

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

GARVEY SCHOOL DISTRICT.

OAH Case No. 2015041168

DECISION

Student, by and through his Parents, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 20, 2015, naming the Garvey School District. On May 26, 2015, the parties jointly requested a continuance. On June 2, 2015, a continuance was granted.

Administrative Law Judge Ted Mann heard this matter in Rosemead, California, on July 14, 15, and 16, 2015.

Attorney Cindy Brining appeared on behalf of Student. Both Mother and Father attended the entire hearing. Student did not attend the hearing. Attorney Sharon Watt represented District. Special Education Director Alma Guerrero attended on behalf of District.

On the last day of hearing, a continuance was granted for the parties to file written closing arguments and the record remained open until July 27, 2015. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on July 27, 2015.

ISSUES¹

Did District deny Student a free appropriate public education by:

- 1) Failing to provide Student a one-on-one, trained behavioral aide and monthly behavioral supervision since the start of Student's 2013-2014 school year?
- 2) Failing to provide Student with appropriate speech and language services since April 7, 2014?
- 3) Failing to offer Student an appropriate placement in the least restrictive environment for Student's 2015-2016 school year?

Student's proposed resolutions are that District provide Student: (i) placement in a blended program of one-half special day class and one-half general education class for Student's 2015-2016 school year; (ii) a full-time, one-on-one behavioral aide and 8 hours per month behavioral supervision, both to be provided by a non-public agency; (iii) compensatory services of 90 hours of speech and language services to be provided by a non-public agency; (iv) compensatory services of 50 hours of one-on-one intensive academic instruction; (v) reimbursement for a private psychoeducational assessment obtained by Parent; and (vi) a total of 1 hour per week of one-on-one District speech and language services, in addition to group speech and language services.

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.) Student waived other issues raised in the complaint on the record at the beginning of the due process hearing.

SUMMARY OF DECISION

Student did not meet his burden of proof in his claims that District had denied him a FAPE by not providing a one-on-one, trained behavioral aide and monthly behavioral supervision since the start of Student's 2013-2014 school year. Student's difficulties in accessing his education were not related to any need for one-on-one behavioral management. Rather, Student's delays were adequately addressed by District's program and services.

Student also failed to meet the burden of proof that District denied him a FAPE by failing to provide Student with appropriate speech and language services since April 7, 2014. Student made meaningful progress with the services provided by District, and Student's displeasure with the amount of such services or District's methodology is not a basis to find a FAPE denial.

Lastly, Student failed to meet the burden of proof that District denied him a FAPE by failing to offer Student an appropriate placement in the least restrictive environment for Student's 2015-2016 school year, specifically a placement consisting of one-half special day class and one-half general education class. The placement offered by District is the least restrictive environment as it acknowledges that Student, owing to his disabilities, is not ready for a general education kindergarten curriculum or environment except in the limited manner proposed by District.

FACTUAL FINDINGS

JURISDICTION

1. At the time of the hearing, Student was a four-year and eleven-month-old boy who resided within District's boundaries at all relevant times, and originally found eligible for special education under the category of Speech/Language Impairment. He originally entered District's special education program on July 25, 2013, the time of his

third birthday. In March of 2015, Student's eligibility was changed to Autism. Student has never had a secondary eligibility category.

BACKGROUND AND EDUCATIONAL HISTORY

2. Student was first diagnosed with a developmental delay in language at the age of 20 months. He received services through the Eastern Los Angeles Regional Center until he was approaching three years of age, at which time he was referred to District for an initial eligibility assessment. He was found to have significant language delays, and was found eligible for special education under the category of speech and language impairment.

PRESCHOOL TRANSITION EVALUATION - 6/10/13

3. School psychologist Drew Balcom prepared a preschool transition evaluation report dated June 10, 2013. The report was based upon his review of records, interviews with both parents, clinical and educational observations of Student, and administration of standardized tests including the Developmental Profile-3, the Vineland-II, and Gilliam Autism Rating Scale-2 ratings prepared by parent and teacher.

4. The assessment found that Student's fine and gross motor skills fell within the low average range. His communication skills were found to be below average, with mild delays in receptive language and moderate to significant delays in expressive language and speech articulation. His adaptive skills fell in the low average range. His social-emotional skills fell in the average range for his age. His cognitive skills fell in the below average range, but may have been negatively influenced by his verbal deficits as his non-verbal thinking appeared good. The probability of autism was rated as "unlikely" as Student received Gilliam Rating scores of 66 from both parent and teacher. Student was not toilet trained at the time of the assessment.

DISTRICT'S SPEECH-LANGUAGE ASSESSMENT - SPRING 2013

5. Speech pathologist Sean Humphrey prepared a Speech-Language Assessment Report ahead of Student's initial IEP team meeting. The undated report was based upon evaluations conducted over two days, and observations of Student at the Almansor School. Student was assessed using standardized testing including the Rossetti Infant-Toddler Language Scale, the Preschool Language Scale-5, and the Receptive One-Word Picture Vocabulary Test. The assessment was also based upon clinical and educational observations, play based assessment, parental input, and a review of records. The assessment found significant delays in communication, language, and articulation.

JUNE 10, 2013 IEP

6. An initial IEP team meeting was held on June 10, 2013, in preparation for Student's transition into the District. The meeting was attended by Parents, Student's future special education teacher Annett Johnson, District's school psychologist Drew Balcom, District's speech language pathologist Sean Humphrey, and several other District representatives.

7. Based upon an assessment by speech pathologist Humphrey, Student's present levels of performance were identified and discussed. In communication development, Student had receptive language skills in approximately the 21 month range, expressive language skills in the 15 to 18 month range, and limited imitation skills. Overall, Student's articulation, phonology, and expressive language skills were in the severely delayed range. In social emotional behavioral, Student had average social-emotional skills, but engaged only minimally with other children in social or play settings. Student's adaptive daily living skills were found to be in the low average range for his age.

8. The team recommended a special day class placement for Student's pre-school class with related services in speech. Speech and language services were provided on an individual basis for 60 minutes weekly. Student was not mainstreamed for any portion of the school day, nor did the team identify any behaviors that impeded Student's or others' learning.

9. The team discussed eight proposed goals and objectives: (1) to rote count 1-10, four out of five trials, for a period of four weeks as measured by staff; (2) to recognize at least six colors by naming, painting, or matching, four out of five trials, for a period of four weeks as measured by staff; (3) to name, point to, or give at least five shapes, four out of five trials, for a period of four weeks as measured by staff; (4) to demonstrate, when objects are placed in front of him, an understanding of the concepts "one more, or just one", and count out the number of objects to five by counting out the designated number of objects; (5) to increase verbalizations, speech sounds, and sound sequences using developmentally appropriate phonemes and vowels in unstructured/structured environments with moderate cues with 80 percent accuracy, three out of five sessions as measured by charting and observation; (6) to increase use of one to two-word utterances/approximations to increase repertoire of communicative intents and functions in a structured/unstructured setting with 80 percent accuracy in three out of five speech sessions as measured by staff; (7) to express 20 desired items/wants using total communication with 80 percent accuracy with a maximum of four prompts in three out of five sessions as measured by staff; (8) to improve pragmatics skills, by engaging in structured play/speech activities using turn-taking skills with peers at least eight times in a 10 minute speech directed activity, with no more than two verbal prompts, over two of three sessions as measured by staff. The eight goals were discussed with and approved by the team, including Parents.

SEPTEMBER 5, 2013 IEP

10. A 30 day review IEP was held on September 5, 2013. Student's mother attended the IEP along with District personnel. The school psychologist Drew Balcom noted concerns about possible regression in Student's communication and language skills over the summer. Student's placement was addressed as he was transitioning from the Moorfield school to the Bitely school. A subsequent amendment to the September 5, 2013 IEP was made on September 30, 2013, mainstreaming Student into the Head Start program for 30 minutes per day. Otherwise, Student's program and services remained the same. Student's goals were retained from the 6/10/13 IEP.

JANUARY 15, 2014 AMENDMENT TO SEPTEMBER 5, 2013 IEP

11. An IEP amendment was undertaken on January 15, 2014, to amend the IEP of September 5, 2013. The amendment was based upon the recommendation of the speech pathologist that Student's speech therapy be undertaken in a group rather than individually as Student's speech and language services provider Julie Sena felt that Student made more progress in a group setting, than with her individually. Parents agreed with the change in delivery of speech services, and the amendment to the IEP was approved.

APRIL 7, 2014 IEP

12. An annual review IEP was held on April 7, 2014. The meeting was attended by Parents, Student's substitute special education teacher Sandra Armenta, District's speech language pathologist Julie Sena, and several other District representatives.

13. Student's present levels of performance were identified and discussed, and success or not meeting his goals was also discussed. Student had met five of eight goals, including one of three of his speech and language goals. He was making progress on the two unmet speech and language goals, and had increased his word utterances.

However, Student remained unable to grasp the concept of "one more".

14. The placement was maintained in the special day class with a half-hour in the Head Start program daily. The change made in the January 15, 2014 IEP amendment to Student's speech and language services, from one hour per week in individualized speech therapy to one hour per week in group instruction, was maintained.

15. The team discussed 10 proposed goals and objectives: (1) to count 1-20, four out of five trials, for a period of four weeks as measured by staff; (2) to recognize numbers 1-20 in random order, four out of five trials, for a period of four weeks as measured by staff; (3) to say/sing the alphabet, four out of five trials, for a period of four weeks as measured by staff; (4) to recognize the uppercase letters of the alphabet, four out of five trials, for a period of four weeks as measured by staff; (5) to pick out his name from a group of four words all beginning with the letter E, four out of five trials, for a period of four weeks as measured by staff; (6) to fill in a picture 90 percent or more with a crayon, and not attempt to escape the task until completed, for a period of four weeks as measured by staff and Student work samples, with minimal verbal prompts and no physical prompts; (7) to take care of his toileting needs other than assistance with wiping, with no more than one wet or soiled clothes, as measured by staff; (8) to use four-word utterances, with 70 percent accuracy over an eight week period, with visual, verbal, or tactile promptings as observed by speech language pathologist; (9) to follow complex, two-step directions (with spatial concepts) with 70 percent accuracy in five out of seven trials, with visual and verbal prompting, as observed by speech language pathologist; (10) to attend to, and take turns with, peers 10 times in a highly preferred activity, with 70 percent accuracy in five out of seven trials, with visual and verbal prompting, as observed by speech language pathologist. The 10 goals were discussed with and approved by the team, including Parents.

OCTOBER 21, 2014 - DR. GUNN'S REPORT

16. Student was referred to Timothy Gunn, PsyD., by his pediatrician for a neuropsychological evaluation. Dr. Gunn conducted a record review, parent interview, Student interview, observations of Student, and administration of standardized tests including the Behavior Assessment System for Children, Second Edition; Expressive and Receptive Picture Tests; Gilliam Autism Rating Scale, Third Edition; and Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition.

17. Based upon a score on the Gilliam Autism Rating Scale indicating the likelihood of autism as probable, along with parental reports, and observations of Student, Dr. Gunn concluded that Student met criteria for Autism Spectrum Disorder with predominately moderate symptomology. Dr. Gunn was less certain about Student's intellectual functioning, but estimated that Student's overall intellectual functioning was average. Dr. Gunn had difficulty drawing a more certain conclusion regarding Student's intellectual functioning due to Student's difficulties with engaging with the objective testing and his delayed language skills. The report, entitled "Psychodiagnostic Assessment Report" was dated October 28, 2014.

DECEMBER 8, 2014 AMENDMENT TO APRIL 7, 2014 IEP

18. Parents reported to District that they had obtained a neuropsychological evaluation of Student. Based upon their having obtained the report, District scheduled an IEP meeting for December 8, 2014. The meeting was attended by Parents, school psychologist Nancy Kugler, Student's special education teacher Annett Johnson, and District speech pathologist Julie Sena.

19. Based upon the report's conclusion that Student met criteria for Autism Spectrum Disorder, the IEP team agreed that Student needed an updated school based assessment. No changes were made to his placement. It was noted in the IEP document

that Student was meeting some of his benchmarks, but not others. Areas of progress included elimination of tantruming in class and tantruming in the context of the toileting goal, use of two and three-word utterances, repeating phrases, and attending to, and taking turns in, tasks with others in speech sessions. Student still needed some prompting to follow verbal directions in speech sessions, and he had made minimal progress on actual toileting skills.

MARCH 13, 2015 - ANNETTE JOHNSON'S REPORT

20. On March 3, 2015, Student's special education teacher administered the Developmental Profile 3 to Student. The subsequent scoring of the results on March 13, 2015, indicated that Student was delayed in adaptive behavior, social-emotional, cognitive, and communication skills.

MARCH 19, 2015 - JULIE SENA'S SPEECH AND LANGUAGE ASSESSMENT REPORT

21. Student was given a speech and language assessment in preparation for his March 2015 IEP. The assessment was undertaken by District speech pathologist Julie Sena. She had also provided Student with speech and language services for the previous two academic years at Bitely. Student was assessed over three non-consecutive sessions in the school's speech room. Ms. Sena administered the following tests: Receptive One-Word Picture Vocabulary Test-4; Expressive One-Word Picture Vocabulary Test-4; and Preschool Language Scales-5. She also considered the following information: her observations of Student in speech therapy; interviews with special education teacher Johnson and Mother; previous speech and language evaluations; and an informal analysis of Student's language use in context.

22. Student scored in the average range in the Receptive One-Word Test, and also scored in the average range in the Expressive One-Word Test. Student scored in the significantly low range in the Preschool Language Scales with deficits in understanding

of language and use of language. Overall, Ms. Sena concluded that Student had made significant progress in speech and language over the two previous academic years, with great growth in phonology and intelligibility and significant progress in moving from a lexicon of approximately 41 words to using sentences of four or more words. She recommended that Student continue with speech and language therapy.

MARCH 20, 2015 - NANCY KUGLER'S PSYCHOEDUCATIONAL REPORT

23. Student was referred to school psychologist Nancy Kugler for a psychoeducational assessment for his yearly IEP and to provide both triennial and transition assessments of Student. Ms. Kugler based her assessment on a review of records, a health update from the school nurse, classroom observations, and administration of standardized tests including the Southern California Ordinal Scales of Development-Cognition, the Developmental Profile 3, the Beery-Buktenica Developmental Test of Visual-Motor Integration, and the Vineland Adaptive Behavior Scales. Her report was dated March 20, 2015.

24. Based upon the information she reviewed and analyzed, Ms. Kugler determined that Student was currently functioning in the Preoperational Stage 1: Preconceptual Thought, at a level typically seen in two to four year old peers, and indicative that Student relied on his perception of the world, rather than conceptual thought. Her opinion was based upon Student's ability to discriminate and order objects by size; match objects by color, shape, and object; classify objects by color and size; recognize part-whole relationships in being able to complete a two to four piece non-inset puzzle; ability to receptively identify body parts and simple common objects; and ability to name common objects.. She also considered that Student had not mastered the ability to discriminate by quantity, the ability to identify what was missing in a picture, or the ability to fix simple broken toys. She further considered that Student was unable to describe pictures of a party, park, or fair, and was unable to follow directions

requiring knowledge of prepositions.

25. Ms. Kugler also reported that Student scored in the third percentile on the test of Visual Motor Integration, which corresponded to a below average score. Student also scored in the low and moderately low level for the various domains and subdomains of the Vineland Adaptive Behavior Scales. Overall, Student's adaptive behavior composite score was in the low range.

MARCH 20, 2015 IEP

26. An annual, triennial, and transition IEP was held on March 20, 2015. The meeting was attended by Parents, Annette Johnson, Julie Sena, Nancy Kugler, Student's home services provider Mayra Haff, and several other District representatives.

27. Student's present levels of performance were identified and discussed, and success or not in meeting his goals was also discussed. Student had met 4 of 10 goals, including 2 of 3 of his speech and language goals. He was making progress on most of the remaining goals, although his toileting progress remained slight.

28. The placement for the 2015-2016 school year was maintained in a special day class, but now for kindergarten, with a half-hour in the general education Head Start program daily, and additional general education time up to 16 percent of the day, inclusive, in general education school settings/activities such as recess, break, and assemblies. Student's speech and language services were increased with the addition of 30 minutes per week in individualized speech therapy to the continuing one hour per week in group instruction.

29. The team discussed 10 proposed goals and objectives: (1) to count up to 10 objects using one to one correspondence, with 80 percent accuracy, for a period of four weeks as measured by staff; (2) to have an understanding when counting, that the number name of the last object counted represented the total number of objects in the group up to 10, four out of five trials, for a period of four weeks as measured by staff; (3)

to recognize and be able to extend simple A, B, A, patterns, four out of five trials, for a period of four weeks as measured by staff; (4) to develop a friendship with one or more students in the classroom by initiating play or interaction with the student for 10 minutes daily, for a period of four weeks as measured by staff; (5) to correctly identify from a set of a consonant letters and four pictures which two had the same initial consonants as the consonant presented, four out of five trials, for a period of four weeks as measured by staff and student work samples; (6) to copy or draw, when shown a model and given step by step directions, a stick person with at least six body parts, four out of five trials, for a period of four weeks as measured by staff and Student work samples; (7) to repeat, in speech sessions, a complete sentence modeled for Student after he used incomplete, disjointed phrases, with 75 percent accuracy in four out of five trials, as observed by the speech pathologist, with visual and verbal prompting; (8) to answer, in speech sessions, simple yes/no, what/where/who questions, with 70 percent accuracy in three out of four trials, as observed by the speech pathologist, with visual and verbal prompting; (9) to take turns with a buddy, in speech sessions, in tossing and catching a ball or balloon with engagement and/or happy disposition, with 75 percent accuracy in four out of five trials, as observed by the speech pathologist, with visual and verbal prompting; (10) to comment about pictures or items, and then engage in a basic three-way zig-zag exchange or conversation, with 70 percent accuracy in three out of four trials, as observed by the speech pathologist, with visual, verbal, and tactile prompting. The 10 goals were discussed with and approved by the team, including Parents.

JULIE SENA'S TESTIMONY

30. Julie Sena is a credentialed and licensed speech pathologist in California. She holds a Certificate of Clinical Competence from the American Speech-Language-Hearing Association. She has a master's degree in speech and language pathology. She

has been with District for approximately 23 or 24 years, of which 20 years were credentialed.

31. She began working with Student in September or October of 2013. Initially she provided speech and language services to Student on an individual basis, but that delivery means changed to group instruction in January of 2014. The change in delivery was due both to Student's resistance to Ms. Sena in individual therapy, as well as the language and behavioral modeling afforded by the other students in the group setting. By that time, Student had progressed from monosyllabic to polysyllabic words when speaking.

32. Student communicated with adults, but did not communicate with his peers. Ms. Sena felt that general education children usually communicated with peers at Student's age, but that all children developed at their own pace, and that Student's lack of communication with peers as of April of 2014 was within what she felt was a normal range of development. She described Student as a non-verbal communicator.

33. In Ms. Sena's opinion, Student's ability to attend and take turns in speech therapy represented significant progress. Also, his ability to produce more regular speech and more spontaneous speech by March of 2015 represented significant progress. However, in her opinion, Student was not ready for the difficulty level presented by Common Core kindergarten due to his limited use of language and his continuing distractibility. She did not think that a one-to-one aide would help Student because the aide would not be able to help Student's comprehension of language. In her opinion, Student was not neurologically ready for a general education kindergarten class.

STUDENT'S MOTHER'S TESTIMONY

34. Student's mother was very concerned about her son's communication skills and lack of interest in interacting with other children. She relied on District and its

personnel to advise her and her husband on how to educate her son. She was not very familiar with special education.

35. Her opinion was that Student's time at the Scottish Rite speech and language therapy program in Pasadena helped her son improve his skills a lot. Student also received Applied Behavioral Analysis therapy at home through People's Care Autism Services. She did not think to mention the services at Scottish Rite or through People's Care to the District, nor did she provide assessments or reports from those services to District, leaving District unaware that Student was receiving the services.

36. Student's mother never saw tantruming, maladaptive behavior, disruptive behavior, or Student lying down while observing him at school in the classroom. She was never told of such behavior occurring at school. She did observe some of this behavior when she had Student at the store or museum.

37. Even though Student's mother suspected something, she was shocked by Dr. Gunn's opinion that her son was on the autism spectrum.

ANNETT JOHNSON'S TESTIMONY

38. Annett Johnson has been a teacher for more than 25 years. She spent nine years as a general education teacher, and the remainder of the time as a special education teacher. She has held a California credential in special education since 2004. She has taught preschool and combined kindergarten/first grade special education classes. She has taught children on the autism spectrum and children with speech and language delays.

39. Ms. Johnson's class had between seven and nine students with two or three classroom aides along with her in the classroom during Student's two years with her. The aides were provided by the District, and though she did not know the extent of their training, she felt that the combination of her and the aides were able to meet Student's needs. Student was able to function and participate in class, as well as be

redirected when needed.

40. Ms. Johnson believed that Student made progress in academic skills, speech, and interactions and speech with adults, as well as the elimination of tantruming. Student made progress with upper and lower case letters and with numbers. Student had good adaptive skills in the classroom with his belongings, his hand washing, and eating, and showed significant improvement in these areas. He did improve somewhat in toileting as he stopped tantruming and would participate somewhat in pulling his pants/diaper up and down.

41. In Ms. Johnson's opinion, a one-to-one aide would not have helped Student engage with other children, and she did not believe that Student needed one in the classroom. She felt that Student's behavior did not interfere with his ability to access education. Ms. Johnson opined that Student should continue to be mainstreamed for 30 minutes a day in the coming school year. She did not know how a general education kindergarten class would modify the curriculum to make it accessible to Student. She did not believe that Student could tolerate more than an hour a day in general education, and that he would not be able to keep up academically, much less spend 50 percent of his time in general education.

AILEEN ARRATOONIAN'S TESTIMONY

42. Aileen Arratoonian is a licensed clinical psychologist who consulted with Parents through Dr. Gunn's office. She has been licensed in California since 2014. Ms. Arratoonian has a background in pediatric neuropsychology and experience as both behavior interventionist and supervisor in California. She also has significant experience conducting autism assessments and neuropsychological assessments. Ms. Arratoonian has not been certified as a Board Certified Behavioral Analyst, but she has had ABA training and has used ABA therapy in her practice.

43. Parents had her assess Student for his social-emotional profile. They wanted to find out what program and services would be good for Student, and they were interested in mainstreaming him.

44. During her testing of Student, he did not seem to understand her questions, nor did he give related responses. She did not assess Student for intelligence or cognitive ability as he had recently been tested in these areas. She was aware that some testing had suggested Student had below average intelligence, but she discounted that testing as possibly compromised by Student's language deficits.

45. Ms. Arratoonian also observed Student during circle time in his special day class. There were a total of seven students in the class she observed. She observed Student to have attention problems and impulsivity, but she also observed Student to be redirectable, participatory, and more engaged and participatory than some of his peers. During her observation, she observed a classroom aide working successfully on a one-to-one basis with Student.

46. She also observed Student during recess time. She observed him engaging in repetitive play by himself. He did not engage with his peers, but did interact with adults. She did not observe any adults assisting Student with peer interactions during her time observing recess time.

47. Based upon her testing, observation, and review of records of Student, Ms. Arratoonian had the opinion that general education was a good goal for Student, but that he needed social-emotional and language skills before attempting general education. She believed that Student could make big improvements with the right supports such as one-to-one support. She concurred with Dr. Gunn's diagnosis that Student was on the autism spectrum.

48. Ms. Arratoonian did not think that Student was ready for 50 percent of his day to be in general education and that it was not appropriate for Student. Rather, she

felt that he needed some additional unstructured general education time beyond the Head Start class, and that Student could work towards the goal of 50 percent of his time in general education once he had developed the necessary skills.

JOE GIVENS' TESTIMONY

49. Joe Givens has taught at both Cal State Northridge and Cal State Los Angeles. He is a licensed speech language pathologist in California. He had most recently been employed by the Pasadena school district as a speech and language pathologist, but he will be moving to a Santa Clarita district. He has spent the last three summers working on a collaborative project between Scottish Rite and Cal State Northridge providing supervision of speech and language services at the Scottish Rite center in Pasadena.

50. Mr. Givens worked with Student at Scottish Rite in Pasadena over the summer of 2014 and the summer of 2015. He believes that Student needs both group and individual speech and language services. Individual therapy would work on attentional issues that are hard to address in a group setting. Mr. Givens recommended more speech and language services than one hour per week in group and half an hour per week in individual therapy. He also believed that Student lacks underlying skills, but has the capacity to acquire them.

NANCY KUGLER TESTIMONY

51. Nancy Kugler has worked as a school psychologist with District since approximately 2001. Prior to that time she was a general education classroom teacher with District for approximately 23 years. As a school psychologist Ms. Kugler has conducted approximately 80 to 100 psychoeducational assessments per year.

52. Ms. Kugler's opinion was that Student was able to communicate basic wants and needs, but was otherwise severely limited in communicative skills. She

recalled observing Student communicate in limited ways with both adults and peers, but did not recall if she had seen more sustained communication. Based upon her observations of Student, she thought that Student made progress over the 2014-2015 school year in Ms. Johnson's class.

53. Ms. Kugler was of the opinion that Student was not ready for academic instruction in a general education kindergarten classroom as he was lacking the foundational skills to access the general education kindergarten curriculum. She found Student to be very delayed in his language skills. She believed that Student had a serious problem with receptive language and lacked comprehension and understanding of language spoken to him. Because of his language limitations, standardized intelligence or cognitive functioning tests were problematic and could produce skewed results.

54. Ms. Kugler believed that the placement identified in the March 20, 2015 IEP was an appropriate placement for Student given his strengths and weaknesses. His lack of academic skills and cognitive impairments will require special day class instruction in the 2015-2016 school year. Any general education time during the 2015-2016 school year should be in unstructured, non-academic settings.

55. Ms. Kugler felt that the necessity for a one-to-one aide was usually driven by a student's behaviors that were a danger to him or others, although there were other instances where such an aide might be appropriate. Based on Student's relative independence in the classroom, Ms. Kugler did not feel an aide was warranted, as Student could access the curriculum without a one to one aide, and such an aide could build Student's dependence on the aide and isolate him from his peers. Overall, the type of support provided by a one-to-one aide did not seem necessary or appropriate for Student, given his ability to make progress in Ms. Johnson's class.

LEGAL CONCLUSIONS

INTRODUCTION - LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act, 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.³; 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 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) "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

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

³ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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) & (f); 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, § 56502, 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); Ed. Code, 56505, subd. (l).) 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].) In this matter, because Student filed the complaint and requested the hearing, Student has the burden of proof.

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

the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

6. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

ISSUE 1 - FAILURE TO PROVIDE ONE-TO-ONE BEHAVIORAL AIDE

7. Student contends that District's failure to provide a one-to-one trained behavioral aide and monthly supervision since the beginning of the 2013-2014 school year resulted in a denial of FAPE to Student. Specifically, Student contends that he required a one-to-one aide to allow him to obtain a benefit from his educational placement. District contends that not providing a one-to-one trained behavioral aide and monthly supervision during that time period did not constitute a denial of FAPE because Student was able to obtain some educational benefit from his placement.

8. The methodology 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 meaningful educational benefit to the child. (*Rowley, supra*, 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.)

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 student. (*Rowley, supra* 458 U.S. 176, 208; *Student v. Corona-Norco Unified School District* (2005) Cal.Ofc.Admin.Hrngs. Case No. 2005070169.)

9. Here, the evidence showed that Student did not need a one-to-one behavioral aide to access his education. He did not have behaviors that were potentially injurious to him or others, and he did not disrupt his peers or the classroom, generally. Although he required some level of redirection at times, that redirection was adequately provided for in the special day class with the trained special education teacher and multiple classroom aides. Student was able to make meaningful progress with the special day class classroom structure of a special education teacher and several aides, and he derived significant and adequate one-to-one attention from that combination of providers.

10. Student asserts that a one-to-one aide would have allowed him to make more progress than he was able to make during the 2013-2014 and 2014-2015 school years, but as noted above, that is not the standard herein. Student did make progress sufficient to meet the *Rowley* standard on his goals over the two school years. To the extent that Student's argument encompasses a disagreement with District's providing a classroom team overseeing all students in Ms. Johnson's special day classes, rather than providing a one-to-one aide exclusively to Student, that argument fails as a disagreement over methodology because Student made meaningful educational progress with the existing classroom structure.

11. Both special education teacher Johnson and speech pathologist Sena testified credibly and convincingly that Student did not need a one-to-one behavioral aide in the classroom. In particular, Ms. Johnson was convincing in her detailed

descriptions of the day-to-day mechanics of her classes, Student's performance and progress in the classes, and his ability to access his education in her special day classes. Likewise, school psychologist Kugler also testified that a one-to-one aide was typically only necessary for a child exhibiting behaviors that threatened the child, his peers, or the school staff with injury or disruption. Student's expert, Ms. Arratoonian, did testify that Student needed an aide were he to be placed in a general education classroom, but she did not extend that requirement to the special day class setting. Importantly, District's witnesses noted the measurable progress Student made over the two years at Bitely. In contrast, Ms. Arratoonian's assessment was directed towards the ideal circumstances for Student, not merely one providing for meaningful progress.

12. In sum, Student did not establish by a preponderance of the evidence that District denied him a FAPE during the two academic years at issue by failing to provide a one-to-one behavioral aide.

ISSUE 2 - EXTENT OF SPEECH AND LANGUAGE SERVICES SINCE APRIL 7, 2014, AS A DENIAL OF FAPE

13. Student contends that the speech and language services provided by District since April 7, 2014, were insufficient for Student's needs and resulted in a denial of FAPE. Specifically, Student disagrees with District's decision to change his speech services from individual to group delivery. District contends that the extent of language and speech services it provided to Student during that time period was sufficient and did not result in a denial of FAPE to Student.

14. Here, District provided adequate speech and language services for Student to make meaningful progress in his education. Both Student's special education teacher and his speech pathologist testified credibly and convincingly that Student made meaningful progress over the two years at issue. While Student did not make consistent progress on all his goals, his acquisition of language and development of basic skills

continued over that period of time, and leads to the conclusion that he made sufficient progress and that the speech and language program offered to him provided him with a FAPE.

15. Student contends that he made insufficient progress to have received a FAPE. However, the balance of the evidence is found to be on District's side as to the sufficiency of Student's progress under *Rowley*. Student also complains that the decision to change the delivery of speech services from individual to group, in effect, resulted in a denial of FAPE. In particular, Mr. Givens testified that he felt that Student should have received individual services, not the group delivery model. However, this is once again a dispute about methodology as Student made meaningful progress with District instruction. Mr. Givens did not establish that Student failed to make meaningful educational progress since April 7, 2014, just his preference for a different delivery model.

16. Significantly, speech pathologist Julie Sena had significant discretion in the methodology utilized by her in educating Student, and the evidence established that he made meaningful progress. As noted, above, so long as the school's methodology meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child, the school is within its discretion in choosing how to deliver the speech and language services.

17. It is found that the extent of language and speech services District provided to Student during the period in question was sufficient and did not result in a denial of FAPE to Student.

ISSUE 3 - PLACEMENT FOR THE 2015-2016 SCHOOL YEAR

18. Student contends that District's placement offer for the 2015-2016 school year is not in the least restrictive environment and thus denies Student a FAPE. Specifically, Student contends that he should be placed in general education 50 percent

of the kindergarten day, including instructional time, with the remaining 50 percent in the kindergarten special day class. District contends that the placement offered for the 2015-2016 school year for 84 percent of the day in special education, and 16 percent in general education is appropriate and does not deny Student a FAPE.

19. Federal and state law require a school district to provide special education in the least restrictive environment. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) "Educating a handicapped child in a regular education classroom with nonhandicapped children is familiarly known as 'mainstreaming'" (*Daniel R.R. v. El Paso Independent School Dist.* (5th Cir. 1989) 874 F.2d 1036, 1039.) In light of this preference, and to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 1403 (*Rachel H.*), adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. In general, a regular education setting is the least restrictive of available environments considered in placement decisions. (See Ed. Code, § 56361.) In selecting the least restrictive environment, a district must consider any potential harmful effect on the child or on the quality of services that he or she needs. (34 C.F.R. § 300.116(d).)

20. Here, District's IEP for the 2015-2016 school year offered a placement in a kindergarten special day class for specialized academic instruction for 84 percent of the day, and placement in general education for 16 percent of the day. The general education portion of Student's schedule consisted of 30 minutes per day in Head Start, along with mainstreaming opportunities for recess, break, and assemblies. Student's core curriculum was offered in the special day class.

21. Due to Student's issues with expressive and receptive language, and his attentional issues, multiple witnesses offered credible testimony that Student was not yet ready for the core curriculum in a general education setting because of the pace and complexity of the curriculum, combined with Student's lack of fundamental learning skills. Notably, Student's expert, psychologist Arratoonian, testified that Student is not ready for half of his program to be in general education. District's witness, special education teacher Annett Johnson, testified credibly that Student was not ready for more than an hour a day in a general education setting for the upcoming school year. In sum, it was the overall conclusion of the witnesses at hearing, including Student's own expert, that Student would not benefit from more time in general education than was offered in District's March 20, 2015 IEP, and that Student needed the small, structured learning environment offered by the special day class.

22. The non-academic benefits of Student's participation in a general education placement are similarly circumscribed. Student continued to socialize primarily with adults. District's proposed placement for the 2015-2016 school year would limit Student's contact with the mainstream school population, but not overly so, or to the extent that he would not obtain a meaningful benefit from his education. As noted above, Student was not ready for a fully mainstreamed program; rather, Student required the small, structured learning environment offered by the special day class to acquire peer socialization skills at his own pace and comfort level. Within the structured

classroom environment, and in the speech and language group sessions, District would be able to work with Student on learning the skills he needed to participate successfully in a general education setting.

23. There was little evidence elicited that Student would have a profound effect either way on the teacher and children in a regular class. Neither side presented evidence on this point specifically. As such, the third factor in the *Rachel H.* test is effectively neutral.

24. The fourth *Rachel H.* factor is the cost of mainstreaming the student. Here, there was no evidence proffered as to the respective costs of Student being mainstreamed versus providing him with specialized academic instruction in a mild/moderate special day class. Thus, the cost of mainstreaming is not a significant factor in the analysis of Student's proposed placement.

25. After consideration of each of the four factors under the *Rachel H.* test, it is found that Student has not met his burden of establishing that the educational placement offered by District is not in the least restrictive environment given Student's disabilities and challenges. In fact, Student's present levels of performance are such that his ability to access his education effectively requires that he be educated in an environment that features the small, structured learning environment offered by the special day class to receive a meaningful educational benefit.

ORDER

Student's 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. District prevailed on all issues presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: August 25, 2015

_____/s/____

TED MANN

Administrative Law Judge

Office of Administrative Hearing