a decision concerning a prior school year is pending upon appeal.

2. Student also asserts that District's case should be dismissed because District seeks to relitigate the same issues that were previously litigated in the prior case. District asserts that the issue of whether it offered Student a FAPE for the 2009-2010 SY was not litigated in the prior case. Under the doctrines of res judicata and collateral estoppel, discussed in Preliminary Matters 7 and 8, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Student's contention lacks merit because the prior case did not litigate the issue of whether District offered Student a FAPE for the 2009-2010 SY. Accordingly, Student's motion to dismiss is denied.

JUDICIAL NOTICE

3 On April 21, 2010, District requested that OAH take judicial notice of the decision in the prior case. District contends that the decision in the prior case involved issues regarding the validity of District's 2008 triennial assessment of Student, and an independent educational evaluation (IEE) obtained by Student in September 2008. District asserts that because the assessment results from District's triennial assessment were utilized in the development of the August 18, 2009 IEP, the decision in the prior case is relevant to the issues in the current matter. Student contends that he has appealed the decision in the prior case and therefore, the decision is not final. The matter was taken under submission.

4. Although not applicable to special education hearings, the Administrative

Procedure Act provides that in an administrative hearing, official notice may be taken of “any generally accepted technical or scientific matter within the agency’s special field, or of any fact which may be judicially noticed by the courts of this State.” (Gov. Code, § 11515.) Similarly, Evidence Code section 452 lists what a court may, within its discretion, consider for judicial notice, including “[official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” Both provisions provide helpful guidance in this matter.

5. After considering the testimony of witnesses, documentary exhibits entered into the record and considering the arguments of the parties, the findings in the prior case are relevant to the factual issues in this matter. Accordingly, District’s request to have judicial notice taken of the decision in the prior case is granted.

RES JUDICATA AND COLLATERAL ESTOPPEL

6. The issues in the prior case were whether District denied Student a FAPE by failing to assess Student in the area of auditory processing deficits through an audiological assessment from May 8, 2007, through the end of the 2008-2009 SY; and, whether District’s offered special education placement and services denied Student a FAPE from May 8, 2007, through the end of the 2008-2009 SY. (*Student v. Poway Unified School District* (July 10, 2009) Cal.Offc.Admin.Hrngs. Case No. 2009020454, pp. 1-2.) During the hearing, District asserted that under the doctrines of res judicata and collateral estoppel, Student is barred from litigating the issues of whether District appropriately assessed Student in all areas of deficit, including the area of auditory processing deficit.

7. Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under the related doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first

case.³ The doctrines serve many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication. (*Allen v. McCurry* (1980) 449 U.S. 90, 94 [66 L.Ed.2d 308]; see, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 280 et seq.)

8. In California, collateral estoppel applies to a decision reached in a quasi-judicial administrative proceeding. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944; *People v. Sims* (1982) 32 Cal.3d 468, 479-84; see also, *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732 [res judicata].) Accordingly, collateral estoppel applies to special education due process hearings in California (see, e.g., *Student v. San Diego Unified School Dist.* (Aug. 1, 2005) SEHO No. SN 2005-1018 [“The Hearing Office has long applied the doctrine of res judicata to its own decisions.”].)

9. The requirements for the application of collateral estoppel are: 1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)

10. District’s characterization of Student’s attempt to relitigate the previous assessment issue is incorrect. Here, Student asserts that District failed to conduct its own audiological assessment and that affected District’s ability to identify Student’s needs in the area of auditory processing deficit. Student’s contention regarding a failure to assess is

³ More modern and precise terms for res judicata and collateral estoppel are claim preclusion and issue preclusion. (See, 7 Witkin, Cal. Procedure (4th ed. 1997) Judgments, § 282, p. 822.)

limited to the question of whether the August 18, 2009 IEP offered Student a FAPE. The prior case did not litigate the issue of whether a failure by District to conduct an audiological assessment denied Student a FAPE with respect to the offer of special education placement and services contained in the August 18, 2009 IEP. Accordingly, the doctrines of res judicata and collateral estoppel are not applicable to Student's contention that the August 18, 2009 IEP fails to offer a FAPE because District did not conduct an audiological assessment of Student.

CONTENTIONS OF THE PARTIES

District contends that the August 18, 2009 IEP offers Student a FAPE. District asserts that it complied with the procedural requirements of the Individuals with Disabilities Education Act (IDEA) in the steps it took to hold the IEP team meeting and in development of the IEP document. District further contends that the August 18, 2009 IEP identified Student's areas of need, offered measurable goals in those areas, offered Student accommodations and modifications necessary to benefit from his special education and offered Student special education placement and related services designed to provide some educational benefit.

Student contends that the August 18, 2009 IEP does not offer him a FAPE because it does not address his auditory processing needs. He contends that District failed to conduct an audiological assessment of Student and the IEP fails to identify auditory processing as an area of need. Student further contends that the August 18, 2009 IEP team did not consider the input of an audiologist, or the information contained in Student's September 2008 IEE, by Diedre Schloyer (Schloyer report). Finally, Student contends the August 18, 2009 IEP fails to offer him a FAPE because it does not contain a transition plan to address moving Student from his private placement onto a public middle school campus.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 13-year-old boy, born October 4, 1996. He is eligible for special education services under the category of specific learning disability. Student last attended school in the District during the 2006-2007 SY. At the conclusion of the 2006-2007 SY, Parents withdrew Student from District and placed him at New Bridge School (New Bridge), a non-public school.

THE AUGUST 18, 2009 IEP

2. Helen Williams has been a program specialist for District for eight years, and before that a speech therapist for 12-and-one-half years. As program specialist, she attends IEP team meetings as the administrative designee with authority to commit District's special education resources. Ms. Williams stated that she is asked to attend IEP team meetings if there are concerns about the placement of the child or if the family is being represented by an advocate. In Student's case, by the end of the 2006-2007 SY, concerns existed regarding Student's placement. Ms. Williams became the program specialist responsible for coordinating Student's IEP team meetings.

3. On April 27, 2009, Ms. Williams sent Parents a letter in which she proposed dates for an annual IEP team meeting for Student to plan for the 2009-2010 SY. She also requested a release of information so that she could contact New Bridge and obtain current educational information regarding Student. Parents did not provide District with a release to obtain information from New Bridge. On April 29, 2009, Ms. Williams spoke with Parents on the telephone and asked for consent to contact Student's educational consultant, Dr. Sara Frampton, to coordinate calendaring an IEP team meeting. Parents requested Ms. Williams not contact Dr. Frampton because Parents wanted to determine their availability first.

4. Between April 29, 2009, and Student's August 18, 2009 IEP team meeting, Ms. Williams made several additional attempts to schedule an IEP team meeting. She communicated with Parents via both letter and telephone. The parties were unable to schedule an IEP team meeting until August 18, 2009.

5. On August 18, 2009, the parties met for Student's annual IEP team meeting. The evidence established that District took reasonable efforts to obtain current information regarding Student's educational functioning from New Bridge. In addition to requesting a release of information from Parents, Ms. Williams stated that she included New Bridge in each of four separate IEP meeting notices, and sent the notices to New Bridge via facsimile requesting their attendance at the IEP team meeting. New Bridge did not respond to District's notices of IEP team meetings.

Information Regarding New Bridge Available to IEP Team

6. By agreement of the parties, Ms. Williams was allowed to observe Student at New Bridge on May 9, 2009. She was accompanied by Steve Mayo, the administrator and teacher at New Bridge. Ms. Williams stated that while she was allowed to observe Student, she was not allowed to discuss or exchange information regarding Student with his teachers at New Bridge.

7. Ms. Williams observed Student during a play rehearsal session in which Student was on stage and performed his lines successfully. She then observed Student in a phonics class for 20 minutes. The classroom had six students, which later increased to seven, and one teacher. All students were seated in close proximity to the teacher and Student sat in the front of the class. During the play rehearsal and the classroom activities, Student was compliant with the teacher's directions, engaged in the academic activity and behaved appropriately.

8. The academic activity Ms. Williams observed involved two-vowel digraphs, wherein students took turns spelling the target words out loud, followed by the teacher

dictating the target words and then dictating sentences using the target words. Ms. Williams shared her notes of the academic activity and the words being worked on with two District resource specialist teachers, one of whom is a reading specialist. From her conversations with these teachers, Ms. Williams believed that Student was working on material that was at a second-grade reading level. Ms. Williams was a credible witness regarding her role in coordinating the IEP team meetings, her observations of Student, and the discussions at the IEP team meeting discussed below. However, because Ms. Williams is not a reading specialist, does not have a background as a teacher and the reading specialist she spoke to did not observe Student, Ms. Williams' testimony regarding Student's reading level at New Bridge was given little weight.

9. The evidence established that between April 27, 2009, and August 18, 2009, Parents denied all requests by District to exchange information with New Bridge regarding Student's educational functioning levels. A representative from New Bridge did not attend the IEP team meeting. Student contended that New Bridge was on summer break on August 18, 2009, and therefore, a representative could not attend the IEP team meeting. However, Student did not request either to reschedule the IEP team meeting or to hold a follow-up IEP team meeting. Accordingly, the only current information District had regarding Student's functioning at New Bridge was from the assessment by Ms. Williams.

Present Levels of Performance and Goals

A district is required to identify a student's unique educational needs and to provide special education and related services designed to meet those needs. An IEP must include a statement of measurable annual goals that are designed to meet the student's needs resulting from his or her disability, and a statement of how the student's progress toward the annual goals will be measured.

10. At the August 18, 2009 IEP meeting, District presented the IEP team with Student's present levels of performance (PLOPs), which were based upon Student's

triennial assessments conducted in 2008. These consisted of a Health History and Physical assessment dated April 28, 2008; an Occupational Therapy (OT) assessment by Kids Integrating Developing Succeeding Therapy Associates, Inc. (Kids Therapy), dated April 30, 2008; a Speech and Language Evaluation conducted on April 28, May 12 and May 14, 2008; and a Psycho-Educational Report dated June 5, 2008. Student did not challenge the appropriateness of these assessments as utilized to establish Student's PLOPs for the August 18, 2009 IEP.

11. Based upon the assessments in Factual Finding 10, District determined that Student had academic needs in the areas of reading and writing; language needs in semantics, syntax and pragmatics; fine motor needs in legibility and alignment for copying tasks; and, difficulty staying organized. District proposed annual goals in the areas of fine motor skills, reading, writing, and communication. Ms. Williams stated that draft goals were provided to Parents prior to the August 18, 2009 IEP team meeting and discussed at the meeting. Parents agreed that Student had these needs.

12. Student contends that District failed to conduct an audiological assessment and therefore, the August 18, 2009 IEP failed to identify his auditory processing deficit. However, the psycho-educational report of June 5, 2008, identified that Student had an auditory processing deficit. It summarized the District's testing from 2005, which also identified Student as having an auditory processing deficit. The August 18, 2009 IEP notes parental concerns regarding Student's auditory processing. When describing how Student's specific learning disability affects his progress in the general curriculum, the IEP states, "a severe discrepancy between ability and achievement in writing, reading, listening comprehension and oral expression, with an auditory processing deficit." District properly identified Student's auditory processing deficit as part of his disability that impacted his progress in the general curriculum. Furthermore, as discussed in Factual Findings 13 through 16 and 19 through 21, the August 18, 2009 IEP offered measurable goals,

accommodations and modifications to address Student's auditory processing deficit.

13. Debra O'Neill, speech therapist for District, participated in the August 18, 2009 IEP team meeting. Ms. O'Neill has been a District speech therapist for approximately 15 years. Ms. O'Neill drafted Student's communication goals, based on his functioning levels determined through the triennial assessments of 2008 and in consultation with Kerrie Nelson, the last District speech therapist to assess and work with Student prior to his placement at New Bridge. Ms. O'Neill presented the communication goals to the team. Parents requested information regarding programs used by Ms. O'Neill to work with students. Ms. O'Neill explained strategies she utilizes in working with students to the IEP team. Student did not challenge the appropriateness of the communication goals.

14. Mary Jo Lance, special education teacher, has been the resource specialist program (RSP) teacher for seven years. Ms. Lance has a master of arts in special education and has been a special education teacher for over 30 years. She reviewed Student's triennial testing from 2008, focusing on the academic testing by Donna Meyers, and his prior annual goals. Based upon this information, Ms. Lance drafted Student's academic goals, which she presented at the August 18, 2009 IEP meeting. Parents provided input to the academic goals at the IEP meeting, and District revised the academic goals in response to Parents' concerns. Student did not challenge the appropriateness of the revised academic goals.

15. Jan Dalby is a licensed occupational therapist and owner of Kids Therapy. She has been an occupational therapist for over 30 years, and has conducted approximately four to eight education-related OT assessments per month, over the last 15 years. Based upon her experience as an assessor and a provider of OT, Ms. Dalby is qualified to interpret the OT assessments of other occupational therapists. One of her staff therapists, Heather Augst, conducted Student's April 30, 2008 OT assessment.⁴ Ms. Dalby

⁴ Ms. Augst (also referred to as Heather Bare in the record) left Kids Therapy and

reviewed Ms. Augst's assessment of Student and concurred with her conclusion that Student displayed fine motor needs within the average range of functioning. However, Student did display difficulty in handwriting, which rendered his work illegible.

16. Ms. Dalby opined that the annual goal for fine motor skills, addressing Student's legibility and alignment in handwriting was appropriate to meet Student's fine motor needs. The evidence established that, based upon parental input during the August 18, 2009 IEP meeting, the goal was revised by District to address Parents' concerns. Student did not challenge the appropriateness of the revised goal.

Services and Placement

17. A school district provides a FAPE to a student if its program is designed to address the student's unique educational needs and is reasonably calculated to provide meaningful educational benefit in the least restrictive environment (LRE).

18. District offered Student placement in a seventh-grade general education program at Meadowbrook Middle School (Meadowbrook) for the 2009-2010 SY. For special education services, District offered 10 sessions per week of specialized academic instruction in RSP. Student would be placed in the RSP class for one period per day and one period per day in the Learning Strategies class. Learning Strategies is an elective class, offered to students in RSP, to assist them with their general education course content. For Student, it would be a class where he could work on his organization and note-taking skills in addition to receiving support for his general education course content. District offered the related services of 60 sessions per year of speech therapy at 25 minutes per session, which is approximately two sessions of pull-out speech therapy per week. District also offered 18 sessions of OT per year at 30 minutes per session, which is approximately two sessions of pull-out OT per month. Finally, District offered nine sessions per year of OT

moved to Colorado. Therefore, Ms. Augst was unavailable to testify at the hearing.

consultation at 30 minutes per session, which amounted to one session per month.

19. During the August 18, 2009 IEP meeting, Parents expressed concerns regarding Student's auditory processing deficit and its impact upon his ability to access the educational environment. They raised concerns regarding Student's listening comprehension, oral expression, sensitivity to noise, memory, organizational skills, effectiveness of receiving copies of notes, and whether Student may benefit from the use of an FM-system. The evidence established that District staff discussed the use of strategies, annual goals, modifications and accommodations to address Student's auditory processing deficit.

20. Instead of an FM system, District utilizes the sound-field system, which is installed in all classrooms at Meadowbrook. The system employs speakers installed in the room that amplify the teacher's instructions through a microphone worn by the teacher. In an FM system, the teacher utilizes a microphone that broadcasts directly into headphones worn by the individual student. The sound-field system brings less peer attention to the student because it does not require headphones that would make the individual student stand out.

21. During the August 18, 2009 IEP team meeting, District discussed accommodations and modifications in response to Parents' concerns regarding Student's organizational skills. District offered allowing Student to take extra time for tasks, take tests over multiple days and take tests at optimal times in the day for Student. District also offered Student graph paper and organizational tools. To address Parents' concerns regarding Student's auditory processing deficit, District offered Student clarification of directions, seating away from noise, monitoring Student's environment for noise levels, a small-group setting for state testing, mutli-sensory or multi-modal presentation of instruction, allowing Student to dictate his responses and note-taking strategies. Additionally, District offered placement in Learning Strategies, as discussed in Factual

Finding 18, to address Student's organizational needs and teach him strategies to compensate for his auditory processing deficit.

22. The evidence established that Parents participated in the development of Student's August 18, 2009 IEP. District established that the services, accommodations and modifications set forth in Factual Findings 18, 20 and 21, would address Student's needs and allow him to receive some educational benefit.

23. At hearing, Student challenged the fact that Student would miss part of his classroom time when he was pulled out for speech therapy or OT. The August 18, 2009 IEP states that Parents desired Student be included in regular education classes to the extent possible. Student does not contest that he requires two speech therapy sessions per week, at 25 minutes per session, and two OT sessions per month, at 30 minutes per session. Meadowbrook is a middle school that has 55-minute class sessions. The evidence established that the only way to implement Student's related services would be to pull him out for portions of a class period. Because the frequency and duration of the related services is appropriate for Student, District established that it has taken steps to ensure Student misses the least amount of regular education time possible.

24. At hearing, Student also challenged the lack of a transition plan in the August 18, 2009 IEP to transition Student from New Bridge to Meadowbrook. Parent stated that Student would have difficulty moving from the small student-to-teacher ratio at New Bridge to a public middle school environment with its larger class size. Parent contends that Student may regress in a larger group environment. Parent could not point to any history of such regression or provide any assessment or testimony in support of Student's position. Parent speculated that Student might have transition needs. Therefore, the evidence did not establish that Student had transition needs to move from New Bridge to Meadowbrook during summer break. Accordingly, the evidence established that Student did not require a transition plan between New Bridge and Meadowbrook.

Private Audiological Assessment

25. Student contends that District did not consider the Schloyer report and therefore, the August 18, 2009 IEP does not address Student's auditory processing deficit. Furthermore, Student contends that District failed to have an audiologist participate in the August 18, 2009 IEP, and only an audiologist can make recommendations regarding placement and services for Student. District contends that it identified Student's auditory processing needs, and offered appropriate special education placement and services to address those needs. Furthermore, District contends that an audiologist is not the only individual qualified to make recommendations regarding placement and services for Student.

26. On September 11, 2008, Student was assessed privately by Diedre Schloyer, audiologist. During the proceedings in the prior case, District was provided with a copy of the Schloyer report. The August 18, 2009 IEP meeting was the first IEP meeting following District's receipt of the Schloyer report. District did not present the Schloyer report to the IEP team. District contends that Parents were required to present the Schloyer report for consideration by the IEP team.

27. The Schloyer report identified Student as having an auditory processing deficit. However, this was not a new area of need, as District had already identified it in its assessments of Student in 2005 and 2008. Student's contention that the Schloyer report revealed a new area of need, unknown to Student's August 18, 2009 IEP team is not supported by the evidence.

28. Student contends that District failed to consider the recommendations of the Schloyer report in developing the August 18, 2009 IEP. However, the Schloyer report does not make specific recommendations that could be utilized to formulate an educational program. This is illustrated by the following from the "Recommendations" section of the Schloyer report:

While this assessment battery can describe auditory skills, they do not directly translate into specific objectives and activities for remediation. Language, attention and cognitive abilities also impact processing abilities. Results of this evaluation should be used in conjunction with observation of the [S]tudent's behavior and results of other standardized and non-standardized measures. Specific programmatic decisions should be made only after integrating these findings.

29. The information available to the IEP team regarding Student's then current functioning in an educational environment was limited because District did not have access to Student's information from New Bridge. Therefore, even if District had considered the Schloyer report at the August 18, 2009 IEP team meeting, the IEP team lacked important information that was necessary to integrate with the Schloyer report.

30. The Schloyer report sets forth suggestions in environmental modifications, compensatory strategies and remediation activities that Ms. Schloyer felt Student "may benefit from." Ms. Schloyer suggested strategies such as improving the teaching signal, using sound treatment for classrooms, reducing class size and trying an assistive listening device or modifying the language used with Student. For the integration issues, she suggested consideration of use of an FM trainer, avoiding situations that require division of attention and self-monitoring. As compensatory strategies, Ms. Schloyer suggested the use of written instructions to supplement auditory information, a tape recorder and books on tape. She suggested organizational strategies such as schedules or a graphic organizer, note-taking assistance, organizational aids and modifications of spoken messages. Under modifications, Ms. Schloyer suggested shorter lengths of auditory information, giving Student extra time, checking for his comprehension, presenting information in smaller chunks, using familiar vocabulary and putting emphasis on key vocabulary. As remediation

activities, she suggested activities that enhance transfer of function and extraction of key information, speech in noise training, use of a reading remediation program with emphasis on visualization technique, and hemispheric integration activities like Brain Gym, verbal motor transfers, singing, keyboarding and listening to books on tape. Ms. Schloyer suggested continued development of vocabulary, meta-linguistic and meta-cognitive strategies. She also suggested that the family consider karate, gymnastics, music, dance and games.

31. The evidence did not support a finding that Ms. Schloyer's suggested strategies were required for Student to receive a FAPE.⁵ Ms. Schloyer did not testify and evidence was not presented to explain any of the suggested strategies and how they would be necessary for Student to receive a FAPE. While District did not consider the Schloyer report in the IEP meeting, the District's offer, as set forth in Factual Findings 18, 20 and 21, offers Student many of the accommodations or modifications Ms. Schloyer suggested. The evidence did not establish that a failure to include all suggested strategies from the Schloyer report would result in a loss of educational benefit to Student or impede in the provision of a FAPE. As discussed in Factual Finding 19, to the extent that Parents raised questions or ideas similar to those in the Schloyer report, District either

⁵ In his closing brief, Student contends that Ms. Schloyer made specific findings consistent with the Education Code and that her recommendations should have been included in Student's IEP. He bases these contentions upon the interpretations of the Schloyer report by Dr. Sara Frampton, educational consultant for Student. No evidence was presented regarding either Ms. Schloyer or Dr. Frampton's opinions regarding the August 18, 2009 IEP and whether it should have incorporated Ms. Schloyer's suggestions. Dr. Frampton did not testify and her opinions, as expressed in Student's closing brief, are not considered in this decision.

addressed them in the annual goals or the accommodations and modifications. The evidence established that a failure to discuss the Schloyer report did not deny Parents meaningful participation in the August 18, 2009 IEP. Accordingly, the evidence established that District did not commit a substantive violation of Student's right to a FAPE when it failed to consider the Schloyer report.

FAILURE TO INCLUDE NECESSARY INDIVIDUALS IN IEP TEAM MEETING

32. Student also contends that the August 18, 2009 IEP does not offer him a FAPE because none of the District's members of the IEP team were audiologists. The August 18, 2009 IEP team included Parents and Dr. Robert Prinz, Student's educational consultant. District staff included Ms. Williams, Ms. Meyers, Ms. Nelson, Ms. O'Neill, Ms. Lance, Mike Dimitrian, regular education teacher, Jan Tom, RSP teacher, Betsy Johnson, program specialist and Alicia Grueff, assistant principal. Additionally, it included Ms. Augst, from Kids Therapy. None of the members was an audiologist. However, the evidence established that District accurately identified Student's areas of need. The role of the IEP team is to discuss and design a plan to address those areas of need. The IEP team was composed of multidisciplinary individuals, including Parents and Student's educational consultant, who were knowledgeable about Student's areas of need. Parents were not prevented from inviting any other individual who may have been knowledgeable about Student. Ms. Williams, Ms. O'Neill and Ms. Meyers opined that an audiologist may be qualified to diagnose, but once the areas of need are identified, the members of the IEP team are qualified to develop the program to address those needs. Their testimony was persuasive. The evidence did not establish that an audiologist was a necessary member of Student's IEP team. The evidence established that the August 18, 2009 IEP team was comprised of individuals necessary to develop a program and recommend special education services to address Student's auditory processing needs.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. As the petitioning party, the District has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

DID THE AUGUST 18, 2009 IEP OFFER STUDENT A FAPE FOR THE 2009-2010 SY?

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 is defined as appropriate special education, and related services, that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil's IEP. (20 U.S.C. § 1401(9); Ed. Code, §§ 56031 & 56040; Cal. Code Regs., tit. 5 § 3001, subd. (o).) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) The term "related services" (also known as designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

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.) In *J.L. v. Mercer Island School District*, the Ninth Circuit found that the *Rowley* FAPE

standard still applies and that the proper standard to determine whether a disabled child has received a FAPE is the "educational benefit" standard. (*Id.* at p. 951.) The Ninth Circuit has previously 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. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams, supra*, 195 F.3d at 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) 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 child. (*Ibid*)

5. There are two parts to the legal analysis. First, the tribunal must determine whether the school 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.*)

Failure to Include Necessary Individuals in IEP Team Meeting

6. An IEP team is required to include one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a

person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

7. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

8. Student contends that the August 18, 2009 IEP fails to offer him a FAPE because the program and services offered were not developed by an audiologist. Based upon Factual Finding 32, the evidence established that District ensured participation in the IEP team by individuals who were capable of identifying Student's areas of need, developing a program and recommending special education placement and related services to address the identified areas of need. Parents were able to discuss their concerns, offer their input and express any disagreements. District invited New Bridge, but New Bridge did not respond to the invitation. Parents were not prevented from inviting others to participate in the IEP team meeting. Based upon Factual Findings 12 through 16, 18, 20 and 21, the evidence established that District accurately identified Student's area of need in auditory processing and offered measurable goals, accommodations and modifications to address the auditory processing deficit. Accordingly, the failure to have

an audiologist at the August 18, 2009 IEP did not deny Student a FAPE.

Failure to Consider the Schloyer Assessment Report

9. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b)(2006); Ed. Code, § 56341.1, subd. (a), (d).) Additionally, a school district is required to consider the results of a privately procured assessment when developing an IEP. (Ed. Code, § 56329, subd. (c).) Education Code section 56329, subdivision (c), is silent on the issue of when a school district's obligation to consider the results of a private assessment is triggered. However, at the very least, the obligation is triggered once a school district has been given a copy of the privately procured assessment report by the student's parents. Failure to consider the results of a privately procured assessment is a procedural violation of the IDEA.

10. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of a FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

11. The Schloyer report was not reviewed or considered at the August 18, 2009 IEP team meeting. District asserts that Parents were required to present the Schloyer report for consideration by the IEP team and that Parents serving the District with a copy

of the report during the proceedings in the prior case did not require District to consider the report in the IEP team meeting. District's contention is not supported by legal authority. District's obligation was triggered as soon as it was provided a copy of the Schloyer report, regardless of whether that exchange occurred in the midst of a due process hearing. Accordingly, District committed a procedural violation of the IDEA when it failed to consider the Schloyer report at the August 18, 2009 IEP team meeting.

12. However, District's failure to review or consider the Schloyer report did not significantly impede Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student. Based upon Factual Findings 13 through 16, 19 through 22, 31 and 32, the evidence established that Parents were able to discuss their concerns, have their questions answered and provide input that resulted in changes to the draft goals and addition of accommodations and modifications for Student.

13. Contrary to Student's assertion, District properly identified Student's area of need in auditory processing without the Schloyer report. As discussed in Factual Findings 30 and 31, the Schloyer report made suggestions on how to address Student's auditory processing deficit. The evidence did not establish that implementation of all the suggestions was necessary for Student to receive a FAPE. As set forth in Factual Findings 19 through 21, District offered Student a number of accommodations and modifications to address Student's auditory processing deficit, which were amended based upon Parents' input. Parents did not disagree with or challenge the proposed accommodations and modifications. To the extent that they are applicable to the school setting, the August 18, 2009 IEP includes many of the Schloyer report's suggestions. Additionally, the Schloyer report did not contain any information that would have changed the District's offer, even if it was presented at the IEP meeting, and the District's offer provided Student with a FAPE. Therefore, the evidence established that District's procedural violation did not result in a denial of parental participation in decision-making, loss of educational benefit to

Student or impede in the provision of a FAPE. Accordingly, District's procedural violation did not result in a substantive denial of a FAPE to Student.

Offer of a FAPE⁶

14. The central document defining a child's special education program is the IEP. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592].) A district must have an IEP in effect for each special needs pupil at the beginning of each school year. (Ed. Code, § 56344, subd. (c); 34 C.F.R. § 300.323(a) (2006).) An IEP is a written document that includes statements regarding a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subds. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: 1) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); 2) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); 3)

⁶ During the hearing, Student did not contend that the August 18, 2009 IEP failed to offer him placement in the LRE. Student did not present any evidence regarding the placement at New Bridge and why it may be less restrictive than the placement offered by District. In his closing brief, Student argues that New Bridge is the LRE placement. Student puts forth factual assertions for the first time that were not presented as testimony in the hearing and subject to cross examination. As such, newly alleged facts in Student's closing brief have not been considered. Therefore, the LRE has not been analyzed in this decision.

an explanation of the extent, if any, that the pupil will not participate with non-disabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and 4) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and district-wide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

15. As set forth in Factual Findings 13 through 16, the August 18, 2009 IEP team developed measurable goals for Student in each of his areas of need. Parents participated in the discussion concerning Student's goals, and District incorporated their input in the final version of the goals. Student did not disagree with the final goals. As set forth in Factual Findings 19 through 21, District offered Student a number of accommodations and modifications. The evidence established that Parents were able to discuss their concerns regarding Student's auditory processing deficit and District offered accommodations and modifications to address those concerns. Student did not disagree with the accommodations and modifications or ask for additional accommodations or modifications. As set forth in Factual Finding 18, District offered Student related services of speech and language therapy, OT and OT consultation. Student did not disagree with either the related services or the frequency and duration of the services. The August 18, 2009 IEP sets forth the manner and frequency with which progress on the goals would be reported to the parents. Finally, the IEP set forth the amount of time Student will spend in special education and in the regular education environment per day.

16. The August 18, 2009 IEP was developed based upon the information available to the District at the time of the meeting. Parents prevented District from obtaining any information from New Bridge regarding Student's areas of need or PLOPs during the 2008-2009 SY. New Bridge did not attend the IEP team meeting despite receiving four invitations. Neither Student nor New Bridge requested a follow-up IEP team

meeting once New Bridge started the 2009-2010 SY. Student presented no evidence regarding his education at New Bridge. Based upon Factual Findings 10 through 21 and 32, and Legal Conclusions 1, 8, 13 and 15, District established that it identified Student's areas of need and developed an IEP consistent with the requirements of the IDEA. The August 18, 2009 IEP offered Student placement and services designed to meet his unique needs, and was reasonably calculated to enable the child to receive meaningful educational benefit. Accordingly, the August 18, 2009 IEP offered Student a FAPE for the 2009-2010 SY.

ORDER

The IEP of August 18, 2009, offered Student a FAPE. Should Student choose to return to public school within District, his August 18, 2009 IEP may be implemented.

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. District prevailed on the sole issue heard and decided.

NOTICE OF APPEAL RIGHTS

This is a final administrative decision, and all parties are bound by this decision. The parties are advised that they have the right to appeal this decision to a court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. (Ed. Code, § 56505 subd. (k).)

Dated: May 24, 2010

_____/s/____

BOB VARMA

Administrative Law Judge

Office of Administrative Hearings