

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PALM SPRINGS UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2011061076

DECISION

Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings (OAH), State of California, heard this matter on November 1, 2011, in Palm Springs, California.

Attorney Constance Taylor, of Atkinson, Andelson, Loya, Ruud & Romo, a professional law corporation, represented Palm Springs Unified School District (District). Attorney Geneva Englebrecht and Kathy Little (Little), Director of Special Education, were also present on behalf of District during the hearing. Student was not represented at the hearing and did not present a defense to District's case.¹

¹ Student's parents (Parents) did not participate in the recorded telephonic pre-hearing conference (PHC) held on October 24, 2011, during which the ALJ confirmed the date and time of the hearing. OAH served a copy of the PHC order on Parents on October 24, 2011. District's counsel sent an email to Parents on October 24, 2011, confirming the hearing dates, and served District's exhibits on Parents on October 25, 2011. Parents did not respond or serve any exhibits or a witness list on District. On Friday, October 28, 2011, OAH staff called Parents and left a telephone message

On June 23, 2011, District filed a request for due process hearing. OAH granted a continuance of the due process hearing on July 19, 2011. At the hearing, the ALJ received sworn testimony and documentary evidence. The record was closed at the end of the hearing on November 1, 2011.

ISSUE

Did District offer Student a free appropriate public education (FAPE) in the individualized education program (IEP) dated December 16, 2010, as amended on April 19, 2011,² and, if so, may District implement the IEP without parent's consent?

confirming the hearing dates and times. Parents did not respond to the OAH message, or notify OAH that they would not attend the hearing until 4:56 p.m. on October 31, 2011, when they filed a Notice of Unavailability with OAH. The Notice was not served on District or District's counsel. The Notice was deemed by OAH to be a request for continuance. District objected to the request for continuance, and OAH denied the request on numerous grounds. The circumstances relating to Parents' non-appearance were recorded on the hearing record by the ALJ.

² Although the original issue included the May 31, 2011 IEP as an amendment, the evidence, as discussed below, established that Parents declined to attend the May 31, 2010 IEP meeting, the IEP team members were dismissed 15 minutes after the meeting convened, and no changes were made to the December 16, 2010 and April 19, 2011 IEP offers. Therefore, no May 31, 2011 IEP amendment exists as it relates to the issue of whether District's offer was FAPE.

FACTUAL FINDINGS

1. Student is 14 years old and lives with Parents within District boundaries. He attends the eighth grade at District's James Workman Middle School (Workman). Student is eligible for special education under the eligibility categories of other health impaired based on a diagnosis of attention deficit hyperactivity disorder (ADHD), and specific learning disability in the areas of reading and mathematics. His last agreed upon IEP prior to the one in dispute provided for placement in a general education classroom with two daily fifty-minute special education resource classes in reading and mathematics.

PRE-IEP ASSESSMENTS

2. On June 28 2010, at Parents' request, District resource specialist Dennis Deeds (Deeds) assessed Student in the area of assistive technology (AT) based upon Student's history of academic difficulty in the areas of reading, written language, and math. Deeds, who testified at the hearing, has been employed by District as a resource specialist in AT for eleven years and has been conducting AT assessments since 2001. He holds bachelor of science and master of arts degrees in special education, a learning handicap credential, and a resource specialist certificate. Deeds worked for District as a special education teacher for twenty-seven years before assuming his current position. He has used technology devices in his classrooms since 1983. He collaborates regularly with colleagues in AT in programs sponsored by the California Technical Assistance Program. Deeds demonstrated his qualification to offer opinions relating to Student's unique needs in the area of assistive technology.

3. Deeds assessed Student at District's Assistive Technology Diagnostic Center. Deeds interviewed Father and reviewed Student's June 12, 2010 IEP, including his present levels of performance (PLOPs), in preparation for his assessment. Deeds

assessed Student in English under the current version of the standardized Wisconsin Assistive Technology Initiative (WATI) protocols, which consisted of a variety of different protocols for reading, math and sciences. The assessment included an evaluation of student's unique needs, and testing with different AT devices to determine what tools would work for Student.

4. Deeds administered a Scotopic Sensitivity questionnaire to determine if Scotopic Sensitivity Syndrome (SSS) was a factor impacting Student's reading ability. Student's score fell within the moderate range for issues impacting reading difficulty. As a result, Deeds completed a diagnostic screening to determine an appropriate colored overlay for Student to use during reading. Deeds provided Student with a list of sixth grade reading words and Student successfully decoded ten of the twenty words provided.

5. Student's performance on the math diagnostic exercise demonstrated that he did not know basic multiplication facts, and had difficulty with addition and subtraction problems involving regrouping. Father reported to Deeds that, while Student was not permitted to use a calculator in the classroom for math problems, he used one at home when completing math assignments.

6. Student demonstrated difficulty expressing his thoughts in writing, using printed words instead of cursive writing when asked to write a brief passage on a given topic. He demonstrated basic keyboarding skills, although he did not use all fingers for typing. Student reported that he did not find the use of portable or laptop computers in class particularly helpful and chose not to use them during class. Student also reported that he preferred to sit in the back of the classroom, and that he had difficulty with taking notes in class.

7. Deeds wrote a report summarizing his assessment and included recommendations of tools and techniques to assist Student in improving in his areas of

unique need, including typing assignments or use of an Alpha Smart device for written assignments when needed; use of carbonless copy paper, also known as "NCR" paper, for note taking; manipulative aids, visual models, and thinking maps; and a green overlay for reading text. Father and Student rejected, at the time of the assessment, some of Deed's recommendations, including the suggestion that a fellow student take notes on NCR paper, a copy of which would be provided to Student, so that Student could devote his attention to the teacher's presentation. Deeds gave a copy of his report to Student's special education case carrier for distribution to Student's IEP team. He did not attend any of Student's IEP meetings.

8. Occupational Therapist Dawn Castiglione (Castiglione), who testified at the hearing, conducted an occupational therapy (OT) assessment in the areas of fine motor and visual perception at Parents' request. She summarized her assessment in a report dated June 22, 2010.

9. Castiglione is a California licensed occupational therapist and massage therapist, has a bachelor of science in OT and behavior science, and a master of science in OT. She has worked for District as an occupational therapist for three years, for other districts within and outside of California since 1997, and has conducted more than three hundred OT assessments. Castiglione demonstrated that she was qualified to offer opinions regarding Student's unique needs in the area of OT.

10. Castiglione reviewed Student's records, including a November 13, 2009 psycho-educational assessment, considered Parents' concerns, and noted that he had received previous interventions in the form of specialized academic instruction for language arts and math. Her assessment methods included a records review, individual assessment and clinical observations of sensory processing, praxis, muscle tone and strength, and reflexes and motor skills.

11. Castiglione administered in English the most current version of the Bruininks-Oseretsky Test of Motor Proficiency Second Edition (BOT-2) to assess motor skills, including the fine motor precision, fine motor integration, manual dexterity and upper limb coordination subtests. The test was appropriate because of Student's difficulty with written work. Student tested in the low average range in all subtests. Castiglione also administered in English the standardized Developmental Test of Visual Perception (DTVP-2), including eight subtests. Student's composite scores in general visual perception were in the 84th percentile and his visual motor integration scores were in the 75th percentile.

12. Castiglione concluded based upon her assessment results that Student did not require occupational therapy services to assist him in benefitting from his specially designed curriculum. She provided Parents with a copy of her report at a September 2010 IEP meeting, at which Parents did not question or disagree with her findings or conclusions.

DECEMBER 17, 2010 IEP TEAM MEETING

13. District held Student's annual IEP review on December 17, 2010. Parents, Student, special education director Little, administrative designee Suzanne Hilzebeck, general education life science teacher Jorge Jimenez, band teacher Jennifer Deen, general education social studies teacher Daniel Faddis, resource language arts teacher Nina Thoeny, and Student's special education case carrier and math resource teacher Emese Eiser attended the meeting. Eiser, Jimenez and Little testified at the hearing.

14. Eiser has a bachelor of arts degree in political science and history, a bachelor of arts degree in marriage and family counseling, and secondary education and special education teaching credentials. The District has employed her for fifteen years as a resource specialist math teacher case carrier for special education students. Her prior work experience includes working as a social worker for Inland Counties Regional

Center. Eiser provided Student with fifty minutes daily of resource math instruction during the 2010-11 school year and also currently teaches Student in the same subject. Eiser has been at all relevant times Student's case carrier, which involves coordinating his special education program. Eiser demonstrated her qualification to offer opinions relating to Student's unique needs in academics.

15. Eiser was the record taker for the IEP team meeting. The IEP team reviewed and discussed Student's prior assessments, goals and PLOPS.

16. In Eiser's resource math class, which had 12 students, Student demonstrated during the first trimester of the school year that he could follow the classroom routine until approximately November, at which time he stopped doing homework 50 percent of the time. His attitude toward classroom behavior changed. He required numerous prompts to engage in basic activities, such as removing a pencil from his backpack, to open his journal, to copy a problem onto paper, and he usually refused offered assistance. Although Student was challenged in math and had difficulty remembering math facts, he demonstrated that he had the ability to think independently. His grades in the first trimester were B's and C's.

17. Jimenez has been employed by District as a life science teacher for six years. He has a bachelor of science degree in biology, a juris doctor, holds a multiple subject teaching credential, a single subject authorization in general science and biology, and a certificate in cross cultural language acquisition. Jimenez taught Student life science during the 2010-11 school year and also provided him with twice weekly tutoring in math and language arts homework on a one-to-one basis. Jimenez demonstrated his qualification to offer opinions relating to Student's unique needs in academics.

18. In Jimenez's class, which had 30 students, Student was not able to follow the daily routine of copying daily notes and agendas, would become distracted during

teacher presentations, and required constant prompting and reminders to pay attention. Jimenez provided Student copies of the notes, which he typically prepared for students who missed class or had trouble copying from the board. Assignments consisted of worksheets, guided reading, and vocabulary lists based upon classroom laboratory work. Homework consisted of completion of classwork not finished during the day, review of sections from the text, lab reports, and vocabulary lists. During the first trimester, Student completed 75-80 percent of his assigned classwork and his homework. Jimenez also observed Student in unstructured settings in the 2010-11 school year and Student frequently stopped to talk with Jimenez. Student shared his life goals with Jimenez, and expressed his enjoyment at doing hands-on lab activities. Based upon Student's performance in life science class and as demonstrated during tutoring, Student was capable of doing the work assigned to him by his teachers. He received a B grade in Jimenez's class at the end of the first trimester.

19. Jimenez reported to the IEP team that he had recently observed a change for the worse in Student's behavior relating to homework and class assignments. He suggested to Parents that he could offer Student options including breaking assignments into smaller modules, and giving more weight to classwork than homework. Student's other teachers also reported that Student was only completing part of his classwork and homework and his class performance was declining.

20. The IEP team discussed Student's progress toward his prior goals, and determined that he had partially met those goals. The IEP team also reviewed Deeds' assistive technology report, including his recommendations for accommodations and supports.

21. Parents actively participated in the IEP meeting, including proposing changes to the IEP. Father raised the issue of homework, and expressed concern that he did not want Student to receive homework assignments except at Parents' discretion

because, based upon his own independent research, Father did not believe that homework had any educational value. The IEP team did not agree to implement Father's requested change in homework responsibility, but it agreed to defer further discussion regarding Father's research to a non-IEP meeting on another date. Parents did not request specific accommodations for Student in connection with homework assignments, other than the complete elimination of homework.

22. The IEP team determined that Student continued to have unique needs in reading comprehension, math reasoning, behavior and writing. The IEP included four goals in reading comprehension, math reasoning, social emotional behavior, and writing. All of the goals were measurable, written to be reasonably attainable in a year and to grade level standards, and were appropriate for Student's unique needs. Parents agreed with the proposed goals.

23. The IEP team discussed the entire continuum of placement and services and agreed that placement in a general education setting with two hours of resource classes in reading and math was appropriate and the least restrictive environment (LRE). Student had demonstrated that, despite his diagnosis of ADHD, he benefitted from being educated with his general education peers, his verbal vocabulary was very high, and he enjoyed and succeeded in his general education science and social studies classes. The IEP team agreed that Student did not require full-time placement in a special day class (SDC) because of his success in other areas. Parents did not request that Student be placed full-time in a SDC where their concerns about homework could be addressed through a modified curriculum. The IEP team agreed that Student's general education teachers could provide him with sufficient accommodations directed at his needs in the areas of attention and task completion to make the curriculum accessible in that setting.

24. The District offered the following placement, services and classroom supports for the following twelve months at the December 16, 2010 IEP: general education placement at Workman with 100 hours a day of resource placement in separate math and language arts classes, fifty minutes per class; classroom use of aids, assistive technology, program accommodations, modifications and supports as recommended by Deeds, including providing Student with a copy of notes or power point presentations; preferential seating; typing assignments or use of Alpha Smart for written assignments when needed; use of manipulative aids, visual models, and thinking maps; green overlay for reading text; orally administered tests, retaking of low-scored tests, extra time on tests; and shortened assignments without compromising grade level standards.

25. Although Parents verbally agreed with District's offer of placement as being appropriate, and agreed with the proposed annual goals, they refused to sign the IEP because District did not agree to implement Parents' request to eliminate homework.

DEVELOPMENT OF APRIL 6, 2011 BEHAVIOR SUPPORT PLAN

26. Jimenez and Eiser observed Student's behavior change for the worse after the December 2010 IEP meeting. After the first trimester, Student completed only ten percent of his homework and classwork in Jimenez's class. His grades fell and he received an F at the end of the year in Jimenez's class. Jimenez asked Student why he was not completing his homework, and Student responded that he could not do the assignments. Jimenez voluntarily accommodated Student by not entering his score until he turned the assignment in, and by accepting late assignments without a penalty. However, Student received a zero on any assignment that he did not turn in. In Eiser's resource math class, Student stopped working more than 50 percent of the time at the beginning of the year, and through the rest of the school year he dropped to 20 percent

completion of classwork, and did no homework. He received an F at the end of the year in her class. Student did not avail himself of the green overlay for reading, the Alpha Smart, or in-class laptop computer for writing.

27. Even though Parents declined to sign his December 19, 2010 IEP, Student's teachers informally implemented many of the offered accommodations and supports to encourage Student to complete his classwork and homework. Because Eiser and Student's other teachers remained concerned about Student's declining grades, Eiser informally assessed Student based upon his classwork and classroom performance to determine whether additional supports were appropriate. In addition to collaborating with his teachers, Eiser consulted with licensed educational psychologist Syreeta Hunter (Hunter) regarding development of a behavior support plan (BSP).

28. Hunter has a bachelor of science degree, a master of arts in general experimental psychology, is a certified behavior intervention case manager (BICM), a board certified behavior analyst (BCBA) and holds a pupil personnel services credential. She has worked for District as a school psychologist for four years. Her job duties include conducting and reviewing psycho-educational assessments, consulting with special education case managers, creating behavior support plans, conducting crisis counseling, and participating in IEP meetings. She demonstrated her qualification to offer opinions relating to Student's performance and unique needs.

29. Hunter reviewed Student's November 13, 2009 psycho-educational assessment and his school records. She collaborated with Eiser and Student's other teachers who reported that Student was not completing his classwork, that his grades had dropped, and that he required behavioral supports in order to complete his classwork. Hunter concluded from her records review and collaborations with Student's teachers that Student had unique needs in the areas of attention, completion of tasks, academic and language arts delays, and that he had a low-average cognitive ability.

30. Eiser and Hunter developed a BSP for Student dated April 6, 2011, designed to address Student's unique needs in attention, completion of tasks, academic and language arts delays and low average cognitive ability. The BSP addressed targeted behaviors in work completion, independence in having work materials present at the time of class, and off task behavior. The BSP considered the impact of Student's behaviors on his academic and social functioning, documented previous interventions, and addressed predictors of the targeted behavior. It also recommended interventions, reinforcement procedures, and reactive strategies. The BSP also established measurable goals. In addition, the BSP designated how and by whom the plan would be coordinated and monitored. The BSP included accommodations and modifications in the classroom, including requiring Student to sit closer to the teacher, the removal penalties for not completing homework, extra time to complete tests, and rewards for completing homework.

APRIL 19, 2011 IEP TEAM MEETING

31. On April 19, 2011, Student's IEP team convened to discuss the BSP. Father, educational advocate Russell Griffiths, Little, Eiser, Hunter, Deen, Faddis, Hilzebeck, and program specialist Deb Sather attended the meeting. The IEP team reviewed Student's PLOPs, including concerns that his performance had declined after the first trimester. Overall, Student was completing less than 50 percent of his classwork and 20 percent of his homework. His performance had not improved, even though his teachers were informally providing him with accommodations including preferential seating, supplies when he came to class unprepared, extra time to copy information from the board, options to receive copies of notes from peers, shortened assignments, and working one on one with teachers to complete assignments.

32. District offered Father the BSP developed by Hunter and Eiser. Father declined the BSP, and again raised his objections to homework. However, Father did not

request at that meeting that Student's placement change to a SDC with a modified curriculum. The IEP team adjourned without Parents' consent to the December 19, 2010 IEP, as amended by the April 19, 2011 IEP.

33. Little has been employed by District as director of special education for six years. Her responsibilities include oversight of special education programs, staff training, and compliance. Little, a licensed speech pathologist, has bachelor of arts and master's degrees in communicative disorders, credentials in language and speech services and administrative services, and a clinical certificate from the American Speech Association.

34. From March 21, 2011, through May 25, 2011, Little exchanged emails with Father relating to Father's objections to the value of homework. Father communicated his disagreement with the need for the proposed BSP to Little. He also advised Little that he disagreed that District had a right to dictate what his child did within the home environment. He informed Little that Student was involved in after school activities, that he would arrive home late from swim team, and that he was tired when he got home, finding it difficult to complete homework. Father objected to Student being required to participate in the school's Lunch Bunch program, in which students who did not complete their homework assignments were required to spend their lunch period completing homework. Father continued to request that the December IEP be modified to include changes relating to Student's homework assignments and he rejected the BSP.

MAY 31, 2011 IEP TEAM MEETING

35. The IEP team scheduled another meeting for May 31, 2011 to obtain Parents' consent to the December 19, 2010 IEP and the April 19, 2011 amendment. Little notified Parents by email of the date and time of the meeting. Father responded by email and informed Little that Parents did not believe an IEP team meeting was necessary and that they would not attend or agree to the BSP. Little, Sather, Jimenez

and Eiser met on May 31, 2011, for the purpose of reviewing the notes from the April 19, 2011 IEP team meeting, Student's proposed homework accommodations, and the BSP. The District team members were excused after fifteen minutes when Parents did not appear.

36. Student ended the seventh grade with failing grades in his academic classes.

LEGAL CONCLUSIONS

1. District contends that it offered Student a FAPE in the LRE in his December 16, 2010 IEP, as amended on April 19, 2011, and it seeks an order that it may implement the IEP without parent's consent.

APPLICABLE LAW

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

3. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists

of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209.; *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

7. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

8. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

9. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided

to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4)(2006)³; Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

10. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

11. 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

³ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

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].)

12. 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 FAPE to the child. (34 C.F.R. § 300.501(a) (2006); 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].)

13. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment (LRE); 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

14. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a); Ed. Code, § 56031.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

ANALYSIS

15. Here, as discussed more fully below, District met its burden of demonstrating that its offer of placement and services in the December 16, 2010 IEP, as amended on April 19, 2011, was a FAPE in the LRE.

16. District credibly established through the testimony of Student's general education and resource teachers that, at the time of the December 16, 2010 annual IEP team meeting, the IEP team was aware of Student's unique needs based upon his history of OHI/ADHD and SLD in reading and math. In addition, at Parents' request, and before the December 16, 2010 IEP team convened, District thoroughly and properly

assessed Student in all other areas of suspected disabilities, including OT, AT and behavior.

17. Specifically, Deeds and Castiglione used a variety of standardized assessment tools and strategies to gather relevant functional, developmental, and academic information, and did not use any single measure or assessment as the sole criterion for determination of whether Student was a child with a disability. The assessment tools included the WATI protocols, the BOT-2, the DTVP-2, Student observations, Father's input, and interviews with and review of reports from Student's teachers. As such, the assessments used technically sound instruments designed to assess the relative contribution of Student's low-average cognitive ability and behavioral factors, in addition to physical or developmental factors, and the assessors selected and administered the assessments in a non-discriminatory manner. Also, Hunter and Eiser relied on a 2009 psycho-educational assessment in connection with Student's PLOPs and reports from his current teachers in order to develop an appropriate BSP for Student to address his unique needs in attention and task completion.

18. The evidence also established that the assessors conducted the assessments in a language and in a form most likely to yield accurate information on what Student knew and could do academically, developmentally and functionally (i.e., English), and that assessments were used for valid and reliable purposes. Moreover, the assessments were administered by trained and knowledgeable personnel in accordance with instructions provided by the producer of the assessments, evidenced by the extensive experience of Deeds, Castiglione, and Hunter, who have been conducting assessments for 10, 14, and four years, respectively. Finally, as a result of these assessments, Deeds and Hunter identified that Student had unique needs in the area of behavior relating to task completion, and in the academic areas of reading and math

comprehension. In addition, Castiglione credibly concluded that Student did not require OT, a conclusion Parents did not dispute.

DECEMBER 21, 2010 IEP

19. District also credibly established that it complied with all procedural requirements related to the development of Student's IEP. Specifically, the evidence shows that the December 21, 2010 IEP team included all necessary members, namely Parents, general and special education teachers, and District representatives. In addition, Student's December 16, 2010 IEP, including the supports, aids, modification and AT services, was intended to cover the following twelve months. The IEP also included a statement of four appropriate and measurable annual goals designed to address Student's unique needs in math, reading comprehension, math reasoning, behavior, and writing. The evidence established that the goals were based on Student's PLOPs at the time of the assessments, and District demonstrated a direct relationship between Student's PLOPs, his stated goals, and the educational services to be provided. The goals were reasonably attainable in one year and were written to a grade level standard, according to Eiser's credible testimony. Parents did not object to the goals offered in the December 16, 2010 IEP.

20. The evidence also showed that in the area of AT, the December 21, 2010 IEP team considered Deeds' report, and offered, and implemented, the recommendations in his report. In addition, Parents received a copy of District's AT report and meaningfully participated in the meeting. Parents provided input to the IEP team, expressed disagreement with some IEP team member's conclusions, and requested revisions to the IEP. Specifically, the IEP team considered Parents' concerns about homework assignments.

21. Regarding placement in the LRE, District met its burden of proving that its offer of a general education classroom at Workman with two 50-minute resource classes

each day, with a BSP, was the LRE. First, District demonstrated convincingly that Parents agreed with the offered placement. Parents did not at any time request that Student be placed in an SDC with a modified curriculum that might more specifically address their concerns about Student's homework assignments. Additionally, District demonstrated that Student was capable of doing the work assigned to him in the general education setting, that he had successfully worked with his teachers and classmates in his general education classes, and that he would continue to benefit academically and non-academically in general education classes other than math and reading comprehension. Eiser and Jimenez credibly testified that Student academically performed successfully in his general education classes during the first trimester of the 2010-11 school year until he stopped doing homework and class work based upon Father's objections to homework.

22. District also persuasively demonstrated that 100 minutes a day in resource classes with smaller class sizes was appropriate to meet his unique needs in math and reading comprehension. Eiser credibly testified that Student had unique needs in those areas, and that he was receiving a modified curriculum with appropriate supports and accommodations in order to address those needs. Student's placement in resource would be with teachers and staff that were trained to address Student's unique needs in those areas. The evidence credibly established that Student was capable of successfully doing the work in his resource classes.

23. Finally, District credibly demonstrated through Deeds', Jimenez's and Eiser's testimony that its offer of aids, AT services, program accommodations, modifications and supports, including preferential seating, technical devices, NCR paper, green overlays for reading printed text, the Alpha Smart, and keyboard writing, were designed to meet Student's unique needs in the areas of attention in the classroom, note taking, reading comprehension, and task completion and to confer some

educational benefit on Student. As to other related services, such as OT, the evidence showed that at the time the IEP was drafted Student did not need these services to receive a FAPE.

APRIL 19, 2011 AMENDED IEP

24. District credibly demonstrated that the April 19, 2011 IEP offer of the program set forth in the December 21, 2010 IEP with the addition of a BSP was reasonably calculated and designed to meet Student's unique needs and to confer some educational benefit to Student. Jimenez, Hunter and Eiser credibly testified that Student's performance had dramatically declined in and after January 2011, in part based on Father's pronouncement at the December IEP meeting that he did not believe that homework would benefit his son. Student refused to do his classwork or homework after the first trimester, and his grades dropped from B's and C's to F's by the end of the school year. Recognizing that Student needed supports and accommodations to encourage him to complete his homework, Hunter and Eiser developed a comprehensive BSP based upon their informal assessments of Student's performance. The BSP was designed to provide Student with necessary supports, including accommodations and supervision, to help him improve his grades and remain on task.

25. The evidence also shows that District provided timely notice of the April 19, 2011 IEP meeting. The IEP team consisted of Father, his educational advocate, general and special education teachers, Hunter, and District representatives as required by 34 C.F.R. §300.321(a). District provided Father with a copy of the proposed BSP. The IEP team discussed and considered Hunter's and Eiser's recommendations and conclusions, and the proposed BSP. Father meaningfully participated in Student's April 19, 2011 IEP team meeting. Specifically, he provided input to the IEP team, expressed disagreement with some IEP team member's conclusions, and requested revisions to the IEP. In addition, the IEP team considered Parents' concerns, including in the days after

the IEP meeting, when Father emailed Little regarding his disagreement with provisions of the BSP and homework requirements. Parents nevertheless declined the BSP and refused to sign the December 19, 2010 IEP as amended by the April 19, 2011 IEP because of Father's objections to homework. As discussed above, District was not required under *Rowley* to implement Father's renewed demands that District amend the IEPs to eliminate homework except at Parents' discretion. (See *Rowley, supra*, 458 U.S. at p. 209.) In sum, given that placement in general education was appropriate, Father's methodological disagreement regarding the effectiveness of homework as an instructional method does not demonstrate that District denied Student a FAPE. To the contrary, District demonstrated that it offered Student a program with the appropriate services and supports to meet his unique needs, such that homework completion, like that required in general education, was a reasonable expectation.

MAY 31, 2011 IEP MEETING

26. District credibly established that it provided timely notice of the May 31, 2011 IEP meeting, and demonstrated convincingly that Parents expressly declined the opportunity to attend that meeting and participate in the development of Student's IEP, and that they would not sign Student's IEPs or agree to a BSP. The evidence shows that Little communicated with Father by email relating to Father's objections to the BSP, to his requested modifications to the December 2010 IEP, and regarding the need for an IEP meeting to discuss his concerns. Father responded that he did not agree that an IEP meeting was necessary, and refused to attend. District members of the IEP team nevertheless convened on May 31, 2011, and were prepared to discuss Student's BSP and PLOPs; however, the meeting adjourned after 15 minutes when Parents did not appear.

27. As discussed above, District has met its burden of proof by establishing that District's IEP offer of December 16, 2010 IEP, as amended with the BSP on April 19,

2011, was reasonably calculated to provide Student with some educational benefit in the LRE and therefore offered Student a FAPE. (Factual Findings Numbers 1-36, and Legal Conclusions Numbers 2-27).

ORDER

District may implement Student's December 16, 2010 IEP, as amended on April 19, 2011, without parental consent.

PREVAILING PARTY

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

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: November 17, 2011

_____/s/____

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings