

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL DISTRICT.

OAH CASE NO. 2012020850

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter in Cupertino, California, on May 21 and 22, 2012.

Father was present on behalf of Student throughout the hearing. Neither Mother nor Student appeared at hearing. Father and Mother are referred to collectively as Parents.

Attorney Rodney Levin of McArthur & Levin represented Cupertino Union School District (District). Jennifer Keicher, District's Director of Special Education, was present during the hearing.¹

Student filed his request for a special education due process hearing (complaint) with OAH on February 22, 2012. On March 22, 2012, OAH granted a continuance. At hearing, witness testimony and documentary evidence were received and the evidentiary record was closed. The parties asked to submit written closing arguments and their request was granted. The parties were given until 5:00 p.m. on June 5, 2012, to

¹ When Ms. Keicher testified, Shelly Ota, a special education coordinator, took her place as District's representative.

submit their arguments. No continuance was requested or granted for that purpose. On June 5, 2012, OAH received Student's and District's closing arguments and the matter was submitted for decision.

On June 5, 2012, Student filed a motion to admit supplemental documents into evidence. The proposed documents consisted of three invoices/receipts addressed to Parents from the Center for Autism and Related Disorders (CARD), dated December 31, 2011, January 31, 2012, and February 29, 2012, for the provision of applied behavior analysis (ABA) services to Student. The motion and documents were marked for identification as Student's Exhibit 14. On June 8, 2012, District filed a response opposing the motion. On June 18, 2012, the undersigned ALJ granted Student's motion and reopened the record. Exhibit 14 was admitted into evidence as hearsay for the limited purpose of explaining or supplementing Father's testimony during the hearing. District was given five business days to file a response to the documents, including any argument or rebuttal evidence. District did not file any response by the deadline. At close of business on June 25, 2012, the record was closed and the matter resubmitted for decision.

ISSUES²

1. Did District deny Student a free appropriate public education (FAPE) when it failed to implement Student's annual Goal Number 4 contained in the February 28, 2011 individualized education program (IEP)?

²In the Order Following Prehearing Conference dated May 2, 2012 (PHC Order), ALJ Adeniyi Ayoade reworded Student's issues for clarity and consistency with the applicable law and Student's complaint. Here, the order of the issues has been reversed for chronological consistency and minor language adjustments made. In addition, the word "appropriately" was removed from the first issue because the law on failure to implement an IEP uses a different standard, that of materiality.

2. Did District deny Student a FAPE when it failed to consider the private evaluation report of Dr. Damon Korb in connection with the February 16, 2012 IEP team meeting?³

REQUESTED REMEDIES

As set forth in the PHC Order, Student requests that OAH issue an order requiring District to fund his placement at a nonpublic autism agency chosen by Parents, including transportation services, and fund ABA services of 25 hours per week.

At hearing, Student claimed that his request for remedies in his complaint included a request for reimbursement for ABA expenses already incurred by Parents, even though his complaint requested that District "get" ABA services for him, usually taken to refer to prospective funding. However, Student's complaint did reference that Parents had already obtained private ABA services. In any event, Student's request does not add a new issue to the complaint, but is a proposed equitable resolution that did not prejudice the District.

PROCEDURAL MATTERS

On May 21, 2012, at the outset of the hearing, Student made a written motion "not to amend" his complaint, claiming that OAH misstated his issues in the PHC Order and amended them without his consent. Student contended that what is now Issue Number Two referred to the February 16, 2012 IEP, and that OAH changed the issue to refer to the February 16, IEP *team meeting* instead. Student's motion also asserted that

³ Student's complaint referred to the "private evaluations" Parents submitted at the IEP meeting, in the plural. However, the evidence established that Parents submitted one report from Dr. Korb at the meeting. Consequently, the word "reports" has been changed to the singular, "report."

OAH amended Issue Number One to eliminate his language claiming that District staff provided false information about Student's progress on his behavioral goal.

District objected to this last-minute motion, and indicated that Student's concerns about the issues were discussed at length during the telephonic PHC on May 2, 2012. Student's motion was denied on the record as to both issues. First, for Issue Number Two, Father did not explain the significance of the difference in language. Second, for Issue Number One, Judge Ayoade explained in a footnote in the PHC Order that he eliminated Student's language that District staff lied or provided false information at Student's prior due process hearing in November 2011, because it was not a FAPE issue.⁴ In addition, Student's motion should have been made to Judge Ayoade within a reasonable time after OAH issued the PHC Order, to request that the ALJ reconsider his order.

While discussing the motion, Student claimed orally that he had a right to litigate the appropriateness of the District's entire "February 2012 IEP offer," including new proposed annual goals, not just whether the District failed to consider Student's private evaluation. Student's request to expand his issues to contest the appropriateness of District's entire IEP offer was also denied as District was never given notice of such an issue. Student did not establish good cause to otherwise revisit the issues as set forth in the PHC Order.

However, during the hearing, as found below, the evidence established that the IEP team meeting of February 16, 2012 was continued because the participating team members had not discussed all of the matters necessary for the District to make an offer of placement and services. When no continued meeting was held, District sent Student a

⁴ Nevertheless, the ALJ allowed Student to present evidence regarding his teachers' past testimony as relevant to issues regarding goal implementation and witness credibility.

formal written offer on March 29, 2012. Accordingly, it became clear that Student believed District's March 29, 2012 offer of services was within the ambit of the February 16, 2012 IEP process, and again attempted to expand his issues.

The ALJ explained to Father on the record that, because he filed Student's complaint on February 22, 2012, he could not add new issues regarding matters that occurred after the date of filing the complaint, unless he asked to amend the complaint.⁵ The ALJ offered to permit Student to make a motion to amend his complaint, and to permit the District to respond, but Student declined to do so. Based on the foregoing, the appropriateness of the District's March 29, 2012 IEP offer is not at issue in this case.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is 10 years old, and has resided with Parents within the boundaries of the District since December 2010, when the family moved from India. Student has been medically diagnosed with regressive autism since he was about three years old.

2. Student began school in the District at Eisenhower Elementary School (Eisenhower), and was initially placed in a moderate to severely handicapped special day

⁵ The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) "A party may amend its due process complaint notice only if (I) the other party consents in writing to such amendment ... or (II) the hearing officer grants permission ... at any time not later than 5 days before a due process hearing occurs." (20 U.S.C. § 1415(c)(2)(E)(i); Ed. Code, § 56502, subd. (e).) Thus, unless OAH grants a timely motion, the law permits the addition of an issue to a due process complaint notice only with the agreement of the opposing party. (20 U.S.C. § 1415(f)(3)(B); see also, Ed. Code, § 56502, subd. (i).)

class (SDC) in third grade taught by Jessica Geldore. District assessed him regarding his suspected disability and held an initial IEP team meeting on February 28, 2011, at which it found Student eligible for special education and related services under the primary category of Autistic-Like Behaviors, and under a secondary category of Intellectual Disability. Parents consented to that IEP. Based on District's assessments and experience with Student, his SDC placement was confirmed in the February 2011 IEP. The District held two more IEP team meetings on April 27, and June 2, 2011.

3. For the 2011-2012 school year, Student continued at Eisenhower for fourth grade in an SDC taught by Vicky Broumas.

4. On September 6, 2011, Student filed with OAH a second amended complaint against the District in OAH Case Number 2011070771, claiming that District denied him a FAPE with respect to all three IEP's. His claims were litigated on the merits at a hearing before ALJ Gary A. Geren on October 11 and 12, and November 1 and 2, 2011. On December 22, 2011, OAH issued a Decision, in which Judge Geren denied Student's requests for relief as to all issues raised in that case.⁶

5. On April 17, 2012, Student filed a first amended civil complaint for judicial review of the December 22, 2011 OAH Decision in the United States District Court for the Northern District of California, Case Number CV 12-01451 PSG. That appeal was pending at the time of the hearing in this case. Student's civil complaint states that the OAH Decision "has become a final decision of The Office of Administrative Hearings for judicial review...."⁷

⁶ Official Notice is taken of Student's second amended complaint and the December 22, 2011 Decision in OAH Case Number 2011070771.

⁷ The OAH Decision is final and binding on the parties. (See Legal Conclusions xxx, and Ed. Code § 56505, subd. (h).)

FAILURE TO IMPLEMENT FEBRUARY 2011 BEHAVIOR GOAL

The Behavior Goal

6. Student contends that District denied him a FAPE by failing to “appropriately implement” his annual behavior goal, Goal Number 4, which originated in his IEP of February 28, 2011. District argues that any issue about implementation of the behavior goal was necessarily decided (“subsumed”) in OAH Case Number 2011070771, and that Student is therefore collaterally estopped from relitigating it. In the alternative, District claims that Student did not meet his burden to establish that District staff failed to implement the behavior goal, and the evidence showed that Student’s teacher and service providers implemented his IEP behavior goal during all times at issue in this case.

7. An IEP must include measurable annual academic and functional goals reasonably calculated to meet the pupil’s unique needs resulting from his or her disability and to enable the pupil to make progress. A failure to implement a provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material. A material deviation from an IEP occurs when the program or services provided to the pupil fall significantly short of those required by his or her IEP.

8. As set forth in the February 2011 IEP, Goal Number 4, Student’s behavior goal, provided as follows:

By 02/28/12: When provided with a box ([Student’s] box), [Student] will be able to independently give and take objects and play with it [sic] for at least 2 minute [sic] and put it in the box and [be] able to sit for 15 minutes without touching/grabbing/licking hands with 70% accuracy in 4 out of 5 trial days as observed and recorded by staff.

9. The IEP provided that the District special education teacher, speech and language therapist, and occupational therapist were responsible for the goal. Ms.

Geldore drafted the behavior goal for the February 2011 IEP based on Student's then-levels of performance. She reported his baseline behaviors for the goal as follows: "[Student] likes to hold and puts [sic] something in his hands and mouth. When the object is taken away, he cries, grabs, bites, or pulls hair of peers and adults." The frequency of the behaviors was not specified.

10. The behavior goal also contained two short-term objectives to track Student's progress, both of which kept the minimum time of two minutes for his appropriate handling of an object, and increased his sitting time after returning the object. The first provided that, by June 28, 2011, Student would be able to sit after returning an object to his box for five minutes without touching, grabbing, or licking his hands. The second provided that he would be able to sit in that manner for 10 minutes by December 28, 2011. It is reasonably inferred that, as of February 2011 when the annual goal was offered, Student's baseline ability to return an object and then sit without engaging in negative behaviors was less than five minutes.

Collateral Estoppel

11. Under the doctrine of collateral estoppel, once a tribunal has decided an issue of fact or law necessary to its judgment, that issue may not be relitigated in a suit on a different cause of action involving a party to the first case. The doctrine serves many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication by preventing inconsistent decisions. To determine whether collateral estoppel applies to this matter, Student's evidence and arguments about the behavior goal are evaluated below.

12. In OAH Case Number 2011070771, Student's second issue included whether District's IEP of February 28, 2011, denied him a FAPE by failing to have annual goals that met his unique needs (were not "appropriate") for many reasons including

that Student did not make meaningful progress on his goals.⁸ In that case, Student had the opportunity to, and did present evidence as to his progress on the behavior goal, or lack of progress for any reason, as a relevant factor in evaluating whether the goal was reasonably calculated to meet his unique behavioral needs. Accordingly, Student had the opportunity to present evidence of District's failure to implement the goal as a reason why he did not make progress on it.

13. The Decision in the prior case reflects that Student actually litigated the question whether he made progress on his goals to demonstrate that the goals did not meet his needs and were therefore not reasonably calculated to permit him to make meaningful educational progress when offered. In contrast, as noted above, Student's current legal issue is whether District materially failed to implement the behavior goal. The December 2011 Decision determined that Student made meaningful progress on his goals, including the behavior goal. This determination necessarily included an implied finding that the goal was implemented and worked on because Student could not make meaningful progress on the goal if District did not implement it. Since the issue of Student's progress on his goals was fully litigated in the first case, Student is collaterally estopped from relitigating that issue as to the behavior goal here. Therefore, Student is precluded from relitigating his claim that he did not make progress on the behavior goal prior to the last hearing because District failed to implement it.

Similarity of 2011 Behavior Goal to February 2012 Draft Behavior Goal

14. In the present case, Student contends that District must be found to have failed to implement his behavior goal because District offered the same goal in its February 2012 IEP as it had in the February 2011 IEP. Student argues that this proves the

⁸ Student's 2011 problems about the April and June 2011 IEP's were limited to issues regarding ABA therapy services, and did not involve claims about his annual goals.

District did not properly implement the goal because, if it had, Student would have made progress and achieved the goal, and his negative behaviors would have been extinguished. Since this position addresses a different legal issue involving new events and information after the last hearing, Student is not collaterally estopped from litigating the issue here. Student is not precluded from presenting new evidence that, since the last hearing date on November 2, 2011, he failed to make progress and his recent levels of performance are relevant to the question whether District materially failed to implement the goal after the last hearing.

15. The evidence showed that District did not *offer* a new behavior goal at the February 16, 2012, IEP team meeting. First, the February 16, 2012 IEP team meeting presented new information about Student's progress on his behavior goal. The meeting did not finish, and was continued with Parents' consent without District making any formal offer of placement, services, or goals at that meeting. Rather, the District members of the IEP team presented a *draft* IEP document that contained a draft of a new proposed behavior goal for discussion by the full team, including Parents. All District witnesses who testified provided credible and consistent testimony that no offer was made, and that all of the IEP team members, including Parents, were open to continuing to discuss Student's goals, including the behavior goal, at the continued IEP team meeting.

16. Nevertheless, the new draft goal, designed by Ms. Broumas, Student's fourth grade special education teacher, did reflect her opinion of Student's baseline behaviors as of February 2012 as follows: "[Student] seeks access to tangible items. He holds cards & items in his hands. He will lick or bite items, or lick his hands and wipe saliva on cards or arms. When the item is taken away, he cries, grabs, pinches or pulls hair of peers and adults."

17. District's 2012 proposed draft behavior goal changed the goal's focus to working on Student's propensity for licking, biting, or wiping saliva on the preferred items as follows:

By 02/16/13: When provided with a box of preferred items, [Student] will be able to independently give and take items and play, hold or look at it [sic] for at [least] 5 minutes without biting or licking item or hands/fingers with minimum prompts with 80% accuracy in 4 out of 5 trial days as observed and recorded by staff.

18. Comparing Student's baseline levels of unique behaviors for the 2011 behavior goal with the identified behaviors to be addressed for the 2012 goal, it is seen that by 2012, Student's overall behaviors were fairly similar. However, no frequency data was provided. Ms. Broumas agreed at hearing that Student's baseline behaviors were similar, but also explained changes, as noted below. Even with the baseline similarities, the draft goal was changed and not the same as the 2011 goal. Ms. Broumas was persuasive that she proposed shifting the focus to working on Student's interpersonal skills to give, take, and hold items without engaging in negative behaviors for a longer time, and increased that goal time from two minutes to five minutes. She was persuasive that Student's behavior had shifted from mouthing items to licking or using his hands to wipe saliva on them. When the item was removed, he was no longer biting the person, but merely used biting while handling the item. In addition, she proposed eliminating the sitting time part of the goal. This goal was a draft, subject to further discussion by the IEP team, including Parents.⁹

⁹ As found previously, the appropriateness of this draft goal is not at issue in this case. The goal was not offered by the District on or before February 22, 2012, when Student's complaint was filed.

19. Father testified that, in his opinion, the 2011 and 2012 behavior goals were essentially the same and addressed Student's same baseline behaviors, with no showing of progress, which proved that District did not implement the goal as it should have been. However, while the evidence established that by February 2012, Student's behaviors had somewhat regressed in Ms. Broumas' class, Father's argument was not persuasive. First, Student cannot relitigate his claim of lack of progress through November 2, 2011. As found above, while the December 2011 Decision did not include individualized findings about the behavior goal, the ALJ in that case found that, overall, Student had made progress on his goals sufficient to support their appropriateness and Student is estopped from relitigating that issue here.

20. Second, Student did not present any evidence from a qualified expert as to the significance of Student's overall modest progress and behavioral changes by February 2012, given the severity of his disabilities.¹⁰ Father is an educated research engineer and established that he and Mother love Student very much, take workshops, and research extensively to be well-versed in how to support Student and his ultimate ability to meaningfully communicate and make educational progress. However, Father's disdain and lack of respect for District's educational program were evident and he was

¹⁰ For example, Father expressed frustration at the lack of a specific intellectual quotient score for Student. However, District's prior assessments, reviewed at the February 2011 IEP team meeting, showed that Student, who is primarily nonverbal, was unable to complete many assessment tests or subtests, and scored significantly below average on others, suggesting a cognitive range between three to five years of age, and a lower social-emotional age. Student had the opportunity to challenge District's assessments in his prior case, but did not do so, and the December 2011 Decision found the assessment data supported the District's February 2011 IEP offer of services and supports.

therefore not persuasive as an objective witness.¹¹ A qualified independent expert might have established either that Student's small and slow progress demonstrated meaningful educational benefit in light of his disabilities, or that Student was capable of greater progress suggesting the goal was not implemented in full. Without such evidence, Father's testimony was not accorded great weight because he lacked the expertise and objectivity to evaluate Student's educational and functional abilities and achievements, when compared to that of Student's teacher and service providers who testified.

21. Third, in connection with the April 27, 2011 IEP team meeting, District's behaviorist, Patricia Strass, conducted a behavioral assessment at Parents' request. Ms. Strass conducted an interview with Parents and observed Student on three different dates in a variety of school settings. At the April 2011 IEP team meeting, District reviewed the assessment. Ms. Strass reported that Student's behaviors at home included frequent tantrums that were only infrequently reported in the school setting. District team members offered to amend the IEP to provide school-based ABA throughout the day with autism-specific programming. The offer included weekly ABA consultation and training with Student's classroom teacher and aides for two hours per month, and one hour per month of parent training for six months, all through the District's Comprehensive Autism Program (CAP). Parents refused the offer, which prevented the District from providing ABA consultation, behavioral consultation with Student's teacher and aides, or parent training. The record established that Parents wanted District to provide Student a one-to-one aide and one-to-one discrete trial training (DTT), a

¹¹ For example, Ms. Broumas established that Parents visited her class once, in January 2012, for about 20 minutes.

particular methodology of ABA, both during and after school.¹² Parents therefore rejected the offer to work with the District and receive training on how District staff implemented ABA with Student, so they could provide consistent supports to him in both the home and school environments. Since Parents declined to work with the District to receive training and consultation in the District's particular ABA methods and strategies and their unique application to Student, Parents did not receive that training and Student did not receive the benefit of consistent supports using the same techniques and strategies both at home and at school. While Parents were already aware of ABA formats, District did not intend to suggest that Parents were "untrained," rather, they were not necessarily using the same strategies and methodologies at home that District staff used in the school setting for Student. Parents' failure to cooperate to coordinate the home and school environments with additional behavioral supports and consultation negatively impacted Father's argument that Student's apparent lack of progress by February 22, 2012, was the District's fault for not implementing the behavior goal.¹³

¹² DTT is a specialized ABA methodology that breaks down individual skills into smaller discrete tasks to help a pupil learn the larger skill through rigorous repetition, including prompting and reinforcement. These matters were litigated in the prior case and the December 2011 Decision determined District's offers were appropriate and Student did not require one-to-one ABA services after school in order to receive a FAPE.

¹³ For example, Father produced one parent training certificate, dated May 31, 2011, from Summit Therapeutic Services, indicating that Parents passed unknown requirements for a "Parent Behavior Modification Workshop." While Parents are knowledgeable about autism and intellectual disability, there are a plethora of available ABA-related products that offer a variety of strategies, techniques and methodologies. Parents missed the point of District's offer to work with them and Student using similar

22. In contrast, Ms. Broumas was credible and convincing that she implemented Student's behavior goal faithfully. Ms. Broumas has a bachelor's degree in psychology and a master's degree in special education, and holds state teaching credentials for both mild/moderate and moderate/severe instruction. She also has prior experience in ABA principles as a behavior therapist for about seven years. Her SDC is a combined fourth-fifth grade class. It has about eight pupils with five adult staff, providing a high ratio of adults to pupils as recommended by Ms. Strass in April 2011, along with additional services with related service providers for occupational therapy, speech and language therapy, alternative augmentative communication, and adaptive physical education, as appropriate. Ms. Broumas' progress reports in November 2011 and February 2012 were informative. In the fall of 2011, Ms. Broumas reported that, although Student met the two-minute handling and return task, he had not yet met the December 2011 benchmark for 10 minutes of sitting appropriately after returning the item, but was on target. By February 2012, following the winter holiday break, Ms. Broumas observed that Student had suffered a setback in his overall behavioral progress in her class. Ms. Broumas credibly established that during January and February 2012, Student more frequently became upset and engaged in crying and pulling behaviors. By February 13, 2012, she therefore reported that Student had not met the 2011 behavior goal. Ms. Broumas testified in a candid and straightforward fashion and was honest in stating that she did not know why Student's behaviors targeted in the behavior goal had regressed somewhat in her class.¹⁴

methods and strategies to support consistency in both the home and school settings for him.

¹⁴ As found below, however, the evidence did not establish why Ms. Broumas did not take into consideration Student's continued progress on the behavior goal with his other service providers since all three of them were responsible for the goal.

Other Evidence Regarding District's Implementation

23. Student argues that District should have administered the behavior goal in a more intense and frequent fashion. However, his contention is without merit because the frequency or intensity of a service or goal goes to its appropriateness. The law does not require annual goals to have stated frequencies and durations, but does require them to be measurable and to meet the pupil's needs. Student has already litigated the appropriateness of the February 2011 behavior goal and cannot do so again here.

24. Student also contends that his teachers did not tell the truth under oath when they testified both at this hearing and the 2011 hearing that they implemented Student's behavior goal at school. Student's logic is that if his teachers had properly implemented this goal he would have achieved it, which he has not done. Again, as found above, Student's contention is unsupported and not persuasive. Ms. Geldore's testimony about Student's progress prior to November 2, 2011, was not relevant, Student is estopped from relitigating it, and it was already considered in the prior case. In addition, progress on goals is not guaranteed and lack of progress does not necessarily mean that the goal was not implemented. Ms. Broumas was persuasive that she used ABA techniques and strategies on a daily basis with Student, including those recommended in District's April 2011 behavior assessment. She had a dedicated box of Student's sensory items available to him every day, consistently redirected Student to positive behaviors, and used praise and snack reinforcers with his preferred snacks from home. Ms. Broumas was a credible and persuasive witness, who carefully considered and answered the questions put to her. She proposed to modify Student's behavior goal in her draft February 2012 goal precisely because she and her classroom aides had faithfully implemented the February 2011 behavior goal and felt it should be adjusted to address Student's recent setback and changed behaviors.

25. In addition, District's April 2011 behavior assessment had recommended using four intervention strategies for Student's behavioral excesses: redirection,

including a visual picture of a “quiet mouth;” prevention of situations; alternative sensory activities; and differential reinforcement of incompatible behaviors (DRI). Ms. Broumas established that she used all of these recommendations in working with Student during the 2011-2012 school year. On cross-examination, Ms. Broumas admitted that she had not heard of the label “DRI” prior to the last hearing, and Father contended she therefore could not have implemented it. However, regardless of the label, DRI involves standard ABA practices to emphasize and reward positive behaviors and reduce or eliminate negative behaviors, and targets reinforcing behaviors that are incompatible with the negative behaviors. Ms. Broumas credibly explained that when she learned what the initials stood for, she realized that she had long implemented the underlying strategies due to her experience and training. Moreover, to the extent that DRI may be a particular methodology, Student did not establish that it was required by his IEP.

26. The evidence established that Student recently received intensive private ABA therapy. Father credibly stated that beginning in about December 2011, Parents hired a nonpublic agency, CARD, to provide 25 hours of ABA DTT services to Student after school and on weekends, until some point prior to Student’s medical emergency in early May 2012.¹⁵ The period during which Student received private ABA services at home also included the period during which Ms. Broumas observed some behavioral regression in her class. Father established that Blue Shield Insurance Company paid for the ABA therapy, except for a required co-payment from Parents for each therapy session.

¹⁵ Student’s exhibits included an independent assessment report from CARD dated September 27, 2011, in which CARD provided an overview of Student’s levels of functioning and recommended 11 goals in various areas, to be worked on with multiple repetitions and trials. However, no one from CARD testified and the evidence did not establish what goals CARD actually worked on with Student.

27. Finally, Student's focus on his lack of progress on the behavior goal, viewed in isolation without regard to his performance levels in other areas, is also rejected as inaccurate. For example, District's draft February 2012 IEP contained reports of Student's levels of performance as required by law. They included a positive report from Ms. Porter, the speech therapist, that Student met three out of his four communication goals. She reported that Student no longer put items in his mouth during his 30-minute speech therapy sessions with her, and his behaviors had improved. Ms. Chandru reported that Student's participation during her occupational therapy sessions had "improved tremendously. During the initial sessions [in early 2011] . . . [Student] would keep putting things into his mouth or push things down onto the floor from the table. But now, [Student] is able to sit and participate in all the table top tasks without those behaviors." Ms. Chandru also reported that Student had made progress toward his fine motor goals, and that she had addressed his needs for oral input with multiple strategies. Neither of these service providers reported any significant regression in Student's behaviors for the February 2012 IEP. Additionally, Student's numerous communication and occupational therapy goals were interrelated with his behavior goal in teaching Student skills to properly express himself and overcome sensory needs so he does not mouth items or need to bite to express himself. Finally, Ms. Broumas also reported on Student's progress in the SDC, including that he "does well with transitions and follows classroom routines with minimum to moderate prompting . . ." and that he had "become more independent with his adaptive and daily living skills." All three testified at hearing and Student did not challenge their findings regarding Student's overall positive progress, despite the recent behavioral setback in the SDC.

28. Based on the foregoing, Student's recent, modest regression in progress on the behavior goal in January and February 2012, did not establish that District failed to implement the goal in any material fashion or materially deviated from it. Father's argument was unsupported by the evidence because there are many reasons why

negative behaviors may recur, progress may slow and behaviors may regress. In addition, the evidence established that Student made progress in his behaviors in his speech and language and occupational therapy sessions. Student did not sustain his burden to establish that District materially failed to implement his behavior goal as of February 22, 2012. Consequently, District did not deny Student a FAPE on that basis.

FAILURE TO CONSIDER STUDENT'S PRIVATE EVALUATION FOR THE FEBRUARY 2012 IEP

29. To determine whether a local educational agency (LEA) has offered a FAPE, the IEP offer must meet both the procedural and substantive requirements of the law. Not every procedural violation is sufficient to support a finding that a pupil was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, and/or (c) caused a deprivation of educational benefits.

30. An IEP for each pupil with a disability must include specified information, including a statement regarding the pupil's present levels of academic achievement and functional performance, and measurable annual goals designed to meet the pupil's educational needs and enable the child to make progress. An IEP offer is to be evaluated as of the time the IEP team developed and offered it, in light of the information available at that time, and is not to be judged in hindsight.

31. Student contends District denied him a FAPE in connection with the February 16, 2012 IEP team meeting because the District members of the team failed to consider the private evaluation report of Dr. Damon Korb, director of the Center for Developing Minds (CDM) in Los Gatos, California. District contends the IEP team meeting did not finish, was continued, and no IEP offer was made for Student on February 16, 2012. In addition, District argues that Dr. Korb's report was considered at

the meeting, and would have been considered at the continued IEP team meeting in formulating a formal offer of placement and services.

32. As found below, Student's claim that District denied him a FAPE in this regard is premature because the evidence established that District did not make an IEP offer at the IEP team meeting on February 16, 2012, and had agreed to continue the IEP team meeting where further discussion, including discussion of Dr. Korb's report, could take place. Student filed the hearing request six days later without giving the District the opportunity to complete the IEP process. OAH jurisdiction is limited and there is no right to file for a special education due process hearing absent an existing dispute between the parties. Special education law provides that a party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, educational placement, or the provision of a FAPE to a child.¹⁶ In addition, the ripeness doctrine in common law also operates to avoid premature adjudication of an issue. District could have moved to dismiss this issue prior to hearing but did not do so.

Predetermination and Consideration of Parental Concerns

33. Under the federal Individuals with Disabilities Education Improvement Act of 2004 (IDEA), the parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings with respect to the provision of a FAPE to their child, and the school district must fairly and honestly consider parents' concerns. While school officials may discuss a child's programming in advance of the IEP team meeting, they may not arrive at an IEP team meeting with a "take it or leave it" attitude. Failure to consider the family's concerns and information, including independent assessments, in making an IEP offer of services may result in a procedural violation.

¹⁶ Education Code section 56501, subdivision (a)(1) – (a)(4).

34. On January 31, 2012, in preparation for the upcoming IEP team meeting, Father wrote a letter addressed to the District's Director of Special Education and enclosed a copy of Dr. Korb's nine-page Developmental Assessment Report from CDM dated August 19, 2011.¹⁷ Father expressly pointed out in the letter that District already had a copy of the report from Student's exhibit binder in connection with his prior due process hearing, and that "the above said report has to be considered" by the District in connection with the February 16, 2012 IEP team meeting.

35. Ms. Keicher credibly testified that she received Father's letter, including Dr. Korb's report, and passed along a copy of the report to Ms. Ota, a special education coordinator. Ms. Keicher has worked with Ms. Ota for several years and found her to be a responsible and reliable employee. Ms. Keicher did not follow up to make sure that Ms. Ota had distributed the report to Student's District IEP team members. Ms. Ota credibly testified that she made a mistake because she assumed that Parents had already provided the report to Student's IEP team members, and she did not check with them to be sure.

36. Also on January 31, 2012, Parents emailed Student's teacher, Ms. Broumas, informing her that they had sent Dr. Korb's report to the Director, but did not attach a copy of the report to the email to Ms. Broumas. She credibly established that she made a mistake and forgot to follow up to obtain a copy of the report from the District office.

37. Accordingly, there is no dispute that when the District personnel invited to Student's IEP team meeting prepared their individual draft proposals for his IEP in advance of the meeting, they had not read Dr. Korb's report.

38. District convened Student's annual IEP team meeting on February 16, 2012, at about 3:15 p.m. The following people attended the meeting: Jason Omcay (vice principal and administrative designee), Laurel Henderson (school principal), Ms. Ota, Ms.

¹⁷ The report was accompanied by two pages of hand-written charts or notes.

Broumas, Smita Chandru (occupational therapist), Shonia Porter (speech and language pathologist), Cynthia Via (Student's private ABA provider through CARD), and Parents. District personnel were prepared for the meeting with a draft IEP document that contained IEP placement and services for Student, along with progress reports of his levels of performance, and 12 proposed annual goals as the starting point for the IEP team to discuss. The draft IEP was clearly marked with a stamped box containing the word "draft" on each page. The draft annual goals were written by Ms. Broumas (academic and functional goals), Ms. Chandu (fine motor goals), and Ms. Porter (communication goals) in their specialized areas. They each credibly and persuasively testified that their proposed goals were only drafts, and that they were open to adjusting or changing them with Parents and the other team members during the IEP team meeting. In addition, Parents had sent the District four pages of proposed draft annual goals on February 15, 2012, which contained 10 proposed goals.

39. During the meeting, District personnel reported orally about Student's levels of performance and progress. The team was discussing Student's fine motor skills when Parents mentioned that Dr. Korb's report recommended a goal for Student's gross motor skills. At that point, the team realized that most of the District members had not received or read a copy of Dr. Korb's report. The evidence established that Ms. Ota, who facilitated the meeting, discussed several options available at that point to solve the problem: (1) the team could stop the meeting and reschedule it after everyone had the opportunity to review Dr. Korb's report; (2) the team could take a short break and each team member could individually review the report and come back to the table; or (3) the team could distribute copies of the report and jointly review the report while continuing the meeting. Parents were given the prerogative and they chose the third option. There is no question that District erred in not distributing the report to everyone in advance of the meeting. While District was willing to take more time or reconvene to make up for the mistake, Parents insisted on moving forward with the meeting and reviewing Dr.

Korb's report jointly. Thus, to the extent there was any procedural violation, the violation was immediately cured prior to the completion of the IEP process and did not result in denying Parents the opportunity to meaningfully participate in the development of Student's educational program.

40. The District team members concluded that Dr. Korb's report did not recommend a goal for gross motor skills, and the team agreed to come back to his report and recommendations when they discussed an offer of services for Student. The team moved to the next item on the IEP Agenda, a review of District's proposed draft goals. The IEP team was still discussing the draft goals for Student as it approached 5:00 p.m. The evidence is undisputed, and Father agreed in his testimony, that the IEP team never got to the last agenda item, "Offer of FAPE" before running out of time. Parents agreed to continue the IEP team meeting to another date in the near future, but no date was agreed upon at that time. As a result, District did not make any offer of educational placement, services, and goals when the February 16, 2012 IEP team meeting ended and was continued.

41. Since District did not make an offer or proposal of FAPE, Student's claim that he was denied a FAPE was premature. Until the District made the annual IEP offer, for the Parents to accept, reject, or continue to negotiate, there was no actionable dispute between the parties. Parents were offended by District's failure to honor their request, made two-weeks in advance of the meeting, to consider Dr. Korb's report. Instead of waiting until the next IEP team meeting to participate in finalizing the IEP and see what District's offer would be, and whether it would reflect District's consideration of Dr. Korb's report, Parents filed their request for a due process hearing on February 22, 2012.

42. Later, on March 2, 2012, Ms. Ota emailed Parents a proposal to continue the IEP team meeting to March 9, 2012. Parents declined to attend that meeting. Parents informed Ms. Ota they believed the IEP process should be halted pending the outcome

of this case and claimed that "stay put" applied.¹⁸ On March 29, 2012, District sent Parents a written IEP offer of placement and services, which is not at issue in this case.

43. Assuming a court could find there was an actionable dispute about the February 16, 2012 IEP team meeting in the absence of an IEP offer, the evidence established that District members of the IEP team did not come to that meeting with a fixed, predetermined offer. Rather, the District team members listened to and considered Parents' concerns as communicated to them during the meeting. For example, Ms. Porter, a licensed speech and language pathologist, has worked with Student since February 2011, and credibly established that she reviewed Parents' goal requests before the IEP team meeting, and read Dr. Korb's report during the meeting. Ms. Porter was persuasive that she concluded, during the IEP meeting, she was already involved in providing Student the individualized speech therapy Dr. Korb recommended. She was fully prepared to attend a continued IEP meeting to discuss his report, the IEP, and finalize her draft communication goals.

44. Ms. Chandru, Student's occupational therapist, was persuasive that she read Dr. Korb's report during the IEP meeting, after it was provided to her. She also

¹⁸ Under federal and California special education law, a special education pupil is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); Cal. Educ. Code §§ 56505(d), 48915.5.) Stay put does not impact an LEA's legal obligation to make an annual offer of FAPE and Student did not present any legal authority to the contrary. Father also testified that Parents did not "refuse" to attend an IEP meeting but District did not give adequate advance notice of the March 9, 2012 IEP team meeting. However, no claims regarding events after February 22, 2012 are at issue in this case. In any event, no date for a continued IEP team meeting had been agreed upon when Student filed his complaint.

received a copy of Parents' proposed goals before the meeting and considered them. Ms. Chandru, a licensed occupational therapist employed by a nonpublic agency, Ascent Rehabilitation Services, has worked with Student since early 2011. She did not find anything in Dr. Korb's report to cause her to change her proposed goals for Student. However, although Ms. Chandru had not proposed a gross motor goal, she credibly testified that she would consider such a goal at the continued IEP meeting. She was prepared to attend a continued IEP meeting and was open to further discussion of the report and her draft goals.

45. Likewise, Ms. Broumas had written proposed annual goals in the areas of math, reading, behavior, and social skills to meet Student's unique needs without having read Dr. Korb's report. Ms. Broumas was persuasive that, after she read the report during the meeting, she remained open to consider Parents' concerns and the report's recommendations in helping finalize annual goals at a continued IEP meeting.

46. Student did not establish whether or how Parents' proposed annual goals in all of the above areas, submitted to District staff the day before the meeting, arose out of Dr. Korb's assessment report, or how District's draft goals in those areas should have been different. For example, Student's proposed behavior goals required his negative behaviors to be completely extinguished in one year, but Dr. Korb's report made no such recommendation or claim. In any event, since no annual goals were actually proposed at that IEP meeting, such a FAPE analysis would be premature.

47. The fact that District personnel mistakenly did not distribute Dr. Korb's report in advance of the IEP team meeting did not establish that District predetermined an IEP offer on a "take it or leave it" basis as there was no offer. While it is understandable that Parents would feel upset, in light of the previous litigation between the parties in the fall of 2011, there was simply no evidence that the failure to ensure team members had the report was intentional or designed to avoid or ignore Parents' concerns. No formal offer was made and the District staff offered options to rectify the

mistake. Everyone at the meeting received the report, had a brief opportunity to read it, and would have had an extended opportunity to review the report prior to the continued IEP meeting, along with Parents' continued input.

48. Based on the foregoing, District considered Parents' concerns during the February 16, 2012 IEP team meeting and staff offered to correct their mistake. District agreed with Parents' request to continue the IEP team meeting and process to finalize an offer of placement and services. Accordingly, District established that it complied with the law and did not predetermine Student's educational offer without considering Parents' concerns and information, especially since District made no offer and all participants understood the discussion would continue at the next IEP team meeting.

REMEDIES

49. When an LEA fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Here, Student did not sustain his burden to establish that District denied him a FAPE. Therefore, District is not obligated to provide any relief.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

FAPE

2. Congress enacted the IDEA "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special

education and related services designed to meet their unique needs. . . ." (20 U.S.C. §§ 1400(c), 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.)

3. A FAPE is defined as 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; Cal. Code Regs., tit. 5 § 3001, subd. (o).) Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) 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.) In addition, the educational needs include functional performance. (Ed. Code 56345, subd. (a)(1).)

4. For a school district's IEP to offer a pupil a substantive FAPE, the proposed program must be specially designed to address the pupil's unique needs, and be reasonably calculated to provide the student with some educational benefit. (Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley (1982) 458 U.S. 176, 189, [73 L.Ed.2d 690], cited as Rowley.) at p. 201; J.L. v. Mercer Island School Dist. (9th Cir. 2010) 592 F.3d. 938, 950-953.) Rowley established that a FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." The Rowley court held that the IDEA does not require school districts to provide special education pupils with the best education available, or to provide instruction or services that maximize a pupil's abilities. (Rowley, supra, at p. 198-200.) (See also, M.L. v. Fed. Way School Dist. (9th Cir. 2005) 394 F.3d 634; 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.3d 1141, 1149.)

5. An IEP is to be evaluated in light of information available at the time it was developed and offered, and is not to be evaluated in hindsight. (*Adams v. State of Oregon*, supra, 195 F.3d at 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

PROCEDURAL VIOLATIONS

6. There are two parts to the legal analysis of whether a school district offered a pupil a FAPE: whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child’s right to a FAPE; (b) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

FINALITY OF OAH SPECIAL EDUCATION DUE PROCESS DECISION

7. A decision issued by OAH is a final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) OAH orders may be enforced in a court of competent jurisdiction, or through a compliance complaint to the California Department of Education. (*Id.*; see, Cal. Code Regs., tit. 5, § 4650, subd. (a)(7)(B).) The

parties have the right to appeal the decision to a state court of competent jurisdiction within 90 days of receipt of the decision, or may bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).) Unless a court of competent jurisdiction orders otherwise, an OAH decision remains in full force and effect, and is legally binding upon the parties. (Ed. Code § 56505, subd. (h), (k).)

COLLATERAL ESTOPPEL

8. Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision precludes litigation of the same issue in a suit on a different cause of action involving a party to the first case. The doctrine of collateral estoppel applies to administrative proceedings. (*Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944 (citing *People v. Simms* (1982) 32 Cal. 3d 468, 479-480).) Collateral estoppel applies to special education due process hearings in California. (*Student v. Los Angeles Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs. Case No. N 2007010315; *Student v. San Diego Unified School Dist.* (2005) Spec.Ed.Hrng Office Case No. SN 2005-1018.) The doctrine serves 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 [101 S.Ct. 411, 66 L.Ed.2d 308]; *Levy v. Cohen* (1977) 19 Cal.3d 165, 171; see *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 798.)

9. Collateral estoppel precludes relitigation of an issue when five conditions are met: (1) the issue to be precluded is identical to that decided in the prior proceeding; (2) the issue was actually litigated at that time; (3) the issue was 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 the same as, or in privity with, the party to the former proceeding. (*People v. Simms, supra*, 32 Cal.3d at 479-480; *People v.*

Garcia (2006) 39 Cal.4th 1070, 1077; *Pacific Lumber, supra*, 37 Cal.4th at 943 (citing *Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341.)

10. Collateral estoppel is not avoided simply because a party chose not to make an argument or introduce evidence in the first proceeding. The doctrine bars relitigation by means of evidence that was, or could have been, presented in the first action. (*People v. Sims, supra*, 32 Cal.3d at 481; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 607; *Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal. App.3d 177, 181.) In *Nevada v. United States* (1983) 463 U.S. 110, the United States Supreme Court stated that "the doctrine of res judicata [claim preclusion or issue preclusion] provides that when a final judgment has been entered on the merits of a case, '[it] is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" (*Id.* at pp. 129-130 [citation omitted].) For claims under the IDEA, "a parent may file a 'separate due process complaint on an issue separate from a due process complaint already filed.' 20 U.S.C. § 1415(o). However, any claims in the separate due process complaint on matters at issue in a due process complaint already filed are barred by principles of claim preclusion." (*A.B. v. Clarke County School Dist.* (M.D.Ga., June 8, 2009, No. 3:08-CV-86 (CDL)) 2009 WL 1606544, p. 8.)

FAILURE TO IMPLEMENT AN IEP

11. When a school district does not perform exactly as called for by an IEP, the district does not violate the IDEA unless it is shown to have "... materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP." (*Van Duyn v. Baker School Dist.* 5J(9th Cir. 2007) 502 F.3d 811, 815.) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.*

(N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, p. 7.) There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn, supra*, 502 F.3d 811, 820-822.)

Issue 1. Did District deny Student a FAPE because it failed to implement Student's annual Goal Number 4 contained in the February 28, 2011 IEP?

12. As set forth in Factual Findings 1 through 28, and Legal Conclusions 1 through 11, Student contends that the District failed to implement his annual behavior goal, Goal Number 4, from February 2011 through February 2012, primarily because Student did not attain the goal by February 22, 2012, and his targeted behaviors were not extinguished. The law requires annual goals to be reasonably calculated to provide Student a FAPE at the time they were developed and offered. While a pupil's lack of success or progress may be relevant to challenge a goal's appropriateness, it cannot be used in hindsight as the sole means of measurement. In any event, the appropriateness of the behavior goal was previously litigated in connection with OAH Case Number 2011070771, and Student is precluded from relitigating that issue in this case.

13. Student's 2011 issue that the behavior goal was not appropriate included Student litigating whether he made progress on the goal. Student had the opportunity in that case to present evidence that District failed to implement the goal in some material fashion to establish his lack of progress. The December 2011 Decision determined that Student made adequate progress on his annual goals as of the hearing, implying that the behavior goal was indeed implemented, and that decision is final pending the outcome of Student's appeal or an order from a court of competent jurisdiction. Consequently, Student is estopped from relitigating his claimed lack of progress on the behavior goal due to District's failure to implement it, through November 2, 2011, the last date of hearing in his prior case.

14. Student does not present any legal authority for his claim that the IDEA requires annual goals to be met every year, and the law does not include a requirement or guarantee of success. However, Student is not estopped to present evidence of his lack of progress on the behavior goal as it may be relevant to the time period following the last hearing date. The evidence showed that, beginning in December 2011, Parents privately retained CARD to provide Student with 25 hours a week of ABA therapy, concentrating on rigorous DTT drills after school and on weekends. After the winter school break, Student experienced some regression in his targeted behaviors in his SDC in January and February 2012. Student's frequency of targeted behaviors had increased in Ms. Broumas SDC. However, Student also showed some modest progress or nuanced changes in that class because he had stopped attempting to bite people, although he still bit items. In addition, he had ceased constant mouthing of items and had begun placing his saliva on them instead, either by licking or with his hands. He had also significantly reduced the frequency of the targeted behaviors during his speech and occupational therapy sessions and made progress on his goals in those areas. Parents failed to recognize Student's overall progress in the school setting. However, even if changes in Student's behaviors in the SDC were regressive, those changes did not prove that District materially failed to implement the behavior goal, especially in light of significant credible evidence to the contrary.

15. Overall, District's draft behavior goal at the February 2012 IEP team meeting targeted most of Student's similar behaviors, but shifted the emphasis from sitting to interaction with others while using his sensory items. The similarity between the 2011 and 2012 behavior goals did not establish that Student's modest lapse in progress in the SDC was caused by a material failure of District staff to implement his behavior goal, or by any material deviation from the goal. Student's teacher was persuasive that she consistently used positive ABA strategies and techniques, including DRI, on a daily basis. Student's teacher and service providers credibly and persuasively

established that they faithfully implemented the behavior goal. Based on the foregoing, Student did not establish that District denied him a FAPE by materially failing to implement his behavior goal or by materially deviating from that goal.

RIPENESS

16. A party has the right to present a special education due process complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415 (b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) There is no right to file for a special education due process hearing absent an existing dispute between the parties. A claim is not ripe for resolution “if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” (*Scott v. Pasadena Unified School Dist.* (9th Cir. 2002) 306 F.3d 646, 662 [citations omitted].) The basic rationale of the ripeness doctrine is “to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148 [87 S.Ct. 1507].)

PREDETERMINATION OF IEP OFFER

17. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd.*

of Educ. (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP team meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688 at p. 693, fn. 3.)

PARENTAL COOPERATION IN THE IEP PROCESS

18. The Supreme Court has noted that the IDEA assumes parents, as well as school districts, will cooperate in the IEP process. (*Shaffer v. Weast, supra*, 546 U.S. at 53 [noting that "[t]he core of the [IDEA] ... is the cooperative process that it establishes between parents and schools"]; see also, *Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 468 [parents who failed to cooperate to make their child reasonably available for evaluation forfeited right to reimbursement for private placement]; *Clyde K. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1400, fn. 5 [rejecting a "my way or the highway" approach by parents' attorney].) Parents who refuse to cooperate in a district's efforts to formulate an IEP are generally not entitled to relief. (See, e.g., *Loren F. v. Atlanta Indep. Sch. Sys.* (11th Cir.2003) 349 F.3d 1309, 1312; *MM v. Sch. Dist. of Greenville Cty.* (4th Cir.2002) 303 F.3d 523, 535; *M.S. v. Mullica Tp. Bd. of Educ.* (D.N.J. 2007) 485 F.Supp.2d 555, 568 [denying reimbursement because parents failed to cooperate in completion of IEP]; *E.P. v. San Ramon Valley Unified School Dist.* (N.D.Cal., June 21, 2007, Case No. C05-01390) 2007 WL 1795747, pp. 10-11 [nonpub. opn.].) When parental non-cooperation obstructs the process, courts usually hold that violations do not deny the pupil a FAPE. (See *C.G. v. Five Town Community School Dist.* (1st Cir. 2008) 513 F.3d 279.)

Issue 2. Did District deny Student a FAPE when it failed to consider the private evaluation report of Dr. Korb in connection with the February 16, 2012 IEP team meeting?

19. As set forth in Factual Findings 29 through 48, and Legal Conclusions 1 through 6, and 16 through 18, it is undisputed that when the District IEP team members prepared their draft proposals for Student's February 16, 2012 annual IEP team meeting, they had not received and reviewed Dr. Korb's August 2011 assessment report. Parents gave District two weeks advance notice that they wanted the team to consider the private evaluation. District clearly made a mistake in not distributing the report ahead of time. However, District did not violate the IDEA when its IEP team members prepared their draft proposals without considering Dr. Korb's report, if they considered his report and recommendations in making an offer of placement and services. That question is not reached in this case. In addition, the evidence established that Parents chose to continue with the meeting when the mistake was discovered. The District team members read the report during the meeting and considered it as the meeting kept going. However, the IEP team meeting concluded prior to completing necessary discussions on all agenda items, and District did not reach the point where it made a formal offer of placement and services. Since the team did not have time to finish discussions and make an annual offer of FAPE, all participants, including Parents, agreed to continue the meeting, but did not agree on a date. The evidence showed that all District team members agreed to remain open to working with Parents at the continued meeting. Based on the foregoing, any procedural violation was cured during the meeting and there is no showing Parents were denied meaningful participation as the IEP process was going to continue at the next meeting.

20. It was incumbent upon Parents to cooperate with the District to complete the IEP process and they failed to do so. Since the IEP team meeting was continued to a future date, the team members would have had the opportunity before the next meeting to review Dr. Korb's report in a more thoughtful manner, and determine

whether any of his findings and recommendations should result in changes to the draft proposals. Instead, Parents viewed the District's mistakes as a deliberate and calculated refusal to consider Dr. Korb's report. Parents thereafter declined to attend any further IEP meeting pending the outcome of this case.

21. Because District did not make an offer of placement and services at the February 16, 2012 IEP team meeting, there was no ripe or actionable dispute about District's proposals or refusals for Student's placement, related services, or provision of a FAPE. Even if a court could find there was an actionable dispute about the February 16, 2012 IEP team meeting, the evidence established that the District members of the IEP team did not come to that meeting with a predetermined offer, considered Dr. Korb's report during the meeting, and were willing to continue to consider it at a continued IEP team meeting. Student therefore did not sustain his burden to establish that District denied him a FAPE with respect to draft proposals in the midst of an incomplete IEP process.

REMEDIES

22. When an LEA fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) The IDEA empowers district courts to "grant such relief as the court determines is appropriate." (20 U.S.C. § 1415(i)(2)(C)(iii).)

23. Student did not meet his burden to establish that the District denied him a FAPE in this case. Accordingly, Student is not entitled to any relief.

ORDER

Student's requests for relief are denied.

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 both issues for hearing in this case.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: July 10, 2012

_____/s/_____
DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings