

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

VISTA UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015010878

DECISION

Vista Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on January 28, 2015, naming Student. OAH continued the matter for good cause on February 23, 2015. Administrative Law Judge Robert G. Martin of OAH heard this matter on May 19 and 20, 2015, in San Diego, California.

Attorney Tiffany Santos represented District. Dawn Dully, District's Executive Director of Special Education, attended the hearing on behalf of District. Student's Mother and Father represented Student. Parents were present at the commencement of the hearing, but left after completing their opening statement on behalf of Student on the morning of May 19, 2015, and did not return for any part of the hearing thereafter. Student did not attend the hearing.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 3, 2015. District timely filed a written closing argument, the record was closed, and the matter was submitted for decision on June 3, 2015.

The hearing was interpreted from English to Spanish and Spanish to English for Parents during the time that they attended the hearing. The interpreter also orally translated parts of documents from Spanish to English, including several documents moved into evidence that were in Spanish, only.

ISSUES¹

1. Did District comply with the procedural requirements of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) when it developed Student's March 6, 2014 individualized education program, as amended on March 19, 2014, April 18, 2014, October 31, 2014, and January 8, 2015?
2. Did Student's March 6, 2014 IEP, as amended on March 19, 2014, April 18, 2014, October 31, 2014, and January 8, 2015, constitute a free appropriate public education in the least restrictive environment for Student, such that District can implement the March 6, 2014 IEP and its amendments without Parents' written consent?

SUMMARY OF DECISION

District complied with the procedures of the IDEA in developing Student's IEP completed on January 8, 2015 IEP. However, District did not establish that the IEP substantively offered Student a FAPE. Student at the time of the offer was failing most of his core general education classes and regressing in his performance on his IEP goals, but District made only small changes to Student's education program that had been implemented in substantially the same form since August 2012. Also, District at the time of its offer had been informally implementing, since August 2014, its proposed changes

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.)

to Student's education program, but this had not improved Student's academic performance or his progress on his existing goals. District therefore did not demonstrate by a preponderance of the evidence that its January 8, 2015 IEP was reasonably calculated to address Student's lack of expected progress toward his IEP goals and in his general education curriculum. District is not entitled to implement the IEP without Parent's consent.

FACTUAL FINDINGS

1. At the time of the hearing, Student was a 13-year-old boy who had resided in District at all times relevant to the issues in this matter, and who was eligible for special education under the categories of specific learning disability and other health impairment based on a diagnosis of attention deficit disorder. District first found Student eligible for special education in fourth grade based on his attention deficit disorder that caused him to lack focus, have a poor short-term memory, have poor organizational skills, and to be inconsistent in completing assignments, particularly homework. Student was in the eighth grade at District's Roosevelt Middle School, attending general education classes except for a daily special education study skills class taught by a special education resource teacher. Student was well-behaved at school, and his teachers found him to be polite, happy, kind, and respectful.

2. District implemented Student's spring 2012 IEP through December 2013. The IEP included goals in study skills, writing, and mathematics. All three goals addressed Student's deficits caused by his difficulties with memory, attention, and organization. Student's grades in fall 2012 were C- in English language arts, C- in literature, C- in social studies, D+ in math, A in physical education, B- in study skills, and C- in science.

STUDENT'S 2012-2013 ASSESSMENTS AND IEP

3. During Student's 2012-2013 sixth grade school year, Parents obtained a private psychological assessment and Lindamood-Bell assessment of Student. District conducted a psychoeducational assessment, speech and language assessment, and assistive technology assessment in preparation for Student's triennial IEP team meeting to be held in March 2013.

4. The assessments concluded that Student had average to high-average intellectual ability. Although he showed deficits in organization, attention, short-term memory, and auditory processing that affected his learning and academic performance, Student's academic achievement test scores demonstrated average academic achievement consistent with his cognitive abilities. Student was learning and retaining information taught, even in subjects in which his grades were poor. However, his scores showed a severe discrepancy between Student's cognitive ability and his achievement in written expression, indicating a specific learning disability in writing resulting from his attention and memory issues.

5. Student's teachers believed that Student was capable of doing grade level work and did not require a special education placement for his academic subjects. They agreed that Student's grades were depressed because he often failed to complete his assignments or turn them in for credit due to his lack of organization and attention. Student performed well in his second-semester sixth grade study skills class where the practice of his teacher, Kathy Adams, was to proactively approach Student to offer assistance and suggestions during class, even when Student did not ask for help.

6. District held six IEP team meetings between March 6, 2013 and May 28, 2013 to develop Student's 2013 IEP. The multiple meetings were necessary because Parents, primarily Father, treated the meetings as adversarial proceedings and tended to fixate on procedural matters instead of focusing on Student's needs and how to address

them. Father's resistance to cooperation with the IEP team significantly protracted the IEP process, and delayed completion of Student's IEP.

7. District completed Student's 2013 IEP on May 28, 2013. Based upon the assessments in 2012, District found Student eligible for special education under the primary classification of specific learning disability, with a secondary eligibility category of other health impairment based on attention deficit disorder.

8. District offered Student continued placement in general education classes, working on core curriculum towards ultimate graduation with a high school diploma, with special education support through specialized academic instruction in the area of study skills for 45 minutes each day. Student would work on five goals – two that addressed Student's deficits in written expression, and three that addressed his needs in study skills. Student's first writing goal focused on Student's ability to prepare a multi-paragraph essay when given a writing topic. Student's starting baseline for this goal at the time of his IEP, was that he included a topic sentence, supporting sentences, and a conclusion statement 60 percent of the time when writing an essay, with two writing errors per 100 words on edited work. Student's measurable annual goal for March 2014 was to be able to write a three-paragraph expository essay with an emerging topic sentence, four to six supporting sentences, and a summary conclusion, using grade appropriate language and conventions with 85 percent accuracy.

9. Student's second writing goal focused on Student's ability to revise his writing using simple and complex sentences, calling for Student to be able to revise his writing using more than 50 percent complex sentences, with 85 percent accuracy.

10. Student's first study skills goal focused on improving his recording of assignments. At the time of his IEP, Student was recording approximately 75 percent of his assigned work. His annual goal for March 2014 was to be recording 95 percent of his class assignments in every class in a daily planner.

11. Student's second study skills goal focused on improving his completion of

his assignments. At the time of his IEP, Student was turning in approximately 75 percent of his assignments. His annual goal for March 2014 was to be turning in 90 percent of his assignments in every class.

12. Student's third study skills goal focused on improving his attention to task. At the time of his IEP, Student was able to work an average of 15 minutes independently without needing prompting. His annual goal for March 2014 was to be able to remain on task and work independently for at least 30 minutes 90 percent of the time as measured by his work completion and teacher observations.

13. District offered seven accommodations including: (i) state testing in English language arts, math and science to be given to Student in a small group setting; (ii) clarification of directions, small group instruction, extra time on assignments, repetition of instruction and direction, and remediation; (iii) the use of graph paper, skill charts, and word problems to be read aloud; (iv) use of an electronic speller, graphic organizers, and access to computers; (v) separate content and homework grades; (vi) monitoring of assignments and projects; and (vii) a multiplication chart to be available in math class.

14. Parents did not consent to District's IEP offer, and District filed a due process hearing request with OAH on July 1, 2013. In a decision issued December 20, 2013 in OAH case number 2013070169, OAH found that Student's May 28, 2013 IEP offered Student a FAPE in the least restrictive environment, and that District could implement the IEP without Parents' consent. District began implementing Student's 2013 IEP in January 2014.

15. Parents did not consent to District's IEP offer, and District filed OAH case number 2013070169 on July 1, 2013, seeking a determination that the IEP offered Student a FAPE. Parents objected that District should have included more goals for Student, should have developed another placement for him, and should have provided Student extended school year instruction and services. Parents pointed to Student's lack

of academic progress in the fall of his 2013-2014 seventh-grade school year, where he received grades of F in all of his core subjects except literature, where he earned a D. Parents also pointed to a significant drop in Student's California State Testing scores on the sixth-grade test administered in April 2013. In that test, Student's scores in English language arts and math fell from "proficient" in fifth grade testing (scores of 350 in English language arts and 406 in math), to "basic" in English language arts and "below basic" in math (scores of 311 and 278, respectively). Parents also contended that Student's IEP should have included a self-advocacy goal to address Student's being too shy and afraid of being thought "stupid" to affirmatively ask for help in his academic classes or study skills class.

16. In a decision issued December 20, 2013, OAH found that Student's IEP developed as of May 28, 2013, offered Student a FAPE in the least restrictive environment appropriate for Student, and could be implemented by District without Parents' consent. Although Student established that District should have developed a self-advocacy goal for Student, the lack of that one goal was not sufficient to invalidate the IEP, which offered Student a FAPE when considered in its entirety. OAH found that information regarding Student's low grades in the first quarter of his 2013-2014 seventh-grade school year, and the drop his California State Testing scores, was not available to District at the time it developed Student's IEP completed on May 28, 2013, and therefore was not relevant to the determination of whether District had offered Student a FAPE in that IEP. District began implementing Student's 2013 IEP in January 2014.

FIRST DRAFT OF THE IEP AT ISSUE, JANUARY – FEBRUARY 2014

17. In January 2014, District began developing a new IEP for Student's annual IEP team meeting to be held in March 2014. The IEP was not completed until January 8, 2015.

18. In January and February 2014, Student's study skills teacher and special education case manager, District Education Specialist Kathy Adams, prepared a draft IEP for discussion purposes. Ms. Adams reviewed Student's May 2013 IEP, the assessments used in its preparation, and the December 20, 2013 OAH decision authorizing implementation of the May 2013 IEP. Ms. Adams also reviewed current examples of Student's work product, discussed Student's present levels of performance as of January-February 2014 with his teachers, and reviewed his then current grades. Ms. Adams added a self-advocacy goal to the draft 2014 IEP.

19. District did not perform any new assessments of Student in preparation for Student's 2014 IEP. Parents had requested in August 2013 that District pay for an independent psychoeducational evaluation of Student, and District had agreed to do so, but that evaluation was not completed until November 2014.

20. Ms. Adams determined that, as of February 2014, Student had met his first writing goal from his 2013 IEP. Ms. Adams could not recall at hearing if Student had met his second writing goal. Student had not met two of his three study skills goals. In Ms. Adams's study skills class, Student had met his third study skills goal, but Ms. Adams could not recall at hearing if Student had met that goal in his other classes.

21. During her review of his progress, Ms. Adams found that Student had poor grades. At the time of Student's May 2013 IEP in sixth grade, his most recent third quarter grades were C- in English language arts, C in literature, D+ in social studies, D- in math, A in PE, B in study skills, and D+ in science. As of February 2014, when Ms. Adams was completing her draft 2014 IEP for Student, Student's most recent second quarter grades had declined to F in English language arts, D in literature, F in social studies, F in math, A- in PE, C-study skills, and F in science.

22. Based on the information she obtained, Ms. Adams completed the draft IEP by February 20, 2014. After completing the draft IEP, Ms. Adams did not attend any meetings at which the team reached substantive issues concerning Student's IEP, and

she made no changes to her draft IEP before she stopped working with Student.

IEP MEETINGS AND POSTPONEMENTS, FEBRUARY – SEPTEMBER 2014

23. On February 20, 2014, Ms. Adams sent an email to Parents, in Spanish, proposing that Student's IEP team meet on February 27, 2014, for his annual review. Ms. Adams attached IEP team meeting notices in English and Spanish. Throughout the IEP process, District took appropriate steps to ensure that Mother would be able to understand Student's IEP team meetings, by including Spanish language translations of most emails regarding the process, providing its IEP meeting notices, draft IEP's and IEP meeting notes in Spanish, and arranging for the presence of a Spanish interpreter at all IEP team meetings attended by Mother. When Parents objected to the interpreter's skills at one IEP team meeting, District terminated the meeting and rescheduled it for a later date with a new interpreter.

24. After Parents told District they could not attend a February 27, 2014 IEP team meeting, Ms. Adams emailed Parents on February 25, 2014, proposing that that the IEP team meet on March 6, 2014. On March 5, 2014, Parents notified District they would not be able to attend a March 6, 2014 IEP team meeting, and the meeting was rescheduled for March 19, 2014.

25. On March 19, 2014, Student's IEP team met for his annual review. Parents attended, as did Ms. Adams, District Special Education Supervisor Steven Davis, District Site Administrator Candice Kordis, Student's English teacher Erin Dayus, Student's math and science teacher John Bechtold, and interpreter Jackie Wallace. At the meeting, District gave Parents a copy of Ms. Adams's draft IEP in English, and told Parents that District would provide them a copy of the final IEP translated into Spanish. Parents stated that Student's pediatrician had recommended to them that District conduct an auditory processing assessment. Parents declined District's request for consent to consult with Student's pediatrician to better understand the request. Parents objected

that the interpreter's interpreting skills were inadequate, and the interpreter conceded that she was unable to interpret specifics of some of Student's assessments. The IEP team agreed to end the meeting and reconvene after the spring break. No substantive discussion of Student's IEP took place at the March 19, 2014 meeting.

26. On April 4, 2014, Mr. Davis emailed Parents Spanish translations of Student's draft IEP and the March 19, 2014 IEP team meeting notes. After Parents indicated they had not received the translations, Mr. Davis re-sent them on April 16, 2014.

27. On April 18, 2014, Student's IEP team reconvened. Parents attended, as did Mr. Davis, Ms. Adams, Ms. Kordis, Ms. Dayus, Mr. Bechtold, and interpreter Juliana Velati. District again asked Parents to sign an exchange of information authorization so that District could communicate with Student's pediatrician regarding his recommendation that District assess Student's auditory processing, and Parents again declined to do so. District also asked Parents to sign a Technology Use Agreement authorizing Student to use District technology and wireless internet connections available to students at Roosevelt Middle School. Parents eventually signed the agreement after crossing out most of its provisions. From the start of the meeting, Father's behavior was belligerent and critical of District staff, escalating to the point where, approximately 10 to 15 minutes into the meeting, Mr. Davis ended the meeting. Mr. Davis told Parents that District would continue to implement Student's March 6, 2013 IEP until the IEP team completed Student's new IEP. No substantive discussion of Student's IEP took place at the March 19, 2014 meeting.

28. On April 24, 2014, Mr. Davis emailed Parents copies of the IEP team meeting notes from the April 18, 2014 meeting in English and Spanish.

29. On May 8, 2014, Ms. Adams emailed Parents to propose that the IEP team reconvene on May 23, 2014. She included IEP team meeting notices in English and Spanish.

30. On May 23, 2014, the IEP team reconvened. Parents arrived and said they could not meet that day due to childcare issues. They requested that District again reschedule the meeting, and District suggested that the team meet on May 27, 2014. Parents did not respond to District's suggestion, and Ms. Adams emailed Parents later in the day on May 23, 2014, proposing that the IEP team reconvene on June 3, 2014, at 9:30 a.m.

31. Early on June 3, 2014, Parents contacted District to say that they could not attend the meeting scheduled for 9:30 a.m. that day. Parents requested that the IEP team reconvene at the beginning of the 2014-2015 school year. Mr. Davis mailed Parents a stating that District would work with Parents to schedule an IEP team meeting for Student at the beginning of the 2014-2015 school year. Mr. Davis also reiterated that District would continue to implement Student's 2013 IEP until the IEP team completed his new IEP.

32. Student's academic performance did not improve after District began implementing Student's 2013 IEP in January 2014. Student's final fourth quarter grades at the end of his 2013-2014 seventh-grade year were F in English language arts, D in literature, F in social studies, F in math, B in PE, C in study skills, and F in science.

33. As of the start of Student's 2014-2015 school year, District assigned Student a new case manager, Brittany Roberson, who was also Student's new special education study skills teacher.

34. On September 9, 2014, Ms. Roberson emailed Parents proposing that Student's IEP team meet on September 24, 2014. On September 23, 2014, Parents told District that they could not meet on September 24, 2014, and asked District to reschedule the IEP team meeting. District agreed to do so. After indicating they would be unavailable, Parents appeared on September 24, 2014 to attend an IEP meeting, but because Parents had previously cancelled, District personnel were not available and District did not hold an IEP meeting that day.

OCTOBER 31, 2014 IEP TEAM MEETING

35. On October 23, 2014, Mr. Davis emailed Parents and proposed that Student's IEP team meet on either October 29, 30, or 31, 2014. Mr. Davis enclosed IEP team meeting notices for all three dates, and stated that if Parents did not respond to any of the meeting notices, District would proceed with Student's IEP team meeting on October 31, 2014, at 9:30 a.m.

36. Parents did not respond to District's October 23, 2014 scheduling proposal until late in the afternoon on October 30, 2014, when they left a note at District's offices requesting that District again postpone Student's IEP team meeting and provide Parents additional future dates for the meeting. After considering the eight-month history of postponements, the late notice of Parent's October 30, 2014 request to reschedule, and Parents' having arrived for a September 24, 2014 IEP team meeting after cancelling it, District decided to proceed with Student's IEP team meeting on October 31, 2014.

37. On October 31, 2014, District personnel met at 9:30 a.m. for Student's IEP team meeting. District IEP team members waited approximately 30 to 45 minutes for Parents to arrive. Parents did not arrive, and District convened Student's IEP team meeting without them. Mr. Davis, Ms. Roberson, Ms. Kordis, Student's then-current math teacher Jorge Calderon and interpreter Stacy Gullen attended the meeting.

38. District IEP team members began the meeting by reviewing the draft IEP that Ms. Adams had prepared in February 2014, to determine whether it remained appropriate for Student. The team considered Student's 2013 goals, Ms. Adams's evaluation of Student's progress on those goals, Student's current grades, and input from Mr. Calderon and Ms. Roberson regarding Student's performance during the first three months of his eighth grade 2014-2015 school year. District did not conduct any assessments after spring 2013, and the team did not discuss those previous assessments at the October 31, 2014 IEP team meeting.

39. The team recorded Student's present levels of academic achievement and functional performance as of October 31, 2014. Student had scored at the basic level in English language arts, and below basic in math on the California Smarter Balanced Assessment Consortium test that he took at an unspecified time prior to 2014. Student was completing grade level math with repeated instruction in a small group setting with 60 percent accuracy. In language arts, when given a graphic organizer, Student could complete a structured paragraph and write with simple sentences, but he did not self-edit his work.

40. The IEP team reviewed Student's grades at the time of the meeting but did not record them in the IEP or its notes. Student's first quarter grades were C+ in English language arts, F in American history, F in math, B in PE, A- in study skills, F in science, and C- in beginning band. Ms. Roberson observed Student in his academic classes several times in fall 2014 and found that Student would "just sit and stare" in class and was "very content with just sitting there and not doing any of the work." Student failed to write in his planner daily and did not use his planner as a tool to ensure that he completed his daily assignments. He turned in little or no classwork, and did poorly on tests and quizzes because he took no notes to prepare for them. Student turned in virtually no homework, even though homework generally accounted for approximately 40 percent of each class's grade.

41. Student did well in study skills class because Ms. Roberson gave no homework in study skills, and because, in Ms. Roberson's word, she was "on him" (as Ms. Adams had been) to make sure he completed his classwork. Even though Ms. Roberson had been working with Student since the start of the 2014-2015 school year to improve his ability to self-advocate and ask for help when he needed it, Student independently asked for help only three times per week in her class. When kept on task, Student performed grade level work.

42. Student demonstrated average expressive and receptive language skills.

Student had age-appropriate gross motor skills and was participating in PE without difficulty. He had age-appropriate fine motor skills, and could write neatly and legibly when focused on his work. When he did not focus and rushed his work, his writing could be sloppy or illegible. Student was polite and respectful to teachers, and got along well with others. He exhibited no behavioral issues that impeded his or others' learning. He had age-appropriate daily living skills.

43. The IEP team noted Student's diagnosis of attention deficit disorder and that he took medication at home daily. No other health concerns were noted.

OCTOBER 31, 2014 DRAFT IEP

44. The October 31, 2014 draft IEP proposed that Student continue his placement in general education classes, working on core curriculum towards ultimate graduation with a high school diploma, with special education support through specialized academic instruction in the area of study skills for 45 minutes each day. It included five goals – one new goal in self-advocacy, one writing goal, and three study skills goals based on previous goals from Student's May 2013 IEP. Although these goals were described as "annual goals," they were set to be completed in five months – in time for Student's annual IEP due March 6, 2015.

45. Student's proposed new self-advocacy goal focused on Student's ability to ask for help in his English language arts class. Student's starting baseline for this goal was that he was independently asking for help in study skills three times per week. His measurable annual goal for March 2015 was to be requesting assistance when needed to understand or complete his classwork in English class or required English assignments at least one time per day in four or five days, as measured by teacher records.

46. Student's proposed writing goal was a modification of his existing May 2013 IEP goal for improving his skill at writing an expository essay. Student's May 2013

stated that Student was including a topic sentence, supporting sentences, and a conclusion statement 60 percent of the time when writing an essay, with two writing errors per 100 words on edited work. His existing goal for March 2014 was to be able to write a three paragraph expository essay with an emerging topic sentence, four to six supporting sentences, and a summary conclusion, using grade appropriate language and conventions with 85 percent accuracy. The October 31, 2014 IEP draft restated Student's present level of performance in writing as "independently writes with 55 percent accuracy with content, organization, and language," suggesting that Student's writing performance had declined. His proposed goal for March 2015 was to produce clear and coherent writing in English class, in which the development of topic sentences and the organization of multiple supporting sentences were appropriate to task, with 75 percent accuracy (rather than the prior 85 percent).

47. Student's first proposed study skills goal was a modification of his previous May 2013 IEP goal focused on improving his completion of his assignments. As of March 2013, Student had been turning in approximately 75 percent of his assignments, and his annual goal for March 2014 was to be turning in 90 percent of his assignments in all his classes. As of October 31, 2014, Student was completing and submitting only 20 percent of his assignments in his classes. His goal for March 2015 was to complete and submit 60 percent of his assignments, in English class only. District offered no explanation for the changes in this goal in the meeting notes or at hearing.

48. Student's second study skills goal was the same as his previous May 2013 IEP goal focused on improving his recording of his assignments. As of March 2013, Student had been recording approximately 75 percent of his assigned work, and his annual goal for March 2014 was to be recording 95 percent of his class assignments in a daily planner in all his classes. As of October 31, 2014, Student's performance had declined, and he was recording fewer than 50 percent of his assignments in his planner. His goal for March 2015 remained accurate recording of 95 percent of his assignments,

but in English class only, instead of all of his classes, without explanation of the limitation.

49. Student's third study skills goal duplicated his previous May 2013 IEP goal focused on improving his attention to task. As of March 2013, Student was able to work an average of 15 minutes independently without needing prompting, and his annual goal for March 2014 was to be able to remain on task and work independently for at least 30 minutes 90 percent of the time as measured by his work completion and teacher observations. As of October 31, 2014, Student was still able to work for approximately 15 minutes before needing teacher prompting, and his goal for March 2015 remained unchanged. Unlike his other two study-skills goals, this goal was not limited to English class only.

50. The October 31, 2014 draft IEP proposed that Student receive five classroom accommodations: (i) consultation and collaboration between Student's general and special education teachers not less than one time per month; (ii) copies of his teacher's notes daily, when available; (iii) access to a word processor; (iv) a graphic organizer for written assignments; (v) extended time for testing. On statewide and District-wide testing, District would accommodate Student by being tested in a small group setting, with extended time, supervised breaks, and clarification of directions.

51. The October 31, 2014 draft IEP deleted five of Student's seven existing accommodations: (i) clarification of directions, small group instruction, extra time on assignments, repetition of instruction and direction, and remediation; (ii) use of graph paper, skill charts, and word problems to be read aloud; (iii) separate content and homework grades; (iv) monitoring of Student's assignments and projects; and (v) a multiplication chart in math class. District did not explain in the meeting notes, or at hearing, why Student no longer needed these accommodations.

DR. PEREZ'S NOVEMBER 24, 2014 INDEPENDENT EDUCATIONAL EVALUATION

52. District intended to immediately send Parents a copy of the October 31, 2014 draft IEP. However, before it could be translated, District was contacted by Roger Perez, Ph.D., a California licensed clinical neuropsychologist, who advised District that he was finishing the independent psychoeducational evaluation District had agreed to fund for Student. Dr. Perez provided Parents and District with a copy of his evaluation report on December 8, 2014.

53. Dr. Perez did not testify at hearing, and information concerning his qualifications, test procedures, test results, conclusions and recommendations comes solely from his 17-page report, dated November 24, 2014. Dr. Perez interviewed Parents on August 28, 2014. He observed Student at school for 70 minutes on October 13, 2014, and administered a variety of assessments to Student during an office visit on October 17, 2014. Dr. Perez's report included a number of recommendations to assist Student. Many of Dr. Perez's findings and recommendations corresponded to facets of District's 2013 assessment results and draft IEP.

JANUARY 8, 2015 IEP MEETING AND COMPLETION OF STUDENT'S IEP

54. On December 10, 2014, Mr. Davis wrote to Parents to propose that Student's IEP team meet on January 7 or 8, 2015, to review Dr. Perez's evaluation and consider its implications for Student's IEP. Mr. Davis invited Parents to contact him to arrange a mutually agreeable date and time to meet if District's proposed dates of January 7 or 8, 2015 were not workable for Parents. Mr. Davis also stated that the IEP team meeting would be held on January 8, 2015 at 9:30 a.m. unless Parents notified District that they would not be available on the proposed dates. Parents did not respond to Mr. Davis' December 10, 2014 letter.

55. On January 8, 2015, Student's IEP team reconvened to consider Dr. Perez's independent educational evaluation. Neither Parents nor Dr. Perez attended this

meeting. School psychologist Anne Hunt presented Dr. Perez's report. Mr. Davis, Ms. Roberson, Ms. Kordis and Mr. Calderon were also present. After presentation of Dr. Perez's report, the IEP team reviewed Student's present levels of performance, goals, placement, services and accommodations. Mr. Davis again brought, and the IEP team again reviewed but did not record, Student's current grades. These were not offered in evidence, but Ms. Roberson recalled that they were somewhat worse than his grades as of October 31, 2014.

56. After reviewing Dr. Perez's report and recommendations and Student's present levels of performance, the team decided to add one new accommodation – breaking larger assignments into manageable amounts – to Student's IEP. The team did not otherwise modify the prior IEP draft from October 31, 2014. District offered no evidence as to whether the IEP team discussed or considered Dr. Perez's other recommendations for additional accommodations, possible eligibility for special education for specific learning disabilities in spelling and math, or skill-based training in adaptive coping skills and social skills.

57. Since August 2014, as a matter of good teaching practice, Ms. Roberson had been working on the new goals and accommodations that were ultimately proposed in Student's January 8, 2015 IEP – in addition to, and not instead of, the goals and accommodations in Student's 2013 IEP. Ms. Roberson worked with Student on his self-advocacy, and provided Student accommodations of consultation and collaboration between Student's general and special education teachers, copies of teacher's notes daily, extended time for testing, and breaking larger assignments into manageable amounts. Despite implementation of these additional goals and accommodations for Student in advance of the January 8, 2015 IEP, Student's academic performance improved only slightly from the last quarter of seventh grade by October 31, 2014, with Student earning a C+ in English language arts, but still failing American history, math, and science in his first quarter of eighth grade.

58. In Ms. Roberson's opinion, formal implementation of Student's self-advocacy goal in his January 8, 2015 IEP would result in greater benefit to Student than her informal implementation, because Student would receive an additional 10 minutes per day of individualized attention in her class towards his goals if the January 8, 2015 IEP were to be implemented.

59. District's offer in Student's January 8, 2015 IEP thus included placement in regular general education classes at his school of residence for 88 percent of his time and specialized academic instruction in a study skills class for one 45-minute period per day or 12 percent of his time. District offered Student the five accommodations from the October 31, 2014 draft, plus the accommodation suggested by Dr. Perez of breaking larger assignments into manageable amounts. Finally, the offer included the five goals for Student developed at the October 31, 2014 team meeting, without change. As in the October 31, 2014 draft IEP, these goals were described as "annual goals," although set to be completed by March 6, 2015, then just two months away. District did not explain in the IEP, or at hearing, whether it actually intended Student to complete the goals by March 2015, or whether the proposed March 2015 completion date was an oversight.

60. On January 12, 2015, Mr. Davis sent Parents a copy of the January 8, 2015 IEP offer, and notes from the meeting, in English and Spanish, by email and mail. Mr. Davis requested that Parents consent to the proposed IEP. He also stated that District would be willing to address any concerns they had through the IEP process or informally, as appropriate.

61. Parents never responded to District's request to consent to District's January 8, 2015 IEP offer, or to raise concerns with District.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (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

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

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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. 951, 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. 49, 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].) District had the burden of persuasion in this matter.

ISSUE 1: DISTRICT COMPLIED WITH THE PROCEDURAL REQUIREMENTS OF THE IDEA IN DEVELOPING STUDENT'S IEP

5. District contended that Student's IEP developed over the period from February 2014 to January 2015, and completed on January 8, 2015, was developed in compliance with the procedural requirements of the IDEA. Student did not present a defense in this matter.

6. When the parents of a special needs pupil refuse to consent to all of the services offered by a school district in an IEP, and the parents have consented to such services in the past, then the district must file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) Upon the filing of a request for a due process hearing, the school district must maintain the child in his or her current educational placement. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a)(2006); Ed. Code, § 56346, subd. (f).)

7. A two-part analysis is used to determine whether a school district has

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

8. A school district seeking to prove that it provided a FAPE to a particular student must show that it complied with the procedural requirements under the IDEA. (*Rowley*, 458 U.S. at 200, 203- 204, 206-207 [102 S.Ct. 3034, 73 L.Ed.2d 690].) A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; *M.L., et al., v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 653.)

Parental Participation in the Development of Student's IEP

9. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

10. School districts are legally required to take whatever action is necessary to

ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322 (e).) The local educational agency shall give the parent or guardian a copy of the IEP in his or her primary language at his or her request. (Cal. Code Regs. tit. 5, § 3040, subd. (a).)

11. The procedural safeguards that protect parents' rights to be involved in the development of their child's educational plan are among the most important in the IDEA. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013), 720 F. 3d 1038, 1044, and 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.) A school district must take steps to ensure that one or both parents of a disabled child are present at the IEP team meeting by "(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place." (34 C.F.R. § 300.322(a).) If neither parent can attend an IEP Team meeting, "the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 C.F.R. § 300.322(c).)

12. The Supreme Court has noted that the IDEA expects that parents, as well as school districts, will cooperate in the collaborative IEP process. "The core of the [IDEA] ... is the cooperative process that it establishes between parents and schools. . . . The central vehicle for this collaboration is the IEP process." (*Schaffer v. Weast, supra*, 546 U.S. at p. 53.)

13. Parents who fail to cooperate in the collaborative IEP process risk a number of unfavorable outcomes. First, the school district might hold their child's IEP without them. If a school district is unable to convince the parents to attend an IEP team meeting, it may conduct the meeting without a parent in attendance, but must keep a record of its attempts to arrange a mutually agreed on time and place. (34 C.F.R. §

300.322(d); *A.M. v. Monrovia Unified Sch. Dist.* (9th Cir. 2010) 627 F.3d 773, 780 (approving a district's election to hold IEP team meeting without the parents, where the parents had cancelled a prior IEP team meeting on three-days' notice and would only agree to reschedule at a time beyond the 30-day deadline for completing an IEP for their son who had transferred into the district).) Also, when parental non-cooperation obstructs the IEP process, courts may excuse the district from responsibility for procedural violations in the process. For example, in *K.E. v. Indep. Sch. Dist. No. 15* (8th Cir. 2011) 647 F.3d 795, 806 (*K.E.*), the district attempted to schedule four different IEP team meetings over several months, but the student's parent or counsel cancelled two of the meetings, walked out of another over a dispute about the agenda, and decided simply not to attend the final meeting. Finding that "[t]he record is clear in this case that it was Parent, not the District, who refused to participate in the IEP process," the court held, "Where a parent has 'truncated [her] own procedural right to contribute to the development of [a child's] IEP,' a school district 'cannot be faulted for failing to engage in an open discussion.'" *Id.*, citing *Blackmon v. Springfield R-XII Sch. Dist.* (8th Cir.1999) 198 F.3d 648, 657. Further evidence that unreasonable parental conduct is disfavored comes from title 20 United States Code Section 1412(a)(10)(C)(iii)(III), which specifically authorizes tribunals to reduce or deny parents' recovery of their costs of a private school placement of their child "upon a judicial finding of unreasonableness with respect to actions taken by the parents."

14. In this case, District discussed and arrived at the substance of Student's IEP in meetings held on October 31, 2014 and January 8, 2015 that Parents did not attend. This raised an issue of whether Parents were denied their right of parental participation in the development of Student's IEP. The evidence established that Parents were not deprived of the right to participate. District provided Parents numerous opportunities to participate in the IEP process. District proposed 13 IEP team meeting dates to Parents over the course of 11 months: February 27, 2014, March 6, 2014, March 19, 2014, April

18, 2014, May 23, 2014, May 27, 2014, June 3, 2014, September 24, 2014, October 29, 2014, October 30, 2014, October 31, 2014, January 7, 2015, and January 8, 2015. District properly notified Parents of each of the proposed IEP team meetings in both English and Spanish, and Parents actively participated in two of the 13 proposed IEP team meetings, on March 19 and April 18, 2014, which did not result in progress on Student's IEP because Father refused to engage in substantive discussions of IEP issues. Parents cancelled meetings that had been scheduled on four dates – March 6, 2014, May 23, 2014, June 3, 2014 and September 24, 2014, and did not respond to District's requests to convene IEP team meetings on six: May 27, 2014; October 29-31, 2014; or January 7 and 8, 2015.

15. District made more than reasonable attempts to convince Parents to attend IEP team meetings and participate in the development of Student's IEP, and kept records of its attempts to do so. Moreover, the 11 IEP dates that District unsuccessfully proposed, the four agreed-upon IEP dates that Parents cancelled, and the six to which they did not respond greatly exceed the four unsuccessful IEP team meeting attempts that led the court in *K.E., supra*, to find a clear record that it was the parent, not the district, who refused to participate in the IEP process. Under both 34 C.F.R. § 300.322(d) and the reasoning of *K.E.*, District cannot be faulted for Parents' failure to attend the IEP team meetings at which Student's IEP was developed, and District committed no procedural error that denied Parents their right of participation in the IEP process.

Mandatory IEP Team Members

16. The IDEA and California education law require certain individuals to be in attendance at every IEP team meeting. In particular, the IEP team must include: (a) the parents of the child with a disability; (b) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (c) not less than one special education teacher, or where appropriate, not less than one

special education provider of the child; (d) a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (e) an individual who can interpret the instructional implications of evaluation results; (f) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (g) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

17. In developing Student's IEP, District convened four IEP team meetings, on March 19, 2014, April 28, 2014, October 31, 2014, and January 8, 2015. The IEP team at each meeting included the attendees required by law, except that Parents, through no fault of District, did not attend the last two meetings. Student's regular education teachers Ms. Dayus and Mr. Bechtold attended the first two meetings, and Mr. Calderon attended the last two meetings. Special education teacher Ms. Adams attended the first two meetings, and Ms. Roberson the last two. Mr. Davis and Ms. Kordis attended all four meetings as district representatives, and school psychologist Anne Hunt attended the January 8, 2015 meeting to interpret the instructional implications of Dr. Perez's November 20, 2014 independent educational evaluation of Student. All required District team members were present at each IEP team meeting.

Matters Considered in Developing Student's IEP, and Required IEP Content

18. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

19. An IEP should include: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability

affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, which will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

20. In this case, the present levels of academic achievement and functional performance, goals, accommodations and team meeting notes in Student's IEP completed on January 8, 2015, and the testimony of IEP team members Mr. Davis, Ms. Dayus, Ms. Roberson and Ms. Adams, established by a preponderance of the evidence that Student's IEP team considered Student's strengths, his Parents' concerns, the results of his most recent evaluations, and his academic, developmental, and functional needs when developing Student's IEP. The IEP contained a statement of Student's present levels of academic achievement and functional performance, and a statement that his disabilities of specific learning disability and other health impairment were associated with deficits in attention, auditory short-term memory, and expression that hindered Student's progress in the general education curriculum. The IEP also contained a statement of the special education and related services, based on peer-reviewed

research to the extent practicable, which would be provided to the student, a statement of measurable annual goals, a projected start date for services and modifications, and a statement of the anticipated frequency, location, and duration of services offered to Student.

21. District met its burden of persuasion that Student's IEP was developed in compliance with all IDEA procedural requirements.

ISSUE 2: DISTRICT DID NOT ESTABLISH THAT ITS JANUARY 8, 2015 IEP SUBSTANTIVELY OFFERED STUDENT A FAPE

22. 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. (*See 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.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Board of Education, supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

Placement in the Least Restrictive Environment

23. Federal and state laws require school districts to provide each special education student an educational program in the least restrictive environment appropriate for that student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when 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).) To determine whether a special education

student may be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following 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] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].) If it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education, supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

24. As of District's January 8, 2015 IEP offer, District understood Student to have average to above-average cognitive ability. Although affected by deficits in attention, executive functioning and organization, auditory short-term memory, visual-motor integration, written expression, math calculation, and spelling, Student generally was capable of performing grade-level work in a general education class in his school of residence. In considering the four factors of *Rachel H.*, none of the evidence suggested

that District should have concluded at the time of its offer that Student could not be educated in the general education environment and receive both academic and non-academic benefits, that his presence in the general education environment had a negative effect on the classroom, or that the cost of educating him in a general education environment was an issue. In summary, with proper supports to address his severe issues with attention, organization, and work completion, placement in the general education setting was appropriate.

25. District met its burden of persuasion that its offer to place Student in general education classes except for one period of specialized academic instruction in the area of study skills constituted an offer of placement in the least restrictive environment appropriate for Student at the time of the offer.

Educational Benefit of District's FAPE Offer

26. District contended that its January 8, 2015 offer conferred an educational benefit and constituted a FAPE for Student.

27. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) However, students are expected to make progress towards their IEP goals and academic goals. "[T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (*Id.* at pp. 203-204.) IEP teams must review a student's progress at least annually and convene an IEP team meeting and revise the student's IEP as appropriate to address any lack of expected progress toward the annual IEP goals and in the general education curriculum, where appropriate to address the student's lack of progress. (20 U.S.C. § 1414(B)(4)(A)(ii)(I).)

28. 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 District* (2nd Cir. 1998) 142 F.3d 119, 130 (*Walczak*); *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.) Whether a student has received more than *de minimis* benefit from his or her IEP must be measured in relation to the student's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.)

29. Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. For a student in a mainstream class, "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." (*Walczak, supra*, 142 F.3d at p. 130.) A district need not guarantee that a student will make a month's academic progress in a month's instruction; a student may benefit even though his progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.) A student derives benefit under *Rowley* when he improves in some areas even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P* (3d Cir. 1995) 62 F.3d 520, 530.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.)

30. In this case, District's offer of FAPE in Student's January 8, 2015 IEP included: (a) placement in regular general education classes at his school of residence for 88 percent of his time; (b) specialized academic instruction in a study skills class for one 45-minute period per day or 12 percent of his time; (c) five measurable annual goals for March 2015, consisting of: (i) requesting assistance when needed to understand or complete his classwork in English class or required English assignments at least one time per day in four or five days, as measured by teacher records; (ii) producing clear and coherent writing in English class, in which the development of topic sentences and the organization of multiple supporting sentences were appropriate to task with 75 percent accuracy; (iii) completing and submitting 60 percent of his assignments, in English class only, as measured by teacher records; (iv) accurately recording 95 percent of his assignments in English class only, as measured by his daily planner; and (v) remaining on task for a period of 30 minutes or more in 90 percent of the time as measured by work completion and teacher observations. District also offered the following six accommodations: (i) consultation and collaboration between Student's general and special education teachers not less than one time per month; (ii) copies of his teacher's notes daily, when available; (iii) access to a word processor; (iv) a graphic organizer for written assignments; (v) extended time for testing; and (vi) statewide and District-wide testing in a small group setting, with extended time, supervised breaks, and clarification of directions.

31. However, District's offer was largely unchanged from the package of placement, goals, services and accommodations that District had been implementing with Student for the prior two and one-half years, since the start of Student's 2012-2013 sixth grade year. During that time, Student had not shown any meaningful progress towards his goals and objectives. Instead, Student's academic performance declined, he failed to meet most of his IEP goals, and his present levels of performance had regressed. Additionally, District's offer modified and reduced the scope of most of

Student's existing goals. These facts raised questions concerning whether District's offer was reasonably calculated to enable Student to receive educational benefits, as required under *Rowley, supra*, 458 U.S. at pp. 206-207.

32. Between the time District completed Student's May 28, 2013 IEP and the time it completed Student's January 8, 2015 IEP, District received ample information indicating that Student was not making progress towards his IEP goals or in his general education curriculum under his current educational program.

33. First, Student's results from the sixth grade California Standards test administered in April 2013 indicated that his performance in English language arts and math had fallen from proficient to basic and below basic, respectively. Next, Student's grades fell dramatically in seventh and eighth grade. At the time of Student's May 2013 IEP in sixth grade, his most recent third quarter grades had been C- in English language arts, C in literature, D+ in social studies, D- in math, A in PE, B in study skills, and D+ in science. In fall of seventh grade, Student's grades fell to F's in all of his core subjects except for literature, where he received a D. Student's grades remained low in spring of seventh grade after District formally implemented the May 28, 2013 IEP, and, aside from improvement to a C+ in English language arts in the first semester, they remained low in eighth grade. This was so, even though Student's study skills teacher, who was also his special education case manager, had informally implemented the additional goals and accommodations that District ultimately proposed in Student's January 8, 2015 IEP. Finally, District knew that Student was not making progress on his IEP writing and study-skills goals that were supposed to help him improve his academic performance. Student showed actual regression in his levels of performance towards three of his four IEP goals developed in March 2013, with a slight decline by October 2014 in his ability to write using topic sentences, supporting sentences, and conclusions, and major declines in his goals of recording assignments in a planner, and completing assignments and turning them in.

34. Measured in relation to Student's potential based on his average to above-average cognitive ability, his demonstrated capability of performing grade-level work when focused, and his overall educational goal of graduating high school with a diploma, Student's regression in his IEP goals and failing grades in his core general education classes was a *de minimis* educational benefit to Student as a result of his educational program. Student's failing grades did not meet the "generally accepted indicators of satisfactory progress" referenced in *Walczak, supra*, 142 F.3d at p. 130. There was no evidence to support a finding that Student's difficulty paying attention in class, or his apparent near-inability to organize, start assignments, stay on task and complete them, and turn them in for credit, were willful acts that Student could choose to stop. To the contrary, the evidence was that these problems were the direct result of Student's disabilities, primarily his attention-deficit disorder.

35. Under title 20 United States Code section 1414(d)(4)(A)(ii)(I), District was required to revise Student's IEP as appropriate to address any lack of expected progress toward his annual IEP goals and in his general education curriculum. District presented no persuasive evidence that its proposed adjustments to Student's existing IEP would allow Student to make progress. Instead, the evidence established that the IEP revisions proposed made no significant changes to the basic structure of Student's IEP, which had remained constant since at least August 2012. At all times, Student had attended six periods of general education classes, and one period of specialized academic instruction devoted to work on his study skills. Student's IEP developed in spring 2012 at the end of Student's fifth grade year and implemented through the middle of his seventh grade year contained a study skills goal, a writing goal, and a mathematics goal, with all three IEP goals intended to address Student's deficits caused by his difficulties with memory, attention, and organization. Student's IEP developed as of May 28, 2013 and implemented from January 2014 to the time of hearing, had continued the emphasis on study skills class and goals as a means of addressing Student's severe issues with

attention, organization, and work completion, but Student's performance had continued to decline.

36. District also knew or should have known as of January 8, 2015, that the decline in Student's performance had not been halted or significantly slowed by Ms. Roberson's informal implementation since the start of eighth grade, of the new goals and accommodations that District was proposing. Ms. Roberson's suggestion that Student would receive an additional 10 minutes of individualized attention per day in his 45-minute study skills class if his proposed self-advocacy goal of asking for help in class were elevated from informal to formal status alongside Student's three existing study skills goals is not credible. Even if true, it would be speculation to assume that such additional time spent on a self-advocacy goal would significantly impact Student's progress on that goal or his resulting academic performance.

37. Also, Ms. Roberson had worked on the new goal and accommodations without depriving Student of the five 2013 IEP accommodations that the January 8, 2015 IEP proposed to delete: (i) clarification of directions, small group instruction, extra time on assignments, repetition of instruction and direction, and remediation; (ii) use of graph paper, skill charts, and word problems to be read aloud; (iii) separate content and homework grades; (iv) monitoring of Student's assignments and projects; and (v) a multiplication chart in math class. District did not meet its burden of establishing why Student no longer needed these accommodations, or why it was proposing to give Student extra time for testing while taking it away from work on assignments. District also did not explain the IEP team's thinking behind its failure to offer Student support in all classes similar to the consistent prompting by Ms. Hall and Ms. Roberson that enabled Student to stay on task and perform grade-level work in his study skills class. District only adopted one of Dr. Perez's proposed accommodations, without offering any credible testimony explaining why it did not consider other modifications and accommodations from Dr. Perez's report.

38. Although District witnesses opined that the offered placement, services, goals and accommodations were appropriate for Student, their opinions were conclusory and did not persuasively explain how the proposed changes to Student's IEP would address Student's historic failure to make progress on his IEP goals or general education curriculum for the two or more years before January 2015.

39. District therefore did not demonstrate by a preponderance of the evidence that its January 8, 2015 IEP substantively offered Student a FAPE.

ORDER

District is not entitled to a remedy in this matter.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, Student prevailed on the issues presented for hearing.

RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATED: June 19, 2015

/s/

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings