

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RIM OF THE WORLD UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2013120111

DECISION

Parent on behalf of Student (Student) filed an amended due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on December 13, 2013, naming Rim of the World Unified School District (District).

Administrative Law Judge (ALJ) Marian H. Tully heard this matter in Blue Jay, California, on February 6, 10, and 11, 2014.

Dan Stormer and Lincoln Ellis, Attorneys at Law, represented Student. Student's mother attended the hearing. Vivian Billups, Attorney at Law, represented District. Laura Chism, East Valley SELPA Program Manager, and Dawn Meade, District Coordinator of Special Education, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until February 18, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did District materially fail to implement Student's October 2, 2012 individualized education program (IEP) by failing to provide 90 minutes per week of speech and language therapy?
2. Did District materially fail to implement Student's October 2, 2012 IEP by failing to provide Student a one-to-one aide with the skill and physical ability to keep pace with Student during practices with Student's high school mountain bike team for the 2013-14 school year?
3. Did District materially fail to implement Student's October 2, 2012 IEP by failing to provide Student a male one-to-one aide during the 2013-14 school year?

SUMMARY OF DECISION

Student demonstrated a material failure to implement speech and language services required by Student's October 2, 2012 IEP. The October 2, 2012 IEP required 90 minutes of speech therapy to be provided on the days regularly scheduled for that service, when school was in session, and Student was in attendance. District provided approximately two thirds of the speech therapy called for in the IEP. The difference between the number of minutes required in the IEP and number of minutes provided was material. Accordingly, Student is entitled to compensatory speech therapy.

Student did not establish a material failure to implement Student's October 2, 2012 IEP by failing to provide an appropriate qualified one-to-one aide. The October 2, 2012 IEP did not specifically provide for Student's participation in interscholastic

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

mountain bike competition, did not specify a one-to-one aide for mountain biking, and did not specify Student required a male aide. Student did not prove that he had unique needs that could only be met through the highly technical and dangerous sport of mountain biking. District was not required to provide a one-to-one aide with specific highly technical skills, mechanical knowledge and the physical stamina and ability to keep pace with Student during mountain bike practice. Student did not prove his inappropriate behaviors were triggered by, or particularly directed toward, female staff or that his needs could not be addressed by a qualified trained female aide. Although Student's one-to-one aide during the 2012-13 school year was male and had the technical skills and physical ability to keep pace with Student during mountain bike practice, so long as Student's needs were addressed, District had discretion to determine the methods by which to meet Student's needs, including the selection of a qualified aide regardless of the aide's gender. District provided a qualified one-to-one aide and addressed Student's social needs and behavioral difficulties a number of ways including speech and language services, social and behavior goals in the IEP, implementation of an effective behavior plan, sensory strategies, regular education PE class, and vocational assessment and work opportunity. Student met or made progress on all goals and received educational benefit from the comprehensive program set out in the October 2, 2012 IEP. Therefore, District did not fail to implement the October 2, 2012 IEP by providing a qualified female one-to-one aide.

FACTUAL FINDINGS

1. Student is an 18-year-old male who resided with his parents within District boundaries at all relevant times. Student was eligible for special education under the category of autistic-like behaviors. Student assigned his educational rights to his mother (Parent) on November 9, 2013.

2. Student was diagnosed with autism and was first found eligible for special education in October 1997. In May 2011, to assist Student's transition from middle school to Rim of the World High School (Rim HS), District provided Student a one-to-one aide to support Student during the school day and for afternoon sports.

2011-12 SCHOOL YEAR

3. Charles Purinton was employed by District as a campus security guard. He began working with Student in January 2012, first to address Student's safety while mountain biking and later as a full time one-to-one aide. Mr. Purinton was very effective with Student and they developed a very good rapport. Mr. Purinton found Student could be physically aggressive, "just like any student." During the first month Mr. Purinton worked with Student, before Mr. Purinton learned Student's routine, an incident occurred in the boy's locker room. Another boy was using a bathroom routinely used by Student. Student was pounding on the door, grinding his teeth and hitting himself in his face with his hand. When Mr. Purinton approached, Student turned around and grabbed Mr. Purinton's arm. Mr. Purinton attributed Student's behavior to his aversion to any change in his routine. Mr. Purinton took Student for a walk around the track. Walking around the track was a strategy Mr. Purinton used to help Student regulate his emotions.

4. There were two incidents of hitting or pinching female staff during the 2011-12 school year. In September 2011, Student grabbed the breast of a female aide. In May 2012 Student hit a female teacher. The May incident in occurred in the computer room. No one-to-one aide was present on either occasion. There was no evidence that either of these incidents were particularly triggered by or directed toward females because of their gender.

5. Student joined the Rim HS interscholastic Mountain Bike Team (Team) in the spring of 2012. Formal league-wide mountain bike competitions take place in the

spring semester. During the fall semester, Team members, coaches and assistant coaches of the Team maintain their physical condition and their skill level by participating in a mountain bike club (Club). The Club was a Rim HS Associated Student Body organization sponsored by the Parks and Recreation Department.

2012-13 SCHOOL YEAR

6. Student attended tenth grade at Rim HS during the 2012-13 school year. Student's autistic-like behaviors in tenth grade included limited expressive language skills that resulted in inappropriate social behavior when objecting or protesting transition from preferred activities to less preferred activities, and changes in his routines or with the people working with him. This inappropriate social behavior included hitting and pinching others as well as himself. Other difficulties caused by Student's autism included lack of social skills, off task behavior and lack of focus, inability to stay together with a group, food stealing, and attempting to walk away from staff.

7. During the first week of the 2012-13 school year, Student hit a female instructional aide on the arm during a transition from computer class, a preferred activity, to another activity. Mr. Purinton was on a break when the incident occurred. No one-to-one aide was with Student during Mr. Purinton's break.

8. District conducted a triennial psycho-educational evaluation over a four day period in September and October 2012. Mr. Purinton accompanied Student throughout the assessment process. School psychologist Cynthia Downey conducted the triennial assessment. She administered standardized tests, conducted observations, and interviewed Student's case carrier, Mr. Purinton, and Parents. None of the standardized testing, observations, or interview data identified any needs or behaviors related to the gender of Student's peers or adults working with Student. At the time of the assessment Student was earning passing grades in his special education classes for

world history, math and biology and “B” grades in his general education classes, physical education (PE) and ceramics. He was attending a regular PE class with his aide, where he met the California Content Standard of moderate to vigorous exercise at least four days each week. Ms. Downey concluded Student had difficulty with expressive, receptive, and social language that affected his social and academic functioning. The triennial assessment included a health update. Student took fluoxetine for depression and panic attacks.

9. Student’s annual IEP team meeting for the 2012-13 school year was held on September 7, 2012, and reconvened on October 2, 2012. Student’s needs were identified as critical thinking, reading comprehension, writing legibility, math, critical thinking, and social awareness. The team agreed Student continued to be eligible for special education. The team reviewed Student’s progress on academic and behavior goals. He met his “hands in pants” and toileting goals. He made considerable progress on moving from place to place quietly, improving voice volume, and respecting personal space. He had four reports of negative personal contacts throughout the 2011-12 school year. The team agreed upon goals for the 2012-13 school year. Student’s goals addressed respecting personal space, inappropriate physical contact, transitioning quietly from place to place, appropriately initiating and acknowledging interaction with others, and using expressive language to communicate his wants and needs.

10. The October 2, 2012 IEP provided specialized academic instruction daily, occupational therapy, collaborative behavior intervention, extended school year, transportation, vocational assessment and training and participation in a regional occupation program. The services included 90 minutes of individual speech and language therapy per week. The offer of services stated that programs and services would be provided when the student was in attendance, and consistent with the public school calendar and scheduled services, excluding holidays and non-instructional days.

11. Student's behavior plan was reviewed and updated to address Student's use of his fist or hands to punch or hit himself or others. This behavior occurred during changes in Student's schedule, and transitioning from a preferred activity to a less favored or unfamiliar activity. Student hit or pinched to protest or attempt to avoid changes in his routine, interference with his preferred activities, or to express frustration when asked to log off a computer or encounter new people. In order to address the incident during the first week of school, computer time was temporarily removed from Student's schedule and District provided additional training to staff so that Student's behavior plan could be properly implemented throughout the day in all settings.

12. District continued to provide a one-to-one aide because Student had difficulty staying together with a group, he had limited communication skills and he occasionally hit or pinched others. The IEP did not specify the gender of the one-one aide or whether a one-to-one aide would be provided for mountain biking. The IEP provided that 100 percent of Student's time was in regular classes, extracurricular, and non-academic activities. The IEP did not specifically include mountain biking as part of Student's program. Parent consented to the IEP.

13. Student lacked the focus and skills necessary to participate on the mountain bike team on his own. In order to safely participate in practice and during competition, Student needed someone to ride with him. This rider needed to be in close proximity to Student in order to keep Student focused and instruct Student when to change gears, apply the brakes, avoid obstacles on the trails and traffic on public roads, navigate the course, adjust speed to the terrain, and to respond to mechanical problems with Student's bike such as flat tires, gear, and brake malfunctions. This degree of support was not necessary for other participants. Mr. Purinton rode with Student in the spring of the 2011-12 and in the fall and spring of the 2012-13 school years. Rim HS coach Scott Craft, with special permission from the high school sports league, rode with

Student during Team competitions. The Team traveled to race courses in Loma Linda, the beach, Lake Perris, Riverside, Temecula, Buellton, Lake Isabella, and Monterey. Coach Craft rode with Student during races because races are more dangerous and each course and the obstacles presented were different. In addition, Student rode with a "spot" that could be monitored by a smart phone so that Student could be located if he got lost. When Student's bike broke down during a race at Vail Lake, Coach Craft and Student carried their bikes and ran 10 miles to finish the race.

14. Student's mountain bike aide required particular specialized skills, mechanical knowledge, and a high level of physical conditioning. Mr. Purinton met with Student before a ride to explain the course to Student. He checked the condition of the bike, gloves, helmet, and shoes. He made sure Student had water and food. He made repairs to tires, gears, and brakes as needed, including when there was a break down on the trail. He designed a color code system for the bike and used verbal prompts so Student knew when to change gears and which gear to use. Mr. Purinton rode in front of or behind Student depending upon the terrain and was in constant communication with Student to avoid obstacles and traffic. On one occasion Student got lost and became distraught. Mr. Purinton found Student hitting himself, open handed on his cheek and temple, and grinding his teeth.

15. Parent was an experienced mountain biker and supervised an autism program in Redlands. Parent frequently rode with Student. Although she was an avid bike rider and a runner in good shape, it took her two years to be able to keep up with Student. She described the sport as technically difficult, "scary," and requiring a great deal of cardio strength. Parent believed mountain biking helped Student with mood regulation, social skills, perseverance, cooperation, and self-regulation in school so he could learn. She also believed exercise helped address Student's anxiety and depression.

2013-14 SCHOOL YEAR.

16. In October 2013, District informed Mr. Purinton that he was "out of classification" and that if he wanted to remain as Student's one-to-one aide he would have to take a pay cut and lose his seniority as a campus security guard. Mr. Purinton decided he could not accept the pay cut or the loss in seniority, and he resigned his position as Student's one-to-one aide. District assigned Audra Scoppen as Student's new one-to-one aide. Ms. Scoppen was a qualified and well trained aide.

17. Student's annual IEP team meeting was held on October 21, 2013. The team reviewed his present levels of performance. Student was making progress on all goals including language communication and speech, and social behavior. The IEP team discussed Student's participation on the mountain bike team. Parent and Coach Craft believed Student should continue to participate. However, Student was unable to safely participate in this sport independently because he would "zone out" and lose focus while riding. He did not pay attention to traffic on the streets or potential hazards on the trail or respond to a mechanical failure or flat tire. Coach Craft was concerned for his safety. Parent requested a one-to-one aide during mountain bike practice. District questioned whether it was required to fund a one-to-one aide for mountain bike practice and agreed to respond to Parent's request in writing.

18. Parent also requested a male one-to-one aide. Parent and some District members of the IEP team felt that Student needed a male aide, although it was unclear whether this preference was for a male in general or Mr. Purinton in particular. Parent described Student's history of difficulties in the bathroom (coming out with his pants down, urinating on walls and floors, pounding on doors of occupied areas), in the boy's locker room (struggles with locks, forgetting pants and to put away clothes), pushing through crowds, aggression, and eating from trash cans. Although Student had a history of these behaviors, these behaviors had not recently been observed at Rim HS. District

team members believed that the reason these behaviors were no longer occurring at school was because the behavior plan was working.

19. The IEP team identified Student's needs and developed goals to address socialization, communication, transitioning, sensory strategies, social pragmatics, and identifying the emotions of others. Modifications and supports offered included allowing Student to leave class and walk with close supervision and to use a "fidget" device in class. Student continued to attend regular education PE. Student's behavior plan was reviewed and continued to address inappropriate use of fists and hands. Parent, Student, and Ms. Scoppen, among others, participated in reviewing and revising the behavior plan. The predictors of Student's inappropriate physical contact continued to be changes in Student's routine or schedule, and transitioning from a preferred to a non-preferred or unfamiliar activity. District offered specialized academic instruction daily, occupational therapy, collaborative behavior intervention, and vocational services. District offered Student a one-to-one aide but did not specify that the aide be a male. Parent did not consent to the IEP, and as a result, the October 2, 2012 IEP remained in effect through the time of hearing.

20. On October 30, 2013, Ms. Scoppen reported that Student attempted to grab her arm as he began to sit down on the ground at her request. The incident began while Ms. Scoppen and Student were in the print shop. It was Student's second day with a substitute teacher. Student asked "track, please." Ms. Scoppen took him to walk around the track but the field was being mowed on one side and blowers were being used on the tennis courts on the opposite side. Student did not like changes in his routines or environment. Student then asked "computer, please." Ms. Scoppen observed Student to be "a bit overwhelmed" and agitated. Student appropriately expressed his needs with one and two word requests. Ms. Scoppen and Student were able to verbally communicate options and choices to help Student calm himself and to engage in

physical activities until Student voluntarily returned to class. Throughout the entire incident Student consistently used one and two word sentences to make his needs known and Ms. Scoppen effectively used the techniques and strategies set out in Student's IEP and behavior plan until Student returned to class, completed a worksheet, and participated in class as usual.

21. Ms. Meade, Coordinator of Special Education, met with Parent on November 13, 2013, to discuss Parent's request for a mountain bike aide. Following the meeting Ms. Meade emailed Parent informing her that an aide would be in place to ride with Student on November 19, 2013. Ms. Scoppen attended the mountain bike practice on November 19, 2013. Ms. Scoppen was unable to keep pace with Student and mountain biking was beyond her abilities.

22. Karen Dougherty was a qualified paraprofessional who worked with autistic high school students as an instructional aide. She was assigned as Student's aide beginning January 15, 2014. Although willing to learn mountain biking, she did not have the physical ability to keep up with Student, the technical skills of the sport, and did not know how to change a tire or handle any mechanical difficulty on the trail.

23. Elizabeth Paganini was Student's speech pathologist. As written in the October 2, 2012 IEP, the October 21, 2013 offer of services stated that programs and services would be provided when the student was in attendance, and consistent with the public school calendar and scheduled services, excluding holidays and non-instructional days. Ms. Paganini provided therapy at Rim HS on Mondays. If Monday was a holiday, a non-instructional day, or a student was absent, no therapy was provided that week. From the start of the 2013-14 school year until the first day of the hearing, Rim HS was in session for a total of 21 weeks. August 27, 2013, was a staff development day, September 2, 2013, and November 11, 2013, were holidays, and Student was absent one Monday. Therefore, of the 21 weeks school was in session, the IEP required 90 minutes

of speech therapy per week for 17 weeks, or a total of 1,530 minutes. From the first day of school until the first day of the due process hearing, District provided 1000 minutes of speech therapy. Ms. Paganini had scheduled 180 additional minutes to be provided between February 10 and February 14, 2013.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational

benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUE 1: SPEECH AND LANGUAGE THERAPY

5. Student contends District failed to provide the full 90 minutes of speech therapy per week required by the October 2, 2012 IEP, and seeks 7.5 hours of compensatory speech therapy to be provided by the end of the spring 2014 semester. District conceded it owed Student 5.5 hours but argued that, by the end of the hearing, all missed hours of speech therapy would have been provided, and no speech therapy would be owed. For the reasons set forth below, Student met his burden of proof on this issue.

6. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed,

reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IDEA requires that an IEP contain a projected date for the beginning of special education services and modifications, and "the anticipated frequency, location, and duration of those services and modifications." (20 U.S.C. § 1414(d)(1)(A)(VII); see also 34 C.F.R. § 300.320(a)(7) ; Ed. Code, § 56345, subd. (a)(7).)

7. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The *Van Duyn* court emphasized that IEP's are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

8. The operative IEP provided 90 minutes per week of speech therapy, which was provided by an itinerant speech pathologist and scheduled weekly on Mondays. According to the operative IEP, no services were to be provided when a regularly scheduled service fell on non-instructional days or holidays or when Student was absent. Therefore, there was no failure to implement the IEP when scheduled services were not provided for those reasons. However, from August 27, 2013 through February 6, 2014, excluding August 27, 2013, two holidays, and an absence, District should have provided 17 sessions of 90 minutes for a total of 1,530 minutes. Student received a total of 1000 minutes of speech therapy during that time. The difference between the amount of speech therapy provided and the amount required in the IEP was 530 minutes. District provided two thirds of the therapy required by the IEP, which is more than a minor

discrepancy. Although the therapy provided benefitted Student and he made progress during that period of time, *Van Duyn* instructs that a child does not have to suffer a demonstrable harm in order to sustain his burden of proof that he was substantially denied services mandated by his IEP. Accordingly, Student met his burden of proof as to Issue 1. Student's remedy is discussed below.

ISSUES 2 AND 3: ONE-TO-ONE AIDE

9. In Issues 2 and 3, Student contends District failed to implement the October 2, 2012 IEP because District did not provide an appropriate one-to-one aide. Student's complaint framed the issues as a failure to implement the October 2, 2012 IEP, not whether the October 21, 2013 IEP offered a FAPE. Student avers, because Student did not consent to the October 21, 2013 IEP, the October 2, 2012 IEP was, essentially, Student's "stay put" placement. For the reasons set forth below, Student did not meet his burden of proof on Issue 2 or Issue 3.

10. Legal conclusions 6 and 7, above, are incorporated by reference.

11. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.)

12. The IDEA requires that special education and related services be provided by qualified personnel. (20 U.S.C. § 1412(a)(14)(A).) The IDEA defines the term "qualified personnel" as personnel who are appropriately and adequately prepared and trained, and who possess the content knowledge and skills to serve children with disabilities. (*Id.*;

34 C.F.R. § 300.156(a).) Paraprofessionals may assist in the provision of special education and related services if they are “appropriately trained and supervised, in accordance with State law, regulation, or written policy ...” (20 U.S.C. § 1412(a)(14)(B)(iii).) A paraprofessional means an “educational aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil service aide, library aide, child development aide, child development assistant, and physical education aide.” (Ed. Code, § 44392, subd. (e).)

13. In Issue 2, Student contends District failed to implement the October 2, 2012 IEP by failing to provide a one-to-one aide with the skills, knowledge, and physical ability to ride with Student during mountain bike practice. Student argues he must have an aide capable of keeping pace with him so he can safely participate in this sport. Student’s safety requires that the aide must be able to bike on difficult terrain over long distances at the same speed as Student, and the aide is necessary to prevent Student from getting lost, separated from the group or hit by a car. District contends it has no obligation to provide an aide to ride with Student during the fall because participation in the mountain bike Club is not a Team requirement and the Club is not a Rim HS activity because it is sponsored by the Parks and Recreation Department. Lastly, District contends Student participates in the Club in the fall to maximize his performance on the Team in the spring competitions and fall training is not necessary to provide Student a FAPE under the *Rowley* standard.

14. Student benefited physically, socially, and emotionally from participating in mountain biking. However, there is insufficient evidence that Student had unique needs that could only be met through that highly technical and dangerous sport. Student had needs in the areas of socialization, communication, transitioning, sensory strategies, social pragmatics, identifying the emotions of others, and physically aggressive behaviors, particularly hitting and pinching himself and others. Student’s IEP

addressed those needs in a variety of ways including speech and language services, social and behavior goals in the IEP, implementation of an effective behavior plan, sensory strategies, regular education PE class, and vocational assessment and work opportunity. Student was making progress on his goals in all areas and was maintaining passing or better grades in his classes. Accordingly, the evidence did not establish that Student had any unique need that required him to participate in competitive mountain biking, particularly when it was not written into his IEP.

15. Pursuant to the IDEA, District must take steps, "including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities." (34 C.F.R. § 300.107.) Extracurricular services may include athletics. (*Id.*) However, District is only required to provide for participation in interscholastic sports when a student's IEP expressly requires such participation. If interscholastic sports are not a part of a student's IEP, districts must ensure that the participation and eligibility rules are not discriminatory against students with disabilities. (34 C.F.R. § 104.37 (a)(1); and *Letter to Anonymous*, 17 IDELR 180 (OSEP 1990).) When participation in interscholastic sports is a necessary component of a FAPE and is explicitly included in the student's IEP, the participation in sports is a related service. However, the general mention of "extracurricular activities" in an IEP may not include interscholastic sports. (*See Board of Educ. of the St. Joseph Pub. Schools*, 34 IDELR 282 (SEA MI 2001).)

16. In sum, because implementation of Student's October 2012 IEP did not require that Student participate on the Team, District was not required to provide a one-to-one aide with exceptional physical strength and endurance, as well as highly

specialized technical and mechanical skills in mountain biking, for Student to participate in that team sport safely.³

17. In Issue 3, Student contends District failed to implement the October 2, 2012 IEP by failing to provide a male one-to-one aide. Student argues, in his case, "a male aide is more successful at reining in problematic behavior attributable to autism" and a male aide could "accompany [Student] into the Boy's locker room and ensure that no dangerous or embarrassing incidents occur" while Student is changing clothes for PE or mountain biking. Student claims "Given [Student's] history of inappropriately touching female aides (due to his autism)," the need is "particularly acute during the periods when [Student] changes in the Boy's locker room before and after P.E. class and mountain biking." District contends Student failed to show that Student required a male aide because Student no longer had bathroom or locker-room needs that required a male aide to be with Student inside those locations, or behaviors that could not be addressed by a properly trained female aide.

18. Student failed to prove by a preponderance of the evidence that Student required a male aide to implement the October 2, 2012 IEP. The first incident of inappropriate physical behavior during the 2011-12 school year occurred with a male aide in the boy's locker room. The incidents involving inappropriate physical behavior toward female staff during the 2011-2012 school year occurred when no one-to-one aide was present. Student's behavior plan was developed to address hitting and pinching of himself and others, and there was no assessment data to demonstrate Students' behaviors were triggered by or directed particularly toward females. The behavior plan was modified as Student made progress but there were no behaviors

³ The question of whether the Club was a Rim HS activity or a Parks and Recreation program is immaterial to this analysis.

attributed to the gender of others and no strategies or modifications related to the gender of others. The IEP team agreed the behavior plan was working. The evidence demonstrated that Student's inappropriate physical contact occurred when he was transitioning from a preferred activity (i.e., computers) to a less preferred activity, when his routine was disrupted (i.e. someone using "his" bathroom area), or a change in his environment, such as a substitute teacher or the environment (i.e., mowing the field and blowing the tennis courts at the track). There was no reason to believe a qualified and trained female aide could not have implemented Student's behavior plan as well as a male aide.

19. The evidence affirmatively showed that Student's behaviors were appropriately addressed by a qualified trained female aide. During the incident that began in print shop, Student verbally communicated his need to walk on the track to Ms. Scoppen when he encountered a substitute teacher and he became overwhelmed and agitated. Ms. Scoppen implemented appropriate strategies to manage the situation until Student voluntarily returned to his next class and successfully participated in class and finished an assignment. Student's argument that the need for a male aide is "particularly acute" in the boy's locker room is not supported by the evidence. The only evidence of a need for behavior support in the boy's locker room was an isolated incident that occurred two years prior to the hearing, and which occurred despite the presence of a male aide. The October 2, 2012 IEP did not specify a male aide. Although Parent preferred a male aide, and Mr. Purinton was an effective aide while he worked with Student, District may assign a qualified female aide to work with Student because methodology and personnel matters are within District's discretion.

20. Student argues a number of legal theories that are inapplicable in due process hearings under the IDEA and inconsistent with special education law. The parties have the right to present a 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); see also Ed. Code, § 56501, subd. (a).) 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.) OAH does not have jurisdiction over claims based upon the Civil Rights Act (42 U.S.C. § 1983), Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq. (Section 504)), and related state and federal civil rights laws. By the same token, District personnel matters are beyond the jurisdiction of OAH. Accordingly, Student’s claims based on Section 504 and other state and federal laws, as well as Student’s claims that District wrongfully terminated Mr. Purinton’s role as Student’s one-to-one aide without cause or notice using the pretense of Mr. Purinton’s job classification, are not addressed in this decision.

REMEDIES

21. Student prevailed on Issue 1. Student requests 450 minutes (7.5 hours) of compensatory speech therapy to be provided by the end of the spring 2014 semester as a remedy. District concedes some compensatory time is owed but disagrees as to the amount of time owed and avers that all missed hours will have been made up over the course of the hearing.

22. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401

F.3d 516, 524, citing *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489,1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid, supra*, 401 F.3d at p. 524.)

23. Although District scheduled speech therapy to be provided during the hearing, there is no evidence of the amount of therapy provided after February 6, 2014. The 450 minutes of compensatory speech therapy sought by Student is less than minute for minute compensation for the actual time missed, but it is reasonable in light of the progress Student made with the therapy provided. Accordingly, District shall provide a total of 450 minutes of compensatory speech therapy by the end of the spring 2014 semester.

ORDER

1. District shall provide, by the end of the spring semester of the 2013-14 school year, 450 minutes of speech therapy to Student in addition to the weekly 90 minutes of speech therapy provided in Student's operative IEP. Speech therapy provided on and after February 6, 2014, over and above the weekly 90 minutes required by the operative IEP, shall be considered as satisfaction of some or all of the 450 minutes ordered by this decision.

2. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student was the prevailing party on Issue 1 and District was the prevailing party on Issues 2 and 3.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: March 10, 2013

_____/s/_____

MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings