

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ASPIRE PUBLIC SCHOOLS,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2013040872

DECISION

Administrative Law Judge (ALJ) Rebecca Freie, from the Office of Administrative Hearings (OAH), State of California, heard this matter on May 22, 2013, and June 4 through 7, 2013, in Stockton, California.

Program Specialist, Meghann Cazale, represented Aspire Public Schools (District).¹ Special Education Director for the District, Sue Shalvey, was present as the District representative throughout the hearing.²

¹ Ms. Cazale has a multi-subject teaching credential, a mild to moderate (special education) credential, and a master's degree in special education. This is her fourth year with the District.

² Ms. Shalvey has 30 years' experience as a public educator and is a credentialed teacher. She has a bachelor's degree, a master's degree in special education, and has completed her oral examination in a doctoral program at the University of Southern California in educational leadership and instruction. She has worked as both a teacher and an administrator, and received her first teaching credential in 1975. Ms. Shalvey also

Mother represented Student. She was assisted by Holly Cash, an advocate and family friend, throughout the hearing. Father and Student did not attend the hearing. Mother and Father are referred to collectively as "Parents."

On April 19, 2013, the District filed a request for a due process hearing (complaint) with OAH. On May 8, 2013, OAH granted the parties' joint request for a continuance. At hearing, oral and documentary evidence were received. The matter was then continued to June 18, 2013, to permit the parties to submit written closing arguments. The record was closed on June 18, 2013, upon receipt of the closing arguments, and the matter was submitted for decision.³

ISSUE

Did the District's individualized education program (IEP) offer dated March 27, 2013, offer Student a free appropriate public education (FAPE) such that District is entitled to implement it without parental consent? ⁴

had an administrative credential that expired in 2007, and is in the process of renewing that credential. She began working for the District in 2009.

³ For the record, the District's closing argument is designated as District's Exhibit D-92, and Student's closing argument is designated as Student's Exhibit S-64.

⁴ The wording of the issue in the Order Following Prehearing Conference was "May the District implement the IEP dated March 5, 2013 without parent consent?" The wording has been changed in this Decision for clarity, and is not substantive. The IEP at issue was completed at a March 27, 2013 IEP team meeting. The IEP was started at an IEP team meeting on March 5, 2013, and at times the IEP was referred to as the March 5, 2013 IEP. In this Decision the IEP will be referred to as the March 27, 2013 IEP.

Proposed Resolutions: The District is asking OAH to issue an order finding that:

1. The District has made reasonable attempts to ensure that Parents were fully informed and provided opportunities to participate in the process;
2. The March 27, 2013 IEP is procedurally compliant and substantively offered Student a FAPE in the least restrictive environment; and
3. The District may implement the March 27, 2013 IEP without parental consent.

CONTENTIONS

The District contends that the IEP of March 27, 2013, offered Student a procedural and substantive FAPE. It argues that although a Parent was not present at the March 27, 2013 IEP team meeting because Mother had requested that the meeting be rescheduled, it was entitled to hold the meeting without one or both Parents being present.⁵ The District claims that it was justified in doing so because Mother had obstructed the IEP process during the 2011-2012 school year (SY) which resulted in the parties participating in an alternative dispute resolution (ADR) process. Further, the agreement from that process required an IEP meeting to be held no later than December 8, 2012, but Mother unreasonably asked the District to reschedule a December 2012 IEP team meeting, subsequently refused to reschedule that meeting in January 2013, and subsequently canceled a mediation with OAH that the District had requested. It further contends that it kept adequate records and documentation to

⁵ Mother is the Parent who primarily participates in the IEP process and in communication with the District. However, it does not appear that Father is uninvolved in the process. Therefore, "Parents" will be used in this Decision at times, rather than just "Mother."

support this action. Finally, the District claims that its offer of placement and services for Student arrived at during the March 27, 2013 meeting, was an offer of a FAPE, and therefore it should be allowed to implement this IEP without Parental consent.

Student claims that Parents were entitled to ask to reschedule both a December 2012 IEP team meeting, and the March 27, 2013 meeting, because the District had failed to timely provide Mother with written reports that were to be discussed at those meetings. Therefore, they could not meaningfully participate in those meetings and engage in the IEP decision-making process. Student claims that Mother has a processing issue that makes it difficult for her to fully participate in IEP team meetings without having an opportunity to read reports beforehand to prepare for the meeting. Student also contends that although the District offered IEP dates in January 2013, the times offered for the January 2013 dates conflicted with Mother's work schedule. In addition, Student claims that Mother repeatedly sent emails to the District in December 2012 and January 2013, asking a question which the District did not answer, and she needed the answer to this question to determine whether she should proceed with an IEP team meeting in January as Student's representative, and mediation, or needed to obtain legal counsel. Student also argues that Mother needed information that the District did not provide her with, to participate in the March 27, 2013 IEP team meeting, which was a continuation of an IEP team meeting held March 5, 2013, and that was why Mother asked for the March 27, 2013 meeting, to be rescheduled. Because all of Mother's actions were reasonable and not intended to interfere with the IEP process, Student argues that the District should not have convened the March 27, 2013, IEP team meeting without a Parent being present. Further, even if the District was justified in holding that meeting, the IEP developed at that meeting does not offer Student a FAPE.

In this Decision, as will be discussed below, the undersigned ALJ finds that the District violated Parents' procedural rights pursuant to the Individuals with Disabilities

Education Act (IDEA) when it held the IEP meeting of March 27, 2013, without a Parent in attendance, and this procedural violation denied Parents meaningful participation in the IEP process. Since District's offer is procedurally defective, there is no need to reach the question of whether the District's offer of placement and services to Student, developed at the March 27, 2013 IEP team meeting, substantively offered a FAPE. Another IEP team meeting, with all required participants, must now be held to develop an IEP for Student for the coming school year.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is presently 14 years of age and resides with Parents in a town near Stockton. He attends Vanguard College Preparatory Academy (Vanguard), a charter school in Stockton, and has done so since August 2011, the beginning of the 2011-2012 school year (SY).

2. Vanguard is part of the District, which is comprised of a network of charter schools with many sites throughout California. Over 12,000 students attend schools of the District in California, and approximately 1,000 of them are students with IEP's. Charter schools are public schools, but are exempt from many of the statutes and regulations by which public school districts are bound.⁶ However, they are not exempt from California special education statutes and regulations.⁷

⁶ Ed. Code § 47600 et seq.

⁷ Ed. Code § 56145.

3. The District is part of the El Dorado County Charter SELPA [Special Education Local Planning Area].⁸ This SELPA provides resources and other services for member charter schools throughout California.

4. Student was found eligible for special education and related services by the school district in which he resides many years ago. At a young age he was medically diagnosed with pervasive developmental disorder, not otherwise specified (PDD-NOS), a condition on the autism spectrum, and the resulting maladaptive behaviors adversely impact his ability to obtain educational benefit without special education and related services. Therefore he needs special education to meet his unique needs and provide him with a FAPE.

STUDENT'S PRIOR SCHOOL DISTRICT AND IEP'S

5. When a student with a disability requires special education and services to receive educational benefit, an IEP must be developed. The IEP is developed by a team that consists of parents, school district personnel, assessors, and often other service providers. An IEP is a document that details an educational program for a student with a disability. The program must meet the student's unique needs, and provide him with a FAPE.

6. Prior to attending Vanguard, Student was enrolled in the public school district where he resides. He has received special education services since at least 2005. One of the services he received, beginning in 2005, was a fulltime one-to-one aide in school, called a behavioral therapist (BT), as well as several hours of consultation services

⁸ A SELPA is often several school districts that pool their resources to coordinate services for special education students in the districts. Some school districts are their own SELPA.

from Genesis Behavior Services (Genesis). He also received in-home services from Genesis. Genesis is a nonpublic agency (NPA), certified by the California Department of Education (CDE) to provide special education services to children in school, home, and community settings.

7. In early 2011, Student's previous school district replaced Genesis with another NPA as the provider of Student's behavioral services. Prior to that time, Student was on track to have his BT faded out during the 2010-2011 school year (SY). The fade out program called for a physical distancing of the BT and gradual reduction of services as Student became better able to monitor his own behavior, and replace maladaptive behaviors with positive behaviors without the intervention of a BT. The plan was to eliminate his need for a one-to-one aide by the end of that school year. However, he regressed with the new NPA providing services. Even before this occurred Mother had developed a deep mistrust of that school district, and this has caused her to approach the IEP process with caution.

2011-2012 SY

8. Mother learned about the District and its charter schools during the summer of 2011, and sought to have Student enrolled for his eighth grade school year at Vanguard. She met with District personnel before the beginning of the 2011-2012 SY to determine whether the District could meet his special education needs, and at Mother's invitation Genesis staff were also present. Satisfied that the District could meet Student's needs, Parents enrolled him at Vanguard.

9. Although Student had not had his BT faded in his local school district, Mother and the District decided that he should begin the school year without the direct services of a BT. Instead, Mother and the District agreed that Genesis would provide consultation services to the district in relation to Student, and the District would provide

their own personnel to assist Student as needed. Mother referred to this in her testimony as a “trial placement.”^{9 10}

10. Initially, Student was successful at Vanguard without any direct aide services. However, this period lasted only two months, when it became obvious that Student still needed one-to-one assistance at school. Therefore, in consultation with Genesis, the District provided its own aide for Student until May 2012, when Genesis resumed the provision of a fulltime BT for Student in the school setting.

11. The District convened several IEP team meetings for Student during the 2011-2012 SY. Ms. Shalvey testified that for the 2011-2012 SY, Student’s last agreed-upon IEP was developed in 2010 at his previous school district.¹¹ After December 2011, the District held several IEP team meetings. Some new annual goals were approved by Mother. Due to concerns about Student’s negative behaviors, at least one functional

⁹ There are certain procedural requirements that must be met when a student transfers from one school district to another, including an IEP team meeting after 30 days to develop a new IEP in the new school district. The evidence was unclear as to what actually occurred in this regard when Student began attending Vanguard, but this is not an issue in this case.

¹⁰ The term “trial placement” is not used in either state or federal statutory and regulatory law, since all placements must be made pursuant to an IEP. If a placement is unsuccessful, a new IEP team meeting must be convened to develop a change of placement.

¹¹ Student’s annual IEP was supposed to be developed by the IEP team in December 2011, but whether this happened was unclear, and is not relevant to this Decision.

analysis assessment (FAA) was conducted by the District during the 2011-2012 SY, and the resultant written report and proposed behavior plan were also reviewed at one or more IEP team meetings.¹² IEP team meetings for Student often lasted several hours, and often had to be reconvened at a later date.

Mother's Request for Written Reports in Advance of an IEP Team Meeting

12. Parents of a student with an IEP must be given the opportunity to meaningfully participate in the IEP process. Also, when a Student is assessed, a written assessment report must be provided to parents. However, there is no statute or regulation that governs when, in the IEP process, parents are to receive an assessment report. Nor is there any law that requires a school district to provide a parent in advance of an IEP team meeting with copies of drafts of all written documents, such as proposed goals, that are going to be discussed at the meeting.

13. However, if a parent has a disability that interferes with her meaningful participation in the IEP process and thus requires special accommodations, the school district is obligated to provide the parent with reasonable accommodations. The determination as to what is reasonable is made on a case by case basis.

14. One of the accommodations Mother requested for attending an IEP team meeting with the District was that she be provided with all written reports, including

¹² When a student has serious behavior problems that impede his learning or that of others, a school district is required to conduct an FAA, and if warranted, develop a behavior plan. An FAA describes the behaviors targeted and manifestations of the behaviors, as well as antecedents and functions of the behaviors, replacement behaviors and positive reinforcers for the replacement behaviors. California regulations provide detailed criteria that govern the contents of an FAA.

progress reports on annual goals, and other draft documents that would be considered at the IEP team meeting, at least five days before the meeting was held. Mother credibly explained in her testimony, and in at least one email to the District, that it is very difficult for her to process information when she sees it for the first time at an IEP team meeting. This is also why Mother insisted on audio recording every IEP team meeting. In one email to District staff that was admitted into evidence, Mother explained that she has an auditory processing disorder which is why she refused to appear at an IEP team meeting via telephone. In addition, Mother works fulltime which further limits the time she has to review information before an IEP team meeting during her work week. The District does not dispute this evidence.

15. At the hearing Mother credibly described what she experiences when she attends an IEP team meeting with the District. When she arrives at the meeting site, she must wait in the waiting area until someone comes to escort her to the room where the meeting is being held. She enters the room and is confronted by many people already seated around a conference table, who all have been talking to one another while waiting for her. Because school personnel generally create and control much of the information that is considered as the IEP team develops an IEP for Student, they have access to this information for many days before the meeting, and have had an opportunity to thoroughly review that information. If most of the information is presented to Mother orally at the IEP team meeting, and she has not had previous access to it, it is difficult for her to process the information and meaningfully participate in the IEP process as an equal team member.

July 2012 ADR

16. By the summer of 2012, the District was concerned that it did not have a complete, current and consented-to IEP for Student to start the 2012-2013 SY. This, in

part, was because the existing IEP had been amended several times.¹³ The District had also acknowledged in April 2012 that it owed Student some compensatory education in the area of behavior services. Therefore, the District called upon its SELPA to convene an ADR session.¹⁴

17. An ADR meeting was held on July 2, 2012. In attendance were Mother, Ms. Shalvey, and Amy Andersen, the SELPA Director and ADR facilitator. An ADR agreement was executed by all parties. It called for the District to provide Student with up to 1,228 hours of compensatory education services from Genesis, to be used through the fall semester of the 2013-2014, which ends in December 2013. The ADR also required a behavior, social-emotional, and mental health assessment of Student (mental health assessment) to be performed by an NPA of the District's choosing, as well as another FAA to be performed by Genesis as an independent educational evaluation (IEE).¹⁵ These assessments would not begin until October 1, 2012, and would be completed so that they could be reviewed at the annual IEP team meeting that was to be held no later than December 8, 2012. Finally, a facilitated IEP team meeting was to be held before the

¹³ The evidence at hearing was not clear as to the date of the last consented-to IEP.

¹⁴ Ed. Code § 56205, subd. (b)(5).

¹⁵ An IEE is "an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) A school district may agree, be required by law, or be ordered to publicly fund an IEE under certain circumstances.

beginning of the 2012-2013 SY, at which a consolidated IEP would be developed.¹⁶ This meeting was scheduled to be held on August 17, 2012. The parties waived all claims accrued up to the date of the ADR session.

18. The District refers to events during the 2011-2012 SY as contributing factors to its decision to hold the March 27, 2013 IEP team meeting without a Parent. However, because all claims were waived up to July 2, 2012, when the parties signed the ADR agreement, those events have no relevance in this proceeding, and need not be addressed.

2012-2013 SY

IEP Team Meeting of August 17, 2012

19. In preparation for the August 2012 IEP team meeting, District personnel and Mother engaged in a series of communications that negatively impacted the relationship between the parties and the consensus that had been reached at the ADR meeting. From August 15 to 16, 2012, there was email correspondence between Mother and Ms. Cazale. In the first email, Mother asked Ms. Cazale for a copy of the last IEP she signed. On August 16, 2012, Ms. Cazale emailed Mother the last certified IEP dated June 15, 2012, which was held in the District's computer software program known as the Special Education Information System (SEIS).

20. The District uses SEIS to create and maintain IEP'S. When an IEP is developed using SEIS, and is then consented to, SEIS maintains copies of this IEP, noting

¹⁶ A facilitated IEP team meeting is one where a trained facilitator from an outside agency, or a mediator, attends the meeting and acts as an intermediary between parents and a school district. There is no statutory or regulatory law governing facilitated IEP team meetings in California.

that it has been “certified.” However, in most cases the computerized version that is kept is one without signatures or handwritten changes to the pages that may have been made during or after the IEP team meeting where the IEP was developed. Pages with handwriting on them and separate documents that someone wants to be part of the IEP can be scanned into the system, but this is not always done. The next time an annual IEP meeting is held, the drafting of the IEP usually begins on a new computerized version that is populated with the information from the last certified IEP.

21. When Mother signs her consent to an IEP for Student, she initials each page of the hard copy document, and sometimes handwrites notes. Sometimes she will add a document such as a copy of the most recently agreed-to behavior plan. The SEIS version of the June 2012 IEP sent to her by Ms. Cazale did not include copies of these pages or other documents Mother wanted to have included as part of that IEP when she signed it. Mother sent an email to Ms. Cazale stating that this was not the last signed IEP because it did not have her handwritten initials on each page, and there were missing pages that included a behavior plan, data from Genesis, and other documents. She then wrote, “What [IEP] is currently being implemented? This is making me very nervous.”

22. When Ms. Shalvey received a copy of this email, she sent a short email response, thinking she was sending it only to Ms. Cazale. Unfortunately she sent it to Mother. It was unclear whether she sent it to anyone else. The email referred to Mother’s “freakin notes,” and ended as follows, “I hope Dubravka and Sadie are ready for this. [Dubravka Tomazin and Sadie Pinody were the two SELPA staff who were to facilitate the IEP team meeting the next day.] Bringing Zanex.”

23. Mother’s prompt response was restrained and gracious, under the circumstances. She added it to the string of emails, which ended with Ms. Shalvey’s, and directed her response to the SELPA facilitators, with a copy to Ms. Shalvey:

Dubravka and Sadie – it is not my intention to cause anyone to have to be on Xanax to attend my son’s IEP meetings. However, I do take my role as an equal IEP team member seriously and try not [to] sign things like IEPs unless I am fully informed. Sue obviously has negative feelings towards me and/or has certain preconceived notions of my parental participation. In any event, expressing feelings like this about a parent to other members of the IEP team (which I assume this email was intended for) is, in my opinion, unprofessional at best. At this point, I am not comfortable having Sue physically participate in IEP meetings with me. I feel attacked and vulnerable.

The email continued with Mother saying that she would not attend the IEP team meeting if Ms. Shalvey was present. Mother concluded the email by stating, “I have been nothing but open to any and all input and have been honest and up front from day one. Sadly, it appears to not have been reciprocal.”

24. Ms. Shalvey telephoned Mother shortly thereafter to apologize, but the relationship between Mother, Ms. Shalvey and the District was seriously damaged. Mother attended the facilitated IEP team meeting on August 17, 2012, without Ms. Shalvey present, and the parties developed an IEP that was consented to by Mother on August 31, 2012

25. This IEP called for Student to have a one-to-one BT from Genesis during the entire school day, as well as time after the regular school day to monitor Student’s

completion of assignments at an on-campus location. In addition, Genesis was to provide 21 hours of monthly consultation services to the District regarding Student.¹⁷

2012-2013 SY

Events Preceding the December 2012 IEP Team Meeting

26. There are two parts to the legal analysis of whether a school district offered a pupil a FAPE: whether the district has complied with the procedures set forth in the Individuals with Disabilities Education Act (IDEA), and whether the IEP developed through those procedures was substantively appropriate. Procedural flaws do not result in a finding of a denial of a 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 a FAPE; or (c) caused a deprivation of educational benefits. In order to determine whether the District's March 27, 2013 IEP offer was procedurally compliant with the IDEA, because a Parent was not present at that meeting, it is necessary to view it in the context of Parents' participation in the IEP process in the months preceding that meeting.

27. A parent is a very important member of the IEP team, and holding an IEP meeting without a parent being present may be a serious procedural violation. Certain legal requirements must be met for an IEP team to meet without a parent, such as good faith attempts to schedule a meeting at a mutually agreeable time and place, offering the parent telephonic participation, and documenting all attempts the school district has made to encourage the parent to attend.

¹⁷ There was no evidence that these services supplanted the 1228 hours of compensatory education services from Genesis that was provided for in the ADR agreement of July 2, 2012.

28. After Ms. Shalvey's misaddressed email of August 16, 2012, Ms. Cazale became the special education contact person for Mother concerning special education concerns. An educational specialist, Nick Lapena was assigned to Student for the 2012-2013 SY.¹⁸ For the next several months, Mr. Lapena handled many of the clerical aspects of the IEP process, such as arranging dates for IEP team meetings, sending Mother documents in advance of those scheduled meetings, and handling many of the day-to-day special education instructional aspects required by the August 17, 2012 IEP.

29. On October 1, 2012, the District sent Parents the consent to assessment forms for the mental health assessment and the Genesis FAA the parties had agreed to at the ADR meeting in July. Mother had a few questions she emailed to Ms. Cazale, primarily about the mental health assessment. On October 23, 2012, Mother returned the signed consent forms. Consistent with her IEP preparation practice, she asked to be provided with the written assessment reports five days prior to the IEP meeting, understanding that it had not yet been scheduled, but was to take place in early December. The District did not dispute this request, nor was there any evidence that it had done so in the past.

December 7, 2012 IEP Team Meeting

30. A pattern of parental obstruction in the IEP process may be justification for a school district to hold an IEP team meeting without a parent being present. The

¹⁸ Mr. Lapena attended California State University at Stanislaus, and has completed coursework at Brandman University to obtain his special education credential. He is currently working as an intern. He has worked for the District for two years, and for the 2011-2012 SY was an "afterschool" educator. Student had a different educational specialist the previous school year.

District argues that one of the incidents of Parental “obstruction” that entitled it to hold the March 27, 2013 IEP team meeting without a Parent being present was Mother’s request to reschedule an IEP team meeting set for December 7, 2012, because she received a document less than five days prior to the date of the meeting. As found below, Mother’s request to reschedule the December 7, 2012 IEP team meeting, did not justify or support the District’s subsequent decision to hold the March 2013 IEP team meeting without the presence of a Parent.

31. In late October 2012, Mr. Lapena contacted Mother so that the December IEP team meeting could be scheduled. The parties agreed that the IEP meeting would be held December 7, 2012, and Mother would be sent the written assessments and other documents no later than November 30, 2012, so that she would have time to familiarize herself with them prior to the meeting.

32. On November 30, 2012, Mr. Lapena emailed Mother a draft of Student’s present levels of performance (PLOP’s), a copy of the mental health assessment, and the Genesis FAA.¹⁹ The Genesis FAA contained a proposed behavior intervention plan (BIP). When Mother reviewed the FAA, she realized that a proposed BIP was incorporated in the FAA, but those pages were not sent to her. She immediately emailed Mr. Lapena and

¹⁹ When goals are developed at an annual IEP team meeting the first step, after reviewing progress on the previous year’s goals, is to look at the student’s PLOP’s. Student had goals in several areas including academics, behavior, and social-emotional. Alyson Dyer, Student’s Genesis case manager, met with Mr. Lapena periodically during the 2012-2013 SY to review and update the PLOP’s. Before an IEP team meeting Mr. Lapena had the ability to place and print out draft PLOP’s in the SEIS system that could then be sent to Mother.

asked for the proposed BIP, stating that if she received it by 10:00 a.m. on December 3, 2012, she would not need to reschedule the December 7, 2012 IEP team meeting.

33. The District did not send the proposed BIP to Mother on December 3, 2012. Shortly before 10:00 a.m., on December 3, 2013, Mother emailed Mr. Lapena that the IEP team meeting set for December 7, 2012, would need to be rescheduled because she had not received the proposed BIP. There was then a flurry of emails between Mother, Ms. Cazale and Tamara Clay, the SELPA program manager who was to facilitate the IEP team meeting. Ms. Cazale explained to Mother that the District, relying on a conversation with Ms. Clay, was refusing to send the proposed BIP because the District believed a proposed BIP could be construed as being “predetermined.”²⁰ Further, Ms. Cazale stated that Genesis needed to redo the proposed BIP because it was “not in line with the SELPA’s guidelines.”

34. Predetermination occurs when a school district unilaterally decides prior to an IEP team meeting what it is going to offer, and enters that meeting with a closed mind as to that offer.²¹ The evidence established that if an FAA is conducted, and the assessor decides that the student requires either a behavior support plan (BSP) or a BIP, a proposed behavior plan will usually be attached to or part of the FAA, and that proposed plan will then be discussed, and changed if necessary, at the IEP team meeting

²⁰ It is unlikely that Ms. Clay actually told Ms. Cazale not to send the proposed BIP to Mother because Ms. Clay’s position was like that of a mediator, and she made it clear in emails that were introduced as evidence, that the SELPA would not take sides in any dispute between Mother and the District.

²¹ *H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31].

where the FAA is reviewed.²² Mother's credible and unrefuted testimony established that the District had conducted two FAA's of Student the previous school year, and a proposed behavior plan was attached to each report. Therefore, the District's position that it could not produce the BIP in advance of the IEP meeting because of "predetermination" was factually and legally incorrect.

35. Further, the proposed BIP was created by Genesis as part of an IEE District agreed to fund in the ADR agreement. Just because Genesis sent the FAA only to the District, and not to Mother, the District is not entitled to withhold any part of the FAA. The proposed BIP should have been sent to Mother by the District on November 30, 2012, as part of the FAA. When a school district withholds documents and other important information from parents, they may lose a significant opportunity to participate in the IEP process.

36. Mid-afternoon on December 4, 2012, Mother emailed Ms. Clay that the December 7, 2012 IEP team meeting, needed to be rescheduled because, without the proposed BIP, she did not feel she would be adequately prepared to fully participate in an IEP team meeting. After 5:00 p.m., on Wednesday, December 5, 2012, the District sent the original proposed BIP, and a new proposed BIP Genesis had prepared to comply with the SELPA's guidelines and Ms. Cazales direction to them that they do so. The attached email also contained a link to the SELPA's guidelines. This was in response to an email from Mother responding to another District email which will be discussed below.

37. The District argues that Mother did not have a bona fide reason to ask to reschedule the December 7, 2012 IEP team meeting, and used the lack of the BIP as a

²² A BSP is less formal than a BIP, and is used when a student has behavior issues that are not serious enough to warrant a BIP.

pretext to interfere with the District's ability to conduct the IEP team meeting on that date. The evidence did not establish this.

38. As previously discussed, Mother established that it was very important for her to receive documents five days before an IEP team meeting. Because she processed oral information slowly, it made her feel more comfortable and better able to participate in the IEP team meeting and decision-making process when she had a few days to review documents before the scheduled IEP team meeting. When the District withheld the original proposed BIP from Mother and then directed Genesis to draft another BIP that met the SELPA guidelines, the District further damaged Mother's trust. Due to her processing disorder, and the need for her now to compare the original proposed BIP with the new one to see if anything had changed, there was not sufficient time for her to prepare for the December 7, 2012 IEP team meeting. The District cannot use Mother's request to reschedule the IEP team meeting of December 7, 2012, as a reason it was justified in holding the March 27, 2013 IEP team meeting without either Parent being present.

District's Attempt to Hold an IEP Team Meeting in January 2013

39. As previously noted, a Parent is an important part of the IEP process. IEP team meetings are to be scheduled at a time and place that is mutually agreeable to both parents and the school District.

40. The District also claims that it was entitled to hold the IEP team meeting on March 27, 2013, without a Parent being present, because Parents did not respond to the District's offer to hold an IEP team meeting in January 2013. This, it argues, is another example of Mother "obstructing" the IEP process.

41. On the morning of December 5, 2012, Ms. Cazale sent Mother an email suggesting three January 2013 dates for an IEP team meeting, January 9, 10, or 11, 2013.

Written notices for each date and time were included. The start time for all three meeting dates was before 1:00 p.m. Mother credibly established that the District knew she could not attend IEP meetings that began before that time due to her work schedule. Ms. Cazale also stated in the email that if Mother refused to agree to attend an IEP team meeting on these dates, the District would convene an IEP team meeting without her on January 11, 2013. There was no suggestion in the letter that Parents could request different dates and/or starting times for a January 2013 IEP team meeting. In the email Ms. Cazale stated that the District needed to know which of the three dates were acceptable by December 14, 2012.

42. Mother immediately responded to this email by stating that without the BIP, she could not fully participate in the IEP team meeting, and asked again that it be sent to her. She also asked why the original proposed BIP did not meet SELPA criteria, and said that until/unless she was provide this this information, she could not determine whether or not she could meet on any of the suggested days in January 2013.

43. As previously noted, after 5:00 p.m., on December 5, 2012, Ms. Cazale emailed to Mother the original Genesis proposed BIP, as well as another that Genesis had completed using the format recommended in the SELPA guidelines. The email included a link to the online SELPA guidelines, but no reference as to where in the guidelines Mother could find the information she was seeking. Again, Ms. Cazale did not directly respond to Mother's question as to why the original Genesis proposed BIP did not meet SELPA criteria.

44. On December 6, 2012, having reviewed the SELPA guidelines, a 130 page document, Mother again emailed Ms. Cazale, and asked if the reason the original proposed BIP did not meet SELPA guidelines was because it was not in the PENT

format.²³ Mother emailed Ms. Cazale the same question on December 12, and 21, 2013, saying she could not address scheduling an IEP team meeting in January 2013, without this information, as she did not know if she needed to retain legal counsel. Ms. Cazale did not answer this question until she testified at the due process hearing.²⁴

45. The District did not establish that Mother's response to the District's unilateral demand that an IEP team meeting be scheduled on one of three dates in January 2013, justified holding the IEP team meeting on March 27, 2013, without a Parent being present. First, the District implied in the email that it would only meet on one of those three days. This was not a request to schedule an IEP meeting at a mutually agreeable time and place. There was nothing in the email to suggest that Mother was entitled to ask for other dates and times to be considered. Secondly, Mother asked a question about the BIP and SELPA guidelines, and explained she needed an answer so

²³ PENT is an acronym for Positive Environments, Network of Trainers. The PENT Cadre is an organization that has members from school districts, SELPA's and the California Diagnostic Centers that are part of CDE. PENT has developed a format for BIP's that many school districts use. Amalie Holly, program director with Genesis and a board certified behavior analyst testified that Genesis does not use the PENT format because it restricts the number of characters in each field, and limits the information they can provide in a BIP. Ms. Cazale testified that the District likes BIP's to be in the PENT format because that is the format with which District teachers are most familiar. Mother explained in one of her emails that she found the Genesis BIP format much easier to understand.

²⁴ Mother also asked the question about the BIP meeting SELPA guidelines in several other emails in January and February 2013, but never received a response.

she could determine whether she needed legal counsel, because the District had asked Genesis to change their proposed BIP. The District simply ignored the question. Without an answer, Mother believed she could not fully participate in the IEP team process, and given her increasing distrust of the District, this was a reasonable belief.

District's January 2013 Mediation Only Request

46. The District also argues that Mother's refusal to attend a mediation session originally scheduled on January 23, 2013, and rescheduled to February 13, 2013, is another reason why it was entitled to hold the IEP team meeting of March 27, 2013, without a Parent being present. However, mediation is a voluntary process, and a party cannot be compelled to participate in mediation.

47. No IEP team meeting was held in January. Instead, on January 8, 2013, the District filed a request for "Mediation Only" with OAH, bearing OAH Case Number 2013010225.²⁵ The request for mediation only stated the reason for the request was that the District wanted mediation to resolve issues that were preventing it from having a current IEP for Student.²⁶

48. Mother questioned the facts stated in the request, and asked the District for additional information and explanation. No one from the District responded. Mother advised OAH that she could not attend the mediation scheduled for January 23, 2013.

²⁵ Education Code section 56500.3 authorizes a parent or school district to file a request for an OAH mediation without requesting a due process hearing.

²⁶ However, in its closing argument the District states that it sought mediation so the parties could arrange for a new IEP date. A reading of the request for mediation only does not confirm this.

49. The parties negotiated possible dates when the mediation could be held, and mutually agreed on February 13, 2013. On February 4, 2013, because the District still had not responded to her continuing question about the BIP and the PENT criteria, Mother canceled the mediation. However, she asked the District if, instead of mediation, the parties could have an IEP team meeting on February 13, 2013. This resulted in the parties agreeing to hold a facilitated IEP team meeting on March 5, 2013.

50. Mother's request to reschedule, and her ultimate refusal to participate in mediation cannot be used by the District as an example of parental obstruction of the IEP process. Because mediation is a voluntary process, refusal of a parent to participate cannot later be used by a school district to justify holding an IEP team meeting without a Parent.

The March 5, 2013 IEP Team Meeting

51. During the month of February 2013, the parties worked together to schedule a new IEP team meeting. On February 5, 2013, Ms. Clay informed the parties that she was unable to facilitate an IEP team meeting on February 13, 2013, but she offered other dates, including February 21, 2013, and Mother agreed to that date. Ms. Cazale was copied in this email correspondence, but the District did not respond to either email until Mother again emailed Ms. Cazale on February 7, 2013. Ms. Cazale then responded that because there were so many people involved, it was difficult to work with everyone's schedule in such a "short" period of time to arrange for a February 21, 2013 IEP team meeting. In addition, she said, the District would need to arrange for a SELPA facilitator, and it did not know if one would be available. However, it was Ms. Clay from the SELPA who originally offered February 21, 2013, as a date for the IEP team meeting because it was a date which she was available to act as facilitator, and Ms. Cazale was copied on that email.

52. The parties were finally able to agree to an IEP team meeting date of March 5, 2013. Although Ms. Clay could not facilitate on that date, Ms. Tomazin and Ms. Pinody from the SELPA, facilitators for the IEP team meeting on August 17, 2012, were available and agreed to facilitate.

53. On February 19, 2013, Mr. Lapena sent Mother a notice for the March 5, 2013 IEP team meeting. Mother returned it on February 20, 2013, noting that she now had the unaltered Genesis FAA and proposed BIP sent by Genesis to the District on November 30, 2012, the revised proposed BIP, and the mental health assessment. She asked for "all other reports, documentation, proposed goals, PLOPs, etc. that [would] be presented at the IEP meeting no later than 2/28/13." The District did not respond, so on March 1, 2013, Mother sent an email to Ms. Cazale, saying there were just four days until the meeting, and she had not received any additional documents, which she believed should include updated PLOP's and an agenda. She ended by email by stating, "Please advise. I really don't want to have to reschedule again."²⁷ The PLOP's were not sent to her, and it was unclear whether she was sent a copy of the agenda.

54. The IEP team met on March 5, 2013. Ms. Pinody and Ms. Tomazin were present as facilitators. Despite the fact that Mother had not received the PLOP's in advance, she attended the meeting. The mental health assessment was reviewed, and Mother noted, and it was affirmed at hearing, that Student's behavior had drastically improved since both assessment reports were written, and he had, as of January 2013, a new BT to whom he responded and really liked. The team had a lengthy discussion about whether Student still needed a BIP rather than a BSP. There was some discussion

²⁷ The PLOP's from November 30, 2012, prepared for the anticipated IEP team meeting date of December 7, 2012, which had previously been sent to Mother were now outdated.

about his need for a fulltime BT, and it was decided to table that discussion and move on. There was no discussion or suggestion that the District was seeking to replace the Genesis BT with an aide of its own.

55. Mr. Lapena shared Student's current PLOP's verbally. Mother expressed to the team that she was not happy that she had not received this information in writing at least five days in advance of the IEP team meeting because she needed more time to process the information, and then be able to actively participate in the discussion.

MOTHER'S REQUEST FOR GENESIS WRITTEN REPORTS

56. There is no statutory, regulatory or case law that requires an NPA to provide school districts and parents with written reports concerning the students they serve. In October 2012, Mother communicated her concern that she was no longer receiving periodic written reports about Student's progress from Genesis that she had been accustomed to receiving in the past, including Student's previous school year at Vanguard. These reports included quarterly reports that were referred to as data collection summaries, and an annual update report.

57. The evidence established that the District does not want any written reports from NPA's that serve its students, and tells them not to provide these reports to either the District or parents, and it told Genesis this in the fall of 2012. Instead, the District wants NPA providers to periodically meet with the educational specialist assigned to the student, and verbally review the progress of the student to whom they are assigned. The District believes this type of information should only be shared with parents in an IEP team meeting. However, the evidence established that Genesis had only been asked by one other school district not to provide written reports, and it has worked with over 100 school districts.

58. The District's policy suggests significant problems in terms of documenting the child's progress in objective and professional ways, and aiding parental understanding of a child's progress, thus enabling them to meaningfully participate in the IEP process. A written report is unambiguous and much less likely to be misinterpreted than when an NPA case manager communicates information verbally to the educational specialist, and the educational specialist later communicates the information at a subsequent IEP team meeting. Further, a written report assists the service provider in relaying all of the important information about a student to those who will be making educational decisions. And, without written reports, there is no ongoing written record in a student's file as to previous levels of performance, measurable gains or losses, and a clear picture of the student's progress, that can inform the IEP team at meetings as to what a student needs in terms of annual goals and services. Although there is no statutory or regulatory law requiring school districts to receive these reports and pass copies on to parents, the District's decision to not allow Genesis to provide periodic written reports to both it and Parents was another factor that negatively impacted Mother's trust in the District as well as her ability to understand Student's progress and meaningfully participate in the IEP process.

59. Following the discussion of Student's PLOP's, the IEP team then moved on to the issue of written reports from Genesis. Mother expressed concern that she was not receiving written reports, as she had in previous school years, including his previous school year at Vanguard. The District indicated that it only wanted to share information in the context of IEP meetings as opposed to providing Mother with separate written updates from the NPA. One of the SELPA facilitators noted that PLOP's should be entered into SEIS and updated there, but also said that written reports from Genesis

could be uploaded into that system as attachments. However, since so much remained to be discussed at the meeting, this issue was also tabled.²⁸

60. In mid-afternoon, the SELPA facilitators noted that there was not enough time to finish developing an IEP for Student, so the parties discussed a continuation date of March 27, 2013. The District agreed that Mr. Lapena would provide Mother with written PLOPs, a progress report on Student's previous goals, and District's proposed annual goals prior to this meeting.²⁹

61. On March 7, 2013, Mr. Lapena sent Mother the IEP team meeting notice for March 27, 2013, along with a draft of proposed goals and PLOPs for Student, as well as IEP notes from the March 5, 2013 meeting. Mother returned the notice, but did not sign agreeing to meet on March 27, 2013, instead she stated that because she had "not received all the documents at least 5 days prior to the IEP meeting . . . (specifically the

²⁸ The District argued that there was a written Genesis report given to Mother at the March 5, 2013 IEP team meeting. However, the notes from that meeting do not reflect this, nor was there testimony from any witness in this regard. The only Genesis report at the meeting was the FAA from Genesis that was completed November 30, 2012. The record established that Mother asked Genesis to prepare a written report for her after the March 5, 2013 IEP team meeting, and a data collection summary report was sent to her by Genesis on April 8, 2013, although it had the date of the initial IEP team meeting, March 5, 2013.

²⁹ Although Student claimed in his closing argument that the District agreed to provide Mother with a written Genesis report prior to the next meeting, the IEP notes from the March 5, 2013 meeting, did not substantiate this, nor did the testimony of any witness.

Genesis Annual Update report). . . . I am unable to offer my parental input or participate as an equal IEP team member.” In the meantime, knowing the District’s stance that it did not want these written reports, she asked Genesis to write and provide her with a report for Student, using some of the compensatory education hours to do so.

The March 27, 2013 IEP Team Meeting

62. In addition to its arguments that Parents obstructed the IEP process, the District argues that it was entitled to hold the March 27 2013 IEP team meeting, without a Parent being present, because procedurally it was required to have completed an IEP by December 8, 2012, according to the terms of the ADR agreement. On March 22, 2013, Mr. Lapena sent Mother the District’s proposed goals and an agenda for the March 27, 2013 IEP team meeting. On March 25, 2013, Mother sent Mr. Lapena a two page email with her comments on the goals. She also offered an explanation about the importance of Genesis written reports, and stated that if she did not receive one by the next day, she would need to reschedule the IEP team meeting set for March 27, 2013. By this communication, Mother shortened her requested time to review a written Genesis report to one day prior to the IEP team meeting.

63. On March 26, 2013, more than 24 hours before the start of the IEP team meeting, Mother sent an email to the District, the SELPA facilitators, and Genesis saying she needed to reschedule the IEP team meeting set for March 27, 2013. She did not give a specific reason, but said she would send a more formal explanation “soon,” and still wanted to speak to the facilitators later that day. Although she did not provide an explicit reason in the email for wanting to reschedule the IEP team meeting, based on all of the emails and previous discussions, it was evident to all why she was asking to reschedule the meeting: because she did not have a written Genesis report.

64. The IEP team meeting was scheduled to begin at 1:00 p.m. on March 27, 2013. Early that morning, Ms. Cazale sent Mother a lengthy letter attached to an email in which the District refused to have Genesis provide a written annual report, and gave its version of its attempts to complete Student's annual IEP, that was supposed to have occurred at the December 7, 2012 IEP team meeting. The District informed Mother that the IEP team meeting would proceed at 1:00 p.m. as scheduled, whether or not a Parent attended.

65. The March 27, 2013 IEP team meeting, was held without a Parent being present. Mother routinely recorded all IEP team meetings.³⁰ In her absence, the District did not record this meeting, although it had time to comply with the requirement that Parents be notified 24 hours in advance of an IEP team meeting that the District wanted to record.

66 Ms. Cazale, Mr. Lapena, three of Student's teachers, two speech and language therapists, a school psychologist, the principal of Vanguard, the assessor from the NPA that conducted the mental health assessment, Student's case manager from Genesis, Alyson Dyer, and for a short time, her supervisor, Ms. Holly attended the IEP team meeting.

67. Those present noted the Genesis FAA was out of date in light of the team's consensus at the March 5, 2013 IEP team meeting that Student's behaviors had significantly improved. Nevertheless, those present still developed a BIP. Goals were also developed. Although Mother's March 25, 2013 email to Mr. Lapena commenting on the goals was mentioned in the notes from the March 27, 2013 IEP team meeting, the notes

³⁰ Under California law, both parents and a school district may record IEP team meetings if certain requirements are met, including 24 hour notice of the intent to record. (Ed. Code § 56341.1, subd. (g).)

do not reflect any discussion of those comments, nor were any of the changes made to those goals related to Mother's email. Nor was there any further discussion around the issue of written Genesis reports. The IEP team produced a proposed IEP with annual goals, accommodations and an offer of placement that included increased educational specialist services to Student, and proposed that Student's Genesis BT be replaced with a District aide. This last matter had not been discussed at the March 5, 2013 IEP team meeting, and the evidence established that Mother was not aware that this was going to be discussed at this meeting. The only non-District (i.e., NPA) services recommended were for 90 monthly minutes of individual counseling related to a social skills goal. As is discussed below, because it is found that the District should not have held this IEP team meeting without a Parent present, there is no need to determine whether this constituted a substantive offer of a FAPE.

68. On March 28, 2013, the District sent to Parents, via certified mail and regular mail through the United States Postal Service, a copy of the proposed IEP. The District asked Parents to consent to the IEP and concluded with, "Please do not hesitate to call should you have any questions or concerns regarding this letter or any of the enclosed materials." There was no evidence that the District also sent copies of the letter and proposed IEP via email to Mother, the usual mode of communication between the parties. Mother had previously informed the District that documents sent via certified mail had to be picked up at the post office, and it was difficult, due to their work schedules, for Parents to do so.

69. On April 3, 2013, the District followed up its March 28 2013 mailing with a letter sent through regular mail that informed Parents that if the District did not receive notice that they had received the proposed IEP by April 8, 2013, it would file a due process complaint with OAH. On April 5, 2013, Mother responded to Ms. Cazale via email that she was still reviewing the proposed IEP and had several questions. She asked

if the District would respond to those questions via email so she could work towards being able to consent to the proposed IEP. She did not receive a response until April 10, 2013.

70. On April 8, 2013, Mother received the written Genesis report she had requested from Genesis after the March 5, 2013 IEP team meeting. On April 9, 2013, she sent an email to Ms. Cazale asking for an IEP team meeting so she could present her questions about the March 27, 2013 IEP offer. In essence, she was asking for the March 27, 2013 IEP team meeting, to be reconvened. She suggested the dates of April 26, or May 3, 2013, from 1:30-4:30 p.m. Although she did not ask that this IEP team meeting be facilitated by the SELPA, she copied the email to Ms. Clay, Ms. Pinody and Ms. Tomazin, apologizing for copying all of them, but saying she did not know who would be coming.

71. On April 10, 2013, Ms. Cazale responded to the emails Mother had sent on April 5, and April 9, 2013. She stated that if the District did not receive Parents' consent to the IEP offer of March 27, 2013, by April 17, 2013, the District would file a request for a due process hearing. Ms. Cazale acknowledged Mother's April 9 request for an IEP team meeting, but referred to Mother's request as one for a "facilitated IEP." She then declined to hold a "facilitated IEP," claiming the facilitated IEP process must be consented to by both parties, and the District would not consent. She did not offer any dates for a non-facilitated IEP team meeting, nor comment on Mother's proposed dates of April 26 or May 3, 2013. She did not respond to Mother's question of April 5, as to whether Mother could ask questions about the proposed IEP in emails.

72. On April 17, 2013, Mother sent her consent to the District to two of the goals from the March 27, 2013 IEP. On April 19, 2013, the District filed its request for due process with OAH. There was no evidence that the District made any attempt to

reconvene the IEP team meeting of March 27, 2013, so that Mother could give her input to the team, and possible changes could be made to the proposed IEP.³¹

Denial of Parental Participation and Denial of FAPE

73. The District violated Parents' procedural rights to be members of the IEP team, and to meaningfully participate in the IEP process by holding the IEP team meeting on March 27, 2013, without a Parent being present. Although the District argues that it was entitled to hold this meeting without a Parent being present due to Mother's previous "obstructive" acts, as previously explained, the evidence did not establish that these acts constituted "obstruction." This is not a case where a parent regularly fails to appear at scheduled IEP team meetings, or repeatedly asks that they be canceled or rescheduled on the day of the meeting. It is not a situation where a parent routinely makes unreasonable demands. Therefore, when Mother asked to reschedule the March 27, 2013 IEP team meeting, the District was required by law to collaborate with Mother to find a mutually agreeable date to hold the continued IEP team meeting. Although the District was not legally obligated to obtain written reports from Genesis, and declined to do so, Mother had now asked Genesis on her own behalf to provide her with this report, and a short continuance for her to get this information was not unreasonable.

74. The District's conduct in holding the March 27, 2013 IEP team meeting, without a Parent being present, violated their procedural rights, and significantly

³¹ However, in at least two Ninth Circuit cases that will be discussed in the Legal Conclusions section of this Decision, reconvening the IEP team meeting, after holding a procedurally noncompliant meeting without parents, may not absolve a district from holding the first IEP team meeting without them.

impeded their opportunity to participate in the development of the proposed IEP for Student. The only recourse is for another IEP team meeting to be convened if Student is to continue to attend Vanguard. Under the circumstances of this case, because the procedural violation of conducting the IEP team meeting without Parents was fatal, it invalidated the District's IEP offer, so there is no need to determine whether the District appropriately documented its attempts to convene an IEP team meeting, and whether the proposed IEP offers Student a FAPE. The ALJ declines to do so.

75. Although it may seem surprising, it was very clear during the due process hearing that in spite of her difficulties with the District, Mother wants very much to have Student continue to attend Vanguard. He has been generally successful and is moving towards becoming more independent so that aide services can be faded. Mother also credibly testified that the use of SELPA personnel as facilitators of IEP team meetings, and for other assistance, has been very helpful for her. The District also had nothing negative to say about the SELPA facilitation, and assistance.

76. The nature of the complaint filed by the District does not give the ALJ jurisdiction to make any orders other than denying the District's requests for relief. However, given the fact that Student will probably continue to attend Vanguard, the parties should consider the following suggestions:

- a. All IEP team meetings should be facilitated by the SELPA. A facilitated IEP meeting should be held no later than 30 days after this decision is issued.
- b. Parents' work needs should be considered in scheduling IEP team meetings. Mother testified, and documentary evidence established, that she needs 10-14 days notice of an IEP team meeting to make arrangements with her employer to be absent from work for the meeting. Also, because it has usually taken more than one meeting to complete an IEP for Student, it would be reasonable to schedule a second IEP meeting several days after the first when

an initial IEP team meeting is scheduled, and Mother could arrange time off for both dates.

- c. Until Genesis is no longer providing services to Student, the District should invite Genesis personnel to IEP team meetings. Genesis personnel spend several hours a day with Student, and the input of its staff should be very helpful to the IEP team.³²
- d. The District should be very mindful of Mother's need to have all documents five days prior to the meeting, and documents and reports should be updated to reflect Student's current status and PLOP's.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. In this case, the District filed for a due process hearing and therefore bears the burden of persuasion.

ELEMENTS OF A FAPE

2. The IDEA and California special education law provide that children with disabilities have the right to a FAPE that emphasizes special education and related

³² There was evidence during the hearing that Genesis personnel were not invited to IEP team meetings following the filing of the complaint in this matter. These IEP team meetings were not related to the issue in this case. The District's explanation was that following the IEP team offer of March 27, 2013, which eliminated Genesis services, the District no longer considered Genesis to be a member of the IEP team.

services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) A FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's IEP. (20 U.S.C. § 1401(9).) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).)

PROCEDURAL VIOLATIONS

3. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley*, supra, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

4. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, supra, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code §

56505, subd. (j); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

5. The IDEA and California education law require certain individuals to be in attendance at every IEP team meeting. In particular, the IEP team must include: (a) the parents of the child with a disability; (b) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (c) not less than one special education teacher, or where appropriate, not less than one special education provider of the child; (d) a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (e) an individual who can interpret the instructional implications of evaluation results; (f) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (g) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

6. A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. June 13, 2013) --- F3d ---- 2013 WL 2631518 (*Doug C.*); *Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003), 317 F.3d 1072, 1077 (*Shapiro*).)

7. A school district must take steps to ensure that one or both parents of a disabled child are present at the IEP meeting by "(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place." (34 C.F.R. § 300.322(a).) "If neither

parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls” (34 C.F.R. § 300.322(c).) “A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place” (34 C.F.R. § 300.322(d).)

MEANINGFUL PARTICIPATION

8. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrman*).) Withholding documents and important information from parents can impede their ability to participate in the IEP process. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890-891.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP team meeting, expresses her 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; *Fuhrman*, at 1036.)

9. In order to ensure that parents understand the IEP proceedings, a school district is required to “take any action necessary.” (Ed. Code § 56341.5, subd. (i).) Federal regulations also require school districts to ensure parental participation in the IEP process. (34 C.F.R. § 300.322.) Further, although the federal regulations do not encourage the preparation of a draft IEP, it is noted in the comments to the proposed implementing regulations for the 2005 version of the IDEA, that if a draft IEP is prepared prior to the IEP team meeting, it should be provided to the parents prior to the date of

the IEP team meeting to help the parents be prepared to fully participate. (71 Fed.Reg. 46678 (2006).)

10. If a parent requires some type of reasonable accommodation to enhance her participation so that it is meaningful, the District must provide the parent with the reasonable accommodation. In 1990, the federal court in Connecticut ruled that parents could record IEP team meetings if it was necessary for the parent to be able to meaningfully participate in the IEP process.³³ In *E.H. v. Tirozzi* (D.C. Conn. 1990) 735 F.Supp. 53, the parent was a non-native English speaker who had trouble following along in IEP meetings and wanted to listen to the recording later to familiarize herself with what had happened, and to better understand special education law. Although one or more of the other participants objected, the court ruled that the parent should be allowed to record the IEP team meetings since it assisted her in understanding the proceedings, and enabled her to better participate. In *V.W. v. Favolise* (D.C. Conn. 1990) 131 F.R.D. 654, the parent had "a disabling injury to her hand that [made] notetaking difficult." (*Id.* at 657.) Therefore she was permitted to record IEP team meetings. Similarly, in a 2005 Office of Civil Rights complaint investigation (*Talbot County (PA) Public Schools*, April 6, 2005, 45 IDELR 45) a school district was found to have violated the rights of a parent with a hearing loss when it did not provide her with adequate access to the IEP process. Parent was entitled to have a note taker so she could understand what was being said at the IEP team meeting, when it was said, by reading the notes that were simultaneously written on a computer. Further, there were rules for the participants to follow, such as speaking one at a time, that would make it easier for the parent to attend to what was occurring. However, the school district violated the

³³ Although California law, as discussed earlier, permits an IEP team meeting to be recorded if certain conditions are met, this is not the law in all other states.

parent's rights by using untrained note takers, and not consistently enforcing rules during the meetings that the parties had previously agreed were necessary so the parent could understand what was occurring at IEP meetings.

11. If a school district is confronted with two competing procedural requirements, such as a parent's right to be present at an IEP team meeting, and the need to have a timely annual meeting, the District must comply with the procedural requirement that most benefits the student. (*Doug C.*, *supra* --- F.3d ----.) A school district cannot hold an IEP team meeting without a Parent being present, if the Parent has reasonably asked that the meeting be rescheduled. (*Ibid.*) And if the IEP team, without a parent, has completed an IEP and offered it to the parent, reconvening the IEP team meeting on a later date to include a parent does not cure the procedural defect. (*Ibid*; *Shapiro*, *supra*, 317 F.3d 1072 at 1078.)

12. The Supreme Court has noted that the IDEA assumes parents, as well as districts, will cooperate in the IEP process. (*Shaffer v. Weast*, *supra*, 546 U.S. at p. 53 [noting that "[t]he core of the [IDEA] . . . is the cooperative process that it establishes between parents and schools", and describing the "significant role" that "[p]arents and guardians play ... in the IEP process"]; see also, *John M. v. Board of Educ. of Evanston Tp. High School Dist.* 202 (7th Cir. 2007) 502 F.3d 708, 711, fn. 2; *Patricia P. v. Bd. of Educ. of Oak Park* (7th Cir. 2000) 203 F.3d 462, 486; *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].)

13. When parental non-cooperation obstructs the IEP process, courts usually hold that procedural violations in the process do not deny the student a FAPE. In *C.G. v. Five Town Community School Dist.* (1st Cir. 2008) 513 F.3d 279, for example, the Court of Appeals held that an IEP was incomplete only because of parents' obstruction of the IEP process, and if parents had cooperated, the IEP would have been adequate.

14. There are situations where parents do not cooperate with school districts, thereby interfering with the IEP process. In these situations school districts may be justified in holding an IEP meeting without the parents, but there is a difference between willfully refusing to attend an IEP team meeting, and asking that it be rescheduled. (*Doug C., supra* --- F.3d ----.) Even if a parent has a history of being uncooperative, school districts must tread carefully if they decide to hold an IEP team meeting without that parent.

15. "Where a court identifies a procedural violation that denied a student a FAPE, the court need not address the second prong" of *Rowley* and determine whether the district made an offer of a FAPE. (*Doug C., supra* --- F.3d ---- citing *Shapiro, supra* 317 F.3d 1072 1084, 1079.)

PARTICIPATION IN MEDIATION

16. The IDEA encourages parties to mediate before filing a due process complaint, and California statutory law affirms this concept. (20 U.S.C. 1415 (e); Ed. Code § 56500.3.) However, if a party refuses to mediate, there is no requirement that it do so.

Issue: Did the District's IEP dated March 27, 2013, offer Student a FAPE such that District is entitled to implement it without parental consent?

17. Based on Legal Conclusions 1 through 66, and Factual Findings 2 through 76, the District erred in holding the March 27, 2013 IEP team meeting, after Mother requested that it be rescheduled. The evidence did not establish that Mother's conduct in the preceding months was "obstructionist," as claimed by the District in its closing argument. Although it cited several situations that had occurred in previous months that had delayed the IEP process, none of Mother's actions were unreasonable. It was understandable that Mother wanted IEP documents a few days ahead of IEP team meetings given her circumstances. Mother was justified in asking for the December 7,

2012 IEP team meeting to be rescheduled because the District had withheld the BIP from her, asked the NPA to redraft it, and then sent both documents to her in the evening just two days before that meeting. It was also unreasonable in December 2012, for the District to try to schedule a January 2013 IEP team meeting, without discussing possible dates with Mother beforehand, and arbitrarily setting start times for those IEP team meetings when it knew, or should have known based on past history, that Mother could not attend. Further, it was unreasonable for the District to ignore or refuse to answer Mother's question concerning the need for Genesis to redo its proposed BIP.

18. The District was not justified in using Mother's refusal to engage in the mediation session scheduled for February 13, 2013, as a basis for holding the March 27, 2013 IEP team meeting, without a Parent in attendance, because mediation is a voluntary process. Further, Mother did not refuse to attend that IEP team meeting set for March 27, 2013, she asked for it to be rescheduled because she was waiting for a written Genesis report that she had asked Genesis to prepare when the District would not. It was not unreasonable for Mother to want written reports from Genesis. Having the information in those reports would have benefited all members of the IEP team.³⁴

19. The District failed to establish justification for violating Parents' procedural rights by holding the March 27, 2013 IEP team meeting, without a Parent being present, after Mother asked to have it rescheduled. Therefore, there is no need to establish whether the IEP developed at that March 27, 2013 meeting offered Student a FAPE.

³⁴ The ALJ recognizes that neither California nor federal law require written reports from an NPA. However, once Mother had requested Genesis to prepare a written report, under the circumstances of this case, she was entitled to ask for the IEP team meeting to be rescheduled for a brief period of time so that she might have an opportunity to receive and review the report.

ORDER

The District'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. The Student prevailed on the issue decided.

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 United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: July 9, 2013

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings