

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

REDWOOD CITY SCHOOL DISTRICT.

OAH Case No. 2013080751

DECISION

On August 20, 2013, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH), naming the Redwood City School District (District). OAH granted a continuance for good cause on October 4, 2013.

Administrative Law Judge (ALJ) Peter Paul Castillo heard this matter in Redwood City, California, on January 27, 28, 29, and 30, 2014.

Beth Hopwood, Attorney at Law, represented Student. Student's mother (Mother) was in attendance for the entire hearing, and Student's Grandfather for portions of the hearing. Student was not present at the hearing.

Claire Cunningham, Attorney at Law, represented District. Lenore Montegna, Director of Special Education, and Carla Crenshaw, Assistant Special Education Director, were present for the entire hearing.

At the conclusion of the hearing, the matter was continued to February 18, 2014, at the parties' request to file written closing briefs. The record closed with the parties' timely filing of closing briefs and the matter was submitted for decision.

ISSUES¹

Issue 1: Did District deny Student a free appropriate public education (FAPE) by failing to assess Student's fine and gross motor skills, sensory processing, and audiological deficits, which violated Student and Parent's procedural rights, since it prevented Parent from meaningfully participating in Student's educational decision-making process and/or denied Student an educational benefit?

Issue 2: From October 18, 2012 through the present, did District deny Student a FAPE by violating Student and Parent's procedural rights, since it prevented Parent from meaningfully participating in the educational decision-making process for Student and/or denied Student an educational benefit by:

- a. Failing to make a specific offer of placement in its individualized education plan (IEP) offers;
- b. Discontinuing early intervention services because Parent did not sign the December 17, 2012 IEP, and;
- c. Failing to provide Parent with a complete copy of Student's educational records?

Issue 3: From October 18, 2012 through the present, did District's IEPs deny Student a FAPE by failing to:

- a. Address his communication, social skills, and safety issues;

¹ The issues were framed in the January 24, 2014 Order Following Prehearing Conference. 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.)

- b. Offer sufficient occupational therapy (OT) and applied behavior analysis (ABA) services to meet his unique needs, and;
- c. Implement its IEP offers and ceasing to provide educationally related services in March 2013, that it had been previously providing pursuant to the October 18, 2012 IEP?

SUMMARY OF DECISION

This Decision holds that Student failed to establish that District failed to appropriately assess Student in all areas of suspected disability or obtain accurate information regarding Student's unique needs. It finds that Parent overestimated his unique needs, especially his behavioral and communication deficits, to obtain a placement in a non-public school. The December 2012 IEP that District offered was reasonably calculated to permit Student to make meaningful educational progress by offering intensive services in his areas of need with the goal of Student attending a general education kindergarten class. Additionally, District adequately documented the ABA services it offered in the December 2012 IEP by accepting and offering the assessment recommendations discussed in the IEP team meeting. Finally, District is not required to continue the early intervention services past the December 17, 2012 IEP team meeting. While Student did not receive what he wanted, he got what he needed to receive a FAPE.

FACTUAL FINDINGS

FACTUAL BACKGROUND

1. Student is four years old and eligible for special education and related services under the category of autistic-like behaviors. In March 2012, the Golden Gate

Regional Center (Regional Center) found Student eligible for early start services based on communication, social, and adaptive delays.² In June 2012, at age two, Student received a medical diagnosis of high functioning autism. On August 29, 2012, Regional Center held a transition meeting with Parent and Regional Center and District personnel, to start planning for Student's transition to the District when he turned three. The District convened an IEP team meeting on October 18, 2012, to make an offer of services and placement. To date, Parent has not accepted any IEP offer from the District and Student at present attends a certified private preschool, Milestones.

OCTOBER 18, 2012 IEP TEAM MEETING

2. To address Student's deficits related to his autism, Regional Center provided 85 hours a month of early intervention services from Center for Speech, Language and Occupational Therapy (CSLOT) at home, and at CSLOT with other children receiving services. CSLOT provided Student with OT and speech and language services and skills that he would need to attend a preschool. These included being able to attend, sit close to others, listen and follow teacher instructions, cooperate and play with classmates, and not engage in disruptive behavior.

² Regional Centers operate under authority of the Lanterman Developmental Disabilities Act (Welf. & Inst. Code, § 4500 et seq.), and provide daily living services and supports to persons with developmental disabilities. Under the IDEA (20 U.S.C. § 1400 et seq.), states can receive funding to provide IDEA part C "early start" services to enhance the development of infants and toddlers up to three years old who have disabilities. Regional Centers provide such services, but the "early start" services do not correspond to those required for provision of a FAPE to children older than three.

3. District convened the IEP team meeting right before Student's third birthday, when Regional Center would cease early start services and District would start providing educationally related special education services. Before the IEP team meeting, District conducted a comprehensive assessment of Student's eligibility for special education services, and, if eligible, the goals, services, and placement needed to receive a FAPE. Before the October 18, 2012 IEP team meeting, District IEP team members prepared a draft IEP that recommended that Student be found eligible for special education services under the category of autistic-like behaviors, and proposed goals in the areas of communication, fine and visual motor skills, coordination, balance, sensory processing, and adaptive skills. District did not propose in the draft IEP special education services and placement because it appropriately decided that Student's goals needed to be agreed upon before it could determine the proposed services and placement to meet the agreed-upon goals.

4. At the October 18, 2012 team meeting, District presented its OT, speech and language, and psychoeducational assessments, which will be discussed regarding District's December 17, 2012 IEP offer of FAPE. Parent did not dispute District's eligibility finding. However, Parent did have many questions regarding the adequacy of the District's proposed goals because she thought that District's assessment was not thorough enough because it failed to consider his behavioral and safety issues and possible audiological deficits. Parent was an active participant in the IEP team meeting, and District considered her views.

5. District agreed to Parent's request to conduct a functional behavior analysis (FBA) as to his behavioral and safety issues and an audiological assessment, and to reconvene the IEP team to discuss the assessments and make any needed changes to the IEP. District agreed to make necessary changes based on Parent's views and further assess Student. In the interim, District agreed to continue Student's early start services

until it made an IEP offer. Parent agreed to the continuation of these early start services, and Student did not contend at hearing that he did not receive a FAPE with these services.

DECEMBER 17, 2012 IEP TEAM MEETING

6. The IEP team met on December 17, 2012. Parent attended with her advocate. In response to Parent's concerns at the prior IEP team meeting and District's recent assessments, District developed new goals in the areas of behavior, communication, adaptive skills, and expressive language. District also proposed 240 minutes a month of speech and language services, in which 210 minutes would be direct services in a small group, and 30 minutes would be consultation with Student's teacher, aides, service providers, and Parent. District proposed 120 minutes a month of OT service, with 90 minutes of direct services in a small group and 30 minutes a month consultative services. And adaptive physical education (APE) was proposed to be 30 minutes a week in a group.

7. Finally, District offered 120 minutes of specialized academic instruction, two times a week to address Student's social skills and social pragmatic language deficits in a District special day classroom with other special education preschoolers. Also discussed in the IEP team meeting, but not listed on the proposed services page was District's offer to provide ABA consultation services.

8. Student asserted that District's offer was procedurally deficient because it failed to specify Student's placement adequately, which prevented Parent from properly evaluating the proposed placement. Additionally, Student contended that District failed to address Student's deficits in social skills, communication, and safety, and did not offer sufficient OT and ABA services. District contended that Student overestimated Student's needs and that the IEP was sufficient to meet them.

Assessments

9. Student asserted that the District failed to not only adequately assess him, but also underestimated his needs regarding his behavior (especially his tendency to bolt ("elope") from the classroom or teachers), OT, communication, and social skills. Further, Student argued that District failed to consider information in private assessments and from private providers that established Student's unique needs. District asserted that it had considered all the information and that it appropriately assessed Student and obtained accurate information regarding his unique needs and level of his deficits.

BEHAVIOR AND SAFETY DEFICITS

10. Student and District both characterized Student as being a high functioning autistic child as he did not have significant problems with repetitive behaviors, echolalia, or sensitivity to sounds. Student and District agree that Student did have difficulty with his attention, tantrums, and non-compliance. However, they disputed the severity of these behavioral problems, and the extent, if any, to which Student had safety issues such as running out of adult control and into unsafe locations, like the street or parking lot.

11. After the October 18, 2012 IEP team meeting, in response to Parent's concerns about Student's behavior, District agreed to conduct an FBA. Jagmeet Sangha conducted the FBA and was qualified to do so.³ Ms. Sangha's assessment included

³ Ms. Sangha obtained in 2012 a Board Certified Behavior Analysis certificate after obtaining in 2010 a graduate certificate in applied behavior analysis. She has a bachelor of arts in education and sociology and masters of arts in educational leadership and policy studies. She has worked intensively with autistic children since March 2010,

speaking to Parent, Student's grandparents (Grandparents), and the preschool teacher. She also reviewed two private assessments, a recent behavior report, and District's psychoeducational assessment. She observed Student twice in his home, once in a local library, and once at his then preschool program. Ms. Sangha had Parent and Grandparents keep data on Student's non-compliance, eloping, and tantrums. Ms. Sangha compiled data during her observations, and presented her report at the December 17, 2012 IEP team meeting.

12. Student's argument that he engaged in unsafe conduct was based on Parent and Grandparents' contention that Student was a constant threat to elope. Grandparents are Student's primary caregivers during the workweek when Student is not at preschool. While Grandfather provided first-hand testimony of instances, in which Student ran off towards play equipment or other preferred things in an unsafe manner, his testimony did not establish that Student's conduct was significantly more frequent than a typical three-year-old child. Additionally, Grandparents' inability to react and prevent these instances may be age-related. Finally, Mother's description of similar incidents was unconvincing that Student's conduct was significantly different than an active three-year-old.

13. Based on her experience, education, and detailed report, Ms. Sangha was convincing that Student's elopement frequency and intensity were not atypical for a three-year-old child. Parent's and Grandparent's descriptions and data collected of

starting as a behavioral tutor who provided direct instruction, and then as a behavioral consultant, focusing on conducting FBA's. Ms. Sangha then began behavior analysis, which includes consulting with and training parents and direct care providers on behavior management techniques. She is now Interim Director of the Gateway Learning Group.

Student's elopement were consistent with Ms. Sangha's conclusions. Ms. Sangha recommended goals and services because even though his behaviors were typical, he needed specialized instruction, while a typical developing peer would not, because of deficits related to his autism. Information from Misty Accristo, Student's present preschool teacher at Milestones, did not contradict Ms. Sangha's findings. Additionally, the one incident in which Student ran away from Grandfather and Ms. Sangha after the library observation and ran towards a play structure, albeit dangerous, was not unusual behavior for a three-year-old child. Finally, Student failed to present evidence from any behaviorist to rebut Ms. Sangha's observations. Therefore, Student did not establish that District underestimated Student's unsafe behaviors.

14. The parties differed on the frequency and intensity of Student's tantrums or non-compliant behaviors, which occur in response to having to perform a non-preferred task or being stopped from continuing a preferred activity. Again Ms. Sangha was convincing, based on her experience, education, and detailed report, that Student's elopement and non-compliance frequency and intensity were not atypical for a three-year-old child, and Parent's and Grandparent's descriptions and data collected about Student's elopement were consistent with Ms. Sangha's conclusions. Information from Ms. Sangha, Parent, Grandfather, and Ms. Accristo established that Student's tantrums and non-compliance were not atypical for a three-year-old who is required to perform a non-preferred task or is asked to stop a preferred activity. The data collected for Ms. Sangha did not establish that Student has a significant problem with respect to tantrums and non-compliance.

15. Finally as to Student's inattention and off-task behaviors, the parties disputed the seriousness of these behaviors. Again, while Parent, Grandfather, and Ms. Accristo contended that Student had significant off-task and attention problems, Ms. Sangha was more convincing that the behaviors that Student exhibited were not atypical

of a three-year-old child. Student's ability to attend was corroborated during the psychoeducation assessment observations and testing conducted by District school psychologist Kathryn Keithly and District Early Childhood Resource Teacher Mary Yung. Ms. Sangha, Ms. Keithly, and Ms. Yung agreed that Student has the ability to maintain attention for long periods when participating in the instruction and assessment testing. While Student had deficits that required special education services, they were not as severe as Student asserted.

Occupational Therapy

16. Marija Milicevic conducted the District's OT assessment, which focused on Student's fine motor and sensory processing deficits. Ms. Milicevic received her master's of science in occupational therapy in May 2010 and has appropriate licensure. Before coming to District, Ms. Milicevic worked for the Modesto Unified School District in spring 2011 and for the San Carlos School District during the summer of 2011. Ms. Milicevic has been employed as an occupational therapist by District since September 2011, assessing and providing OT services to children from preschool through eighth grade.

17. Ms. Milicevic conducted her OT assessment on October 1, 2012. Her assessment consisted of reviewing records, including an April 2012 OT assessment provided by Regional Center, observing Student during his speech and language assessment, and observing him play during the OT assessment. The April 2012 assessment stated that Student had a history of low muscle tone and decreased trunk control, which would make it difficult for Student to sit properly. During her observations, Ms. Milicevic noted that Student could sit on the ground properly and maintain postural control while playing. For tabletop activities, Ms. Milicevic provided Student with a footstool, which allowed him to sit properly. Student's fine motor skills were not severely impaired as he was able to solve puzzles, string beads and unscrew a

bottle, among many fine motor tasks that Ms. Milicevic observed him complete. His area of difficulty was using scissors to cut paper without assistance and using a fist grip to hold a writing instrument. Ms. Milicevic's observations are consistent with Student's April 2012 results on the early start eligibility assessment, and with improvements he had made since with intensive services.

18. To measure Student's sensory processing, Ms. Milicevic administered the Sensory Profile, in which Ms. Milicevic observed Student and noted his reaction to various stimulæ and activities. Additionally, to determine Student's sensory processing deficits, Ms. Milicevic used information in Student's records and from Mother in the psychoeducational assessment.

19. Ms. Milicevic found that Student did have sensory processing deficits, as the record review indicated his aggressive play, risk taking during play, and constant movement are most likely related to his seeking sensory input. Ms. Milicevic made recommendations for Student to self-regulate this sensory-seeking behavior. Additionally based on record review, Ms. Milicevic noted Student's sensitivity to tactile stimulation and made recommendations. Ms. Sangha noted from her record review that Student was sometimes distracted by sounds, and that he made noises when he strung beads.

20. Student attempted to establish through Parent and Ms. Accristo that he had more significant fine motor and sensory processing deficits than Ms. Milicevic described in her report. However, those witnesses did not establish that Student's sensory processing deficits were much different than those Ms. Milicevic reported, and revealed by her records review. Student's sensory processing skills at Milestones were consistent with Ms. Milicevic's report. Finally, Student did not present any testimony by a qualified OT provider to establish why Ms. Milicevic's OT assessment was not adequate or that there were areas of disability related to OT that Ms. Milicevic failed to assess.

21. Scott Green, District's APE provider, assessed Student's gross motor skills. Mr. Green has worked at District since 2006 as an APE specialist, and has the appropriate education and credentialing. Mr. Green's assessment consisted of interacting with Student, observing him outside and in the OT room and administering the Test of Gross Motor Development, second edition. Student could jump off a two-foot high barrier, go up stairs by himself, ride a scooter, walk on a balance beam, and access the play structure. The test of gross motor skills measures a student's ability to perform moving skills and ability to control objects, like a football. Mr. Green noted, as Ms. Milicevic had, that Student could be distracted by sound. Student scored in the 16th percentile on loco-motor skills as he had difficulty blending various motor functions, like jumping, galloping and balancing on one foot to hop, while he had no difficulty with simple freestyle running. On object control, Student was in the 25th percentile; he had difficulty in throwing and rolling a ball.

22. Overall, Mr. Green found Student to have many strengths with base gross motor skills, but difficulty with skills that required multiple steps to perform, such as throwing a ball or balancing on one foot to hop. Thus, Student required APE services. Student did not demonstrate that Mr. Green improperly assessed Student or that the present levels of performance he reported were not accurate. Student did not present any person familiar with APE who could contradict Mr. Green's assessment and findings.

Speech and Language and Social Skills

23. The parties did not dispute that Student prefers to interact with adults rather than his peers and that he had pragmatic language and social skills deficits in engaging with classmates. The dispute focused on the severity of his deficits in these areas, and whether the bilingualism at home and preschool negatively affects his ability to communicate only in English.

24. Kate Ramacciotti conducted District's speech and language assessment. Ms. Ramacciotti has a bachelor's of arts in communication and a master's of science in speech-language pathology. She has worked as an independent speech and language pathologist since 2008. District contracts with her to conduct assessments, provide therapy, and develop strategies for District personnel to implement.

25. Ms. Ramacciotti's assessment consisted of a document review, including documents from the Regional Center; reviewing information from Parent and Grandparents; and observation and testing for about four hours over two days, which Ms. Ramacciotti administered the various standardized test that she is qualified to administer based on her education and experience.

26. Ms. Ramacciotti's observation of Student showed that he had the ability to attend as he sat in the testing chair while she assessed him. He cooperated during the hour-long testing and was willing to continue testing even when offered breaks. Student displayed appropriate joint attention skills and ability to follow instructions. On the standardized tests, he displayed pragmatic language skills deficits in Ms. Ramacciotti's structured observation and Parent's questionnaire, such as turn-taking while speaking, asking questions, answering open-ended personal questions (such as, how are you feeling?), and sharing personal feelings. Student also had deficits in his receptive language, but they were not as significant as his expressive language as he understood requests made of him. This information was consistent with the speech and language assessment conducted for Regional Center. Finally, Student did not establish that bilingualism at home, French and English, or at preschool at the time, Spanish and English, had any effect on his speech and language abilities.

AUDIOLOGICAL SKILLS

27. Student challenged District's audiological assessment for not being thorough and not assessing possible auditory processing deficits. District asserted that

the assessment was adequate because Student had no significant hearing deficits and because auditory processing deficits cannot typically be formally assessed before the age of seven.

28. Ellen King, Au.D., conducted the audiological assessment. Dr. King has been an educational audiologist for District since 2007, and before then worked for the San Mateo County Office of Education for two years. She has a doctorate in audiology, is licensed in California, and has been employed in the field for nearly twenty years. Based on her education and experience, she was qualified to conduct the audiological assessment.

29. Dr. King observed Student at CSLOT at the end of November 2012, while Student attended the preschool program. Before the observation, Dr. King spoke to Parent to understand further why she felt that the assessment was needed. Parent expressed concern that Student had an auditory processing disorder due to his delay in responding to verbal commands. Dr. King explained to Parent, and at hearing, that due to the pace of a child's neurological development, the tests are normed for children seven and older and the child needs to have speech and language skills equivalent to at least a five-year-old to understand the test questions. Student did not introduce any evidence to rebut this claim.

30. During her observation of Student's playtime, Student's response to his name was inconsistent based on whether he was engrossed in something. When not engrossed, Student would follow simple one-step instructions and share simple observations regarding the task he was performing. He appropriately answered questions regarding the toys he played with and what he was doing. During snack time, Student responded to questions and addressed his teacher by name when prompted.

31. Dr. King did not conduct any formal hearing tests as they had been conducted in June 2012, and the results demonstrated hearing within normal limits.

Student did not demonstrate any hearing difficulties during her CSLOT observations, or indication that he had an auditory processing disorder, because he understood simple directions and responded appropriately. Student failed to produce any sufficient evidence that contradicted Dr. King's conclusion that he did not require any special education goals or services in this area.

IEP Offer December 17, 2012 – Goals and Services

COMMUNICATION AND SOCIAL SKILLS

32. For its offer of December 17, 2012, District developed five speech and language goals based on its assessment information, information from CSLOT and from Parent, focusing primarily on Student's pragmatic language and social communication deficits. District proposed 240 minutes of speech and language services a month, of which 210 minutes would be direct services in a small group and 30 minutes consultation. Student asserted that the proposed goals and services underestimated his deficits and therefore were not reasonably calculated to permit him to make meaningful educational progress. District disagreed as it considered all relevant information and its proposed goals and speech and language services addressed his unique needs.

33. The proposed communication goals focused on having Student participate in structured play and turn-taking with others, identify and label emotions, express himself in a variety of situation with four to five word sentences, and work on spoken grammar by using the verb 'be,' possessive pronouns, and articles like 'a' and 'the.' District designed proposed goals to address his social skills deficits by getting Student to interact more with his peers. Additionally, the proposed services in a small group setting were designed to foster social interaction.

34. Student attempted to prove that District failed to consider information from Parent, including reports provided by her, in developing communication goals and service level. However, Ms. Ramacciotti was convincing based on her assessment,

information she reviewed, and IEP team discussion, including Parent's information, that the goals and service levels were appropriate to address Student's unique needs and that he overestimated his speech and language deficits. Additionally, the proposed goals and service levels in small groups addressed Student's social skills deficits by focusing on skills he needed.

35. Student did not present an expert to refute Ms. Ramacciotti's testimony as the prior speech and language reports were not sufficient by themselves, without testimony from these assessors, to prove the inadequacy of District's offer. Additionally, prior speech and language service recommendations were to determine early start service levels, which have a different basis than educationally related services. Testimony from Ruth Pinkus-Reskin, the Education Coordinator at Family Connections, where Student received his CSLOT preschool services, was not persuasive because of her lack of expertise in this area.

Safety, Behavior and ABA Services

36. Student contended that he constantly threatened to elope at any time and that District failed to address that problem with adequate goals and services. Additionally, District failed to address his tantrums and non-compliance. District argued that Student overestimated his safety and behavior difficulties, as established in Ms. Sangha's FBA, and that the goals and ABA services it offered were adequate.

37. As noted above, Ms. Sangha's FBA appropriately determined that Student's elopement behaviors were not severe or atypical of a child his age. Based on accurate assessment information, District proposed that Student would not engage in any elopement in three consecutive days at home and the community. For non-compliance, District proposed that Student would follow the directions of the caregiver, and to prevent tantrums Student would use words to request breaks from non-preferred tasks. To further address Student's behavioral issues, Ms. Sangha recommended that

District provide Student with three hours a month of behavioral consultation for four months to review data collected by District personnel and advise classroom staff. She also recommended three hours a week of parent training and coaching, to be provided by a behaviorist.

38. Student failed to establish the inadequacy of these proposed goals because Student's challenge focused on overestimating the seriousness of the behaviors at issue. Additionally, Student's instances of tantrums and non-compliant conduct were not much worse than that of a typical three-year-old.

39. Information provided by Ms. Pinkus-Reskin regarding Student's time at Family Connections in the CSLOT program and by Ms. Accristo regarding his time at Milestones was consistent with Ms. Sangha's observations; they just thought Student's conduct was worse than it was. Additionally, Student did not establish that his behavior problems at home interfered with his ability to participate successfully at Family Connections or Milestones, and Ms. Sangha's home, library, and park observation established that Student overestimated his behavior problems outside of preschool.

40. The December 17, 2012 IEP team discussed Ms. Sangha's recommendation for ABA services. Parent and her advocate disagreed with the proposed service level because they believed that Student required direct, hands-on service, such as discrete trial training. Discrete trial training involves repetitive, one-to-one drills, in which the instructor attempts to teach the student a particular skill or behavior, usually in a cubicle or at a table. Additionally, based on the two private assessments, they believed that Student required a 20 to 25 hour a week ABA program.

41. Ms. Sangha was convincing that Student did not require discrete trial training or an intensive ABA program because he was high functioning. Her observations, District's psychoeducational assessment, and the two private assessments showed he had the skills to learn independently. Therefore, Ms. Sangha recommended

pivotal response training, which incorporates ABA principles, but is not adult-directed; instead, it focuses on the child's interests by targeting specific behavioral areas that are already in the child's repertoire in the natural environment.

42. Student failed to produce sufficient evidence to prove that he required an intensive ABA program. The private assessors did not testify, so information in their reports cannot be considered as direct evidence to disprove Ms. Sangha's recommendation.⁴ Also, Student failed to produce reliable evidence to corroborate the recommendations in the private assessments. Further, information provided by Ms. Pinkus-Reskin and Ms. Accristo did not establish a particular need for an intensive ABA program, nor did they have the expertise based on training, work, and education to disprove Ms. Sangha's recommendation.

43. District discussed Ms. Sangha's ABA recommendation in depth with Parent and her advocate, District failed to document the proposed ABA service level on the IEP services page. However, Ms. Sangha's report with her ABA service level recommendation was attached to Student's IEP and District made it clear at the December 17, 2012 IEP team meeting that it was offering Ms. Sangha's ABA service recommendation and that Parent rejected that offer as not being sufficient.

OCCUPATIONAL THERAPY

44. District's proposed OT goals included fine motor skills such as copying horizontal and vertical lines and cutting a circle with scissors. For sensory processing, District proposed that Student jump eight inches with both feet and balance by standing on one foot. An additional sensory processing goal would put Student in close proximity

⁴ Hearsay evidence is admissible if it supplements or explains direct evidence and can be considered reliable. (Cal. Code Regs., tit. 5, § 3082, subd. (b).)

to others during circle time to desensitize him to tactile stimulæ. The OT service level was 30 minutes of therapy a week in a group and APE for 30 minutes a week, also in a group.

45. Ms. Milicevic and Mr. Green were convincing in establishing that Student's fine and gross motor and sensory processing deficits were not as severe as Student contended. Prior OT assessments did not undermine the accuracy of their assessments because those assessments were for early start services, which are different from educationally related services. Ms. Milicevic and Mr. Green considered information in those assessments in making their recommendations. Additionally, Student failed to present at hearing the private assessors or anyone else who assessed Student to counter Ms. Milicevic's and Mr. Green's opinions.

PLACEMENT

46. First Student argued that District failed to make a procedurally adequate offer of placement at both the October and December 2012 IEP team meetings by not stating explicitly where Student's placement would be. Further, Student asserted that he needed a full time preschool program that could provide him with intensive ABA services, access to general education peers and safety. District countered that the offered two hours a day for two days a week in a special day class at Henry Ford Elementary School (Ford) was sufficient to meet Student's needs and that there he would have access to general education peers, and be safe.

47. Student contended that District needed to make an offer of placement at the October 18, 2012 IEP team meeting. However, that IEP team meeting was not finished on that date because the proposed goals were not complete and further assessments required. The parties agreed to continue the IEP team meeting, and which occurred on December 17, 2012. Accordingly, District properly waited until the December 17, 2012 IEP team meeting to make an offer. Additionally, District's offer in

the December 17, 2012 IEP was adequate because District sufficiently described the proposed classroom and had Ms. Yung, the teacher of the proposed special day class, attend the meeting to describe the class. Parent did not establish that she did not know what type of program that District offered or needed additional information to adequately participate in the IEP process.

48. Student failed to present any adequate evidence to challenge District's placement offer. As to safety, Ms. Sangha's FBA established that Student's elopement rate is not excessive and his behavior is typical of a child his age. Ms. Accristo failed to establish that Student is a threat to run off, and Parent and Grandfather overstated the seriousness of Student's conduct. The staff at the proposed placement were qualified and experienced enough to monitor Student and redirect him if he tried to elope. Ms. Yung, persuasively described the services her class would provide to meet Student's needs the qualifications of its staff. Additionally, the proposed class at Ford typically had on average three students, with Ms. Yung and an aide to prevent any elopement. Accordingly, Student failed to establish that the proposed placement at Ford was not safe for Student.

49. As to the only four hours a week at Ford, Ms. Yung also established that in her class Student would receive ABA services from qualified District personnel. The class also integrates work on Student's speech and language and OT skills. Additionally, Student would have mainstreaming opportunities with students from the head start program who would go into Ms. Young's class to interact with her students, or if needed for Student to go into the head start class. In addition, District designed the class to teach students the skills required to attend a general education kindergarten. Neither Ms. Pinkus-Reskin nor Ms. Accristo had ever visited the proposed class at Ford or offered an opinion that it was not adequate to meet Student's unique needs. Parent's opinion about the adequacy of Ford was undercut by her statements to District

personnel that she did not trust any proposed District placement because of an allegation of abuse by another District teacher.

50. Student failed to discharge his burden to establish that District's proposed placement denied him a FAPE, largely because he failed to introduce sufficient evidence upon which such a finding could be based that District's offer not adequate. Student did not offer any expert testimony to counter the testimony District personnel, and Parent's testimony was not credible due to her bias against District special education programs without any basis in fact. Accordingly, Student failed to establish the proposed special day class at Ford was not adequate to provide a FAPE.

EARLY START SERVICES

51. Student's early start services continued after the December 17, 2012 IEP offer. Student asserted that District promised to continue the early services as stay put⁵ at the October 2012 IEP team meeting, but reneged when it ceased these services on March 21, 2013. However, District contended that it mistakenly continued the early start services and ceased the services when it discovered its error.

52. Carla Crenshaw, District's Assistant Director of Special Education, was the District's representative at both IEP team meetings. At the October 18, 2012 IEP team meeting she authorized the continuation of Student's early start services. Parent believed that the early start services met her son's unique needs. Ms. Crenshaw was

⁵ When parties dispute the appropriate placement of a student, unless the school district and parents agree otherwise, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission, with parental consent, placed in the public school program until all such proceedings have been completed.

convincing that the parties understood at the October 18, 2012 meeting that early start services were only to continue until the District made a formal offer of FAPE. Parent was not convincing that Ms. Crenshaw stated that the continuation of early start services was to continue until Parent consented to a District offer based on Parent's continuous assertion that District did not have any program that was appropriate for Student.

53. However, due to a District oversight, the early start services continued after the December 17, 2012 IEP team meeting. On January 21, 2013, Parent notified District that Student would attend Milestones and requested that District pay for this placement because the District's December 17, 2012 offer did not provide Student with a FAPE. On January 31, 2013, District sent a notice to Parent rejecting that request and stating that its December 17, 2012 IEP offer provided Student with a FAPE. The early start services continued after Student began to attend Milestones.

54. In its January 31, 2013 letter, District stated explicitly that it was offering ABA services as set forth in Ms. Sangha's report and discussed in depth at the December 17, 2012 IEP team meeting. Parent did not state that she did not understand the December 17, 2012 offer. Additionally, Parent was explicit in her rejection of the District's offer of ABA services because she believed that it was not adequate, which means she knew what it was. Finally, even if District increased the ABA service hours, but required that service be provided at Ford, Parent would have rejected District's offer because she wanted Student to attend a certified private school.

55. By March 21, 2013, Ms. Crenshaw realized the early start services were continuing and sent Parent a letter discontinuing them on the ground that District made a formal offer on December 17, 2012. Student did not establish why District was required to continue this service as the October 18 and December 17, 2012 IEPs stated that District would discontinue these services upon making a formal offer of FAPE, and Ms. Crenshaw never promised these services to continue indefinitely.

56. District convened another IEP team meeting on April 23, 2013, in which it made the same offer as on December 17, 2013, except to specify the ABA services recommended by Ms. Sangha in the body of the document and to offer extended school year services. For the reasons set forth above as to the December 17, 2012 IEP, as corrected on January 31, 2013, District's April 23, 2013 IEP offer provided Student with a FAPE.

EDUCATIONAL RECORDS

57. Student did not present any evidence that District failed to produce his educational records after Parent requested the records, and did not counter evidence that District produced the requested records.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

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)⁷ 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them

⁶ Unless otherwise indicated, the legal citations in the Introduction section are incorporated by reference into the analysis of each issue decided below.

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 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 and academic and functional goals related to those needs. It contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining goals, making progress in the general education curriculum, and participating 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) (*Mercer Island*) Although the required educational benefit is sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases refer to the same *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. 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].)

Issue 1: Assessment

5. Student asserted that District failed to conduct an adequate OT assessment because its assessment underestimated his deficits, and the audiological assessment was cursory, at best. District argued that it completely and properly assessed Student in these two areas.

6. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).) A school district’s failure to adequately assess a student is a procedural violation that may result in a substantive denial of FAPE. (*Orange Unified School Dist. v.*

C.K. (C.D.Cal. June 4, 2012, No. SACV 11–1253 JVS(MLGx)) 2012 WL 2478389, *8; 20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2).)

7. Student did not establish that District failed to conduct adequate OT and audiological assessments, because he failed to present sufficient, competent evidence of that claim. Student presented no experts to counter Ms. Milicevic, Mr. Green, and Dr. King about the adequacy of their assessments. Additionally, information from Parent, Grandfather, Ms. Accristo, Ms. Pinkus-Reskin, and the private assessment reports did not establish that Student deficits were more significant than what District assessors found or that they failed to assess in all areas of suspected disability. Accordingly, Student did not demonstrate District’s assessment of his fine and gross motor and sensory processing and audiological deficits was not properly conducted or that the information contained in the reports were not accurate. Therefore, Student failed to establish that District’s OT and audiological assessments were not appropriate.

Issue 2a: Failure to Make Offer of Placement

8. Student asserted that District failed to make an offer of placement in the October 18, 2012 IEP, and that its offer in the December 17, 2012 IEP was inadequate. District contended that it was not required to make a placement offer at the October 18, 2012 IEP team meeting because the team had not completed Student’s goals, which are necessary for determining appropriate services and placement to meet the goals. District offered placement on December 17, 2012.

9. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) 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.

(*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

10. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist. of St. Louis* (E.D. Mo. 2007) 503 F.Supp.2d 1206.) Nor must an IEP conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parents' desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

11. In *Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526), the court emphasized the importance of the formal offer requirement. The formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in presenting complaints with respect to any matter relating to the educational placement of the child. However, a school district is not required to specify the exact location of the educational placement. (*T.Y. v. New York City Dept. of Educ.* (2nd Cir. 2009) 584 F.3d 412, 420; *Deer Valley Unified School Dist. v. L.P. ex rel. Schripsema* (D.Ariz. 2013) 942 F.Supp.2d 880, 889.)

12. In the *Union* case, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. Even if a district is convinced that a parent will not agree to the district's proposed IEP, the district must still hold the meeting, give the parent the opportunity to discuss the placement and services, and make the offer. A school district cannot escape its obligation to make a formal placement offer on the basis that the parents had previously "expressed unwillingness to accept that placement." (*Union Sch. Dist. v. Smith, supra*, 15 F.3d at p. 1526.)

13. Student did not establish that District needed to make a placement offer at the October 18, 2012 IEP team meeting because first the IEP team had not completed going over Student's goals, and without proposed goals develop the special education services to meet the goals and then develop the appropriate placement. District continued the IEP team meeting to finalize its offer, and continued providing early start services, which Parent believed met Student's unique needs.

14. The District's December 17, 2012 placement offer is sufficiently clear and there was no evidence that Parent did not understand the type of classroom it offered. District answer Parent's questions about the placement in the IEP team meeting, and the IEP document specifies adequately the type of classroom District offered. At the meeting, Ms. Yung described the class at Ford and District had people present who could answer Parent's questions about it. Accordingly, Student did not establish that District made a procedurally inadequate offer of placement.

ISSUES 2B AND 3C: TERMINATION OF EARLY START SERVICES

15. Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); Ed. Code, § 56505

subd. (d).) This is referred to as “stay put.” For purposes of stay put, the current educational placement is typically the placement called for in the student’s IEP, which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.) However, stay put does not apply to maintain early start services, Part C, after the child turns three, and is found eligible for special education services, Part B. ((Ed. Code, § 56505, subd. (d); see 34 C.F.R. § 300.518(c).)

16. 34 Code of Federal Regulations part 300.518(c), provides:

If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child has been receiving.

17. The comments to section 300.518 state the following:

We believe that a child who previously received services under Part C of the Act, but has turned three and is no longer eligible under Part C of the Act, and is applying for initial services under Part B of the Act, does not have a “current educational placement.”

We are adding language to clarify that if the complaint involves an application for initial services under Part B of the Act from a child who has turned three and is no longer eligible under Part C of the Act, the public agency is not

required to continue providing the early intervention services on the child's IFSP.

(Federal Register, Vol. 71, No. 156, p. 46709.)

18. Student did not establish that District promised to continue to provide the early start services indefinitely in writing or verbally. Ms. Crenshaw was more believable than Parent that District only promised the early start services to continue until District made a formal IEP offer based on the IEP notes, the recollection of other IEP team attendees, and Parent's bias against any District program. District did not discontinue the early start services in retaliation for Parent's not signing the December 17, 2012, nor was the continuation of those services a legally required obligation on District. While Student does not have a last agreed upon and implemented educational program during the litigation, Parent cannot expect early start services, which she prefers, to continue over a program she finds objectionable. (See *Huerta v. San Francisco Unified Sch. Dist.* (N.D. Cal., November 14, 2011, No. C 11-04817 CRB) 2011 WL 5521742, *7.)

Issue 2c: Production of Education Records

19. Student asserted that District failed to timely produce his educational records on request, which District denied.

20. The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) All parents have the right to receive

copies of all school records within five business days after parents make a request. (Ed. Code, §56504.)

21. Student did not introduce any evidence to establish that District failed to timely produce requested educational records, and District proof of timely production.

Issue 3a and 3b: Adequate Goals, Services and Placement

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

23. The methodology to be used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

24. Student did not establish that District failed to establish goals that met all his unique needs. District had accurate information assessment regarding Student's unique needs, and the private assessments and assessments conducted as part of Student's early start services did not establish that Student had unique needs that District's proposed goals failed to address. District listened to and considered Parent's views and revised the proposed goals after the October 18, 2012 IEP team meeting.

25. District also provided the FBA Parent requested. District assessors were convincing that the proposed goals met Student's unique needs as to communication, social skills, and safety issues. Also, Parent, Ms. Pinkus-Reskin, and Ms. Accristo failed to produce sufficient contrary information, especially since Student could not produce any expert at hearing to support his position. Student failed to establish that he had severe deficits as to safety, tantrums, non-compliance, and off-task behaviors Student failed to present reliable evidence, especially because he presented no witness with equivalent education and experience as Ms. Sangha. Student failed to provide competent evidence to demonstrate that he had more significant speech and language and behavior deficits than Ms. Ramacciotti and Ms. Sangha found. Therefore, Ms. Ramacciotti's assessment accurately described Student's communication and social skills deficits.

26. Student was not successful in establishing through District's own employees and assessors that the offered ABA and OT services were not adequate to meet Student's unique needs. Without the testimony of the assessors themselves, the private and Regional Center assessment reports were inadequate to prove that District's services did not address his motor skills, sensory processing, communication, social skills and safety issues, or that he needed additional OT or ABA services. An ABA recommendation by the National Research Council does not by itself establish that this Student requires a 20 to 25-hour a week ABA program. Finally, Student did very little to disprove that he would not make meaningful educational progress with District's proposed ABA services.

27. District's proposed special day class was small, with a high ratio of qualified staff to provide Student with the services he needed, and to focus on the skills he needed to attend a regular education kindergarten. Parent's concerns about the proposed SDC were not persuasive because of her bias against any District program, which was based on her belief that no District program could protect her son.

Additionally, Student failed to produce sufficient evidence through others that District's program was not adequate to meet his needs. Accordingly, Student failed to establish that District's December 17, 2012 IEP offer, as corrected on January 31, 2013, was not reasonably calculated to provide Student with meaningful educational progress.

ORDER

Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues for hearing.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: March 17, 2014

/s/

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings