

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RIM OF THE WORLD UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015040297

DECISION

Rim of the World Unified School District filed a due process complaint with the Office of Administrative Hearings, State of California, on April 7, 2015, naming Student. The matter was continued for good cause on April 27, 2015.

Administrative Law Judge Cole Dalton, Office of Administrative Hearings, State of California, heard this matter in Crestline, California, on May 26, 27, 28, and June 10, 2015.

Vivian Billups, Attorney at Law, represented District. Carol Unterseher, Director of Special Education and Laura Chism, Due Process Manager, East Valley Special Education Local Plan Area, were also present on behalf of District. Dan Stormer and Acrivi Coromelas, Attorneys at Law, represented Student. Student's mother (Parent) attended all days of hearing. Student was not present during the hearing.

At the conclusion of the hearing, OAH granted the parties' request for continuance to June 25, 2015, to submit written closing briefs. Briefs were timely filed and the matter was submitted on June 25, 2015.

ISSUES¹

1. Did District's individualized education program of January 13, 2015, offer Student a free appropriate public education such that District may implement the IEP over Parent's objection?

SUMMARY OF DECISION

District demonstrated that it offered Student a free appropriate public education in the January 13, 2015 IEP and is therefore entitled to implement the IEP over Parent's objection. District appropriately identified Student's areas of need, crafted appropriate goals and provided an environment where those goals could be implemented. Further, District offered placement in the least restrictive environment in that Student's IEP offered participation in general education classes and activities during 50 percent of Student's school day. The IEP provided a one-on-one aide with training in behavior intervention, the use of sensory strategies, and a sensory diet tailored specifically to Student's unique needs. Combining the behavior intervention plan and sensory strategies had been successful in reducing the frequency and duration of Student's

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 District* (9th Cir. 2010) 626 F.3d 431, 442-443.) To the extent Student's closing brief includes issues concerning equal access to extra-curricular activities based upon Section 504 of the Title V of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq., those issues are not addressed in this decision because OAH does not have jurisdiction over claims based upon section 504. (20 U.S.C. § 1415(b)(6); Ed. Code § 56501, subd. (a); *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

maladaptive behaviors at the time of development of the annual IEP.

Student did not require participation in mountain biking as part of his educational program. Student had good physical strength and agility and was successful in regular physical education. Further, physical activity breaks, such as walking the track, hand fidgets, bouncing a ball, and kicking a soccer ball, were successful in meeting Student's sensory regulation needs during the school day.

Student did not require a male one-on-one aide, either for mountain biking or safety reasons, in order to receive a FAPE. District had the right to employ staff of its choosing, so long as it offered a FAPE, which it did.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. At the time of hearing Student was a 20-year-old male, in 12th grade, receiving special education services under the eligibility category of autism. Student lived with his parents within the jurisdictional boundaries of Rim of the World Unified School District at all times relevant to the issues for hearing. Student assigned his educational rights to parents on November 9, 2013.

2. Under his IEP of October 2, 2012, the last implemented IEP, Student received 200 minutes of specialized academic instruction daily in a moderate-severe special day class with inclusion in general education classes; 90 minutes weekly, pull-out speech and language therapy; 20 minutes monthly, in class occupational therapy; 60 minutes, annually, vocational support; one-on-one aide support throughout each school day; 30 minutes weekly behavioral intervention support; a behavior support plan; and an individualized transition plan. Student was receiving a functional life skills curriculum in his special day class, working towards a certificate of completion.

ASSESSMENTS

3. Jo Ann Vargas, a licensed occupational therapist, previously worked for six years as an occupational therapy manager at Loma Linda University Medical Center, supervising 27 staff members. At the time of hearing, she was an occupational therapy supervisor for the East Valley Special Education Local Plan Area. Her case load required her to conduct assessments of students, attend IEP team meetings, provide consultation services to staff, and therapy for students.

4. Ms. Vargas assessed Student in 2012 and 2014. She provided 90 minutes of consultative services per year pursuant to Student's 2012 IEP. She observed Student in class on July 16, 2014. According to input from both the teacher and one-on-one aide, Student responded well to directions and did not have behavioral challenges in the classroom. He did well with hand fidgets and movement breaks.

5. Ms. Vargas' Occupational Therapy Assessment of December 15, 2014, consisted of observations of Student in a variety of settings, standardized assessments and teacher interviews and questionnaires. Ms. Vargas used the Bruininks-Oseretsky Test of Motor Proficiency-2 to assess motor skills, including fine motor precision, fine motor integration, manual dexterity, upper limb coordination, bilateral coordination and balance. Student scored in the average range on all sub-tests, except in fine motor precision, which was below average. However, according to teacher and aide input and Ms. Vargas' observations, Student was able to: write legibly, with prompting to slow down at times; navigate the classroom and campus without difficulty; participate in physical education; and independently manage the mouse and keyboard for computer use in print shop and other classes. He could walk between classes even in crowded, noisy hallways where he would be bumped into by other students.

6. Ms. Vargas attempted to administer the Adult Sensory Profile assessment, but could not complete it due to the complexity of the questions and Student's inability

to answer them. However, Ms. Vargas trained and consulted with Student's one-on-one aide and teachers to address Student's school based sensory needs. She developed sensory regulation strategies and a sensory diet to enable Student to work through mood changes so that he could attend, be calm, listen to instruction, and interact appropriately with his educational environment. The strategies included using a lower tone of voice, which soothed Student; providing movement opportunities such as walking the track or doing lunges; using one step commands; and touching Student on the shoulder, to initiate quiet mouth-quiet hands.

7. In the assessment report, Ms. Vargas recommended discontinuing occupational therapy services as Student was able to access his curriculum without it. According to Ms. Vargas, Student's teacher and aide were "well trained in the management of his sensory needs," and Student continued to benefit from use of movement breaks, hand fidgets, visual aids, and behavioral strategies.

BEHAVIOR INCIDENTS

8. There were four incidents of Student's behavior reported from June 9, 2014, to the time of Student's annual IEP team meeting on January 13, 2015. The incidents occurred on June 9, 2014, September 30, 2014, October 20, 2014, and December 9, 2014. In each incident, the female aide was able to de-escalate Student using the sensory and behavior strategies developed by the team. The incidents did not reflect a pattern of inappropriate behavior directed at females.

JANUARY 13, 2015 IEP TEAM MEETING

9. District held Student's annual IEP review on January 13, 2015. Parent, case carrier and special education teacher Tina Thompson, site administrator Derek Swem, Director of Special Services Carol Unterseher, speech language pathologist Tammy Hopkins, physical education teacher Robert Turner, school psychologist Alison Wing,

occupational therapist Jo Ann Vargas, East Valley SELPA representative Laura Chism and attorneys Billups and Stormer attended the IEP. Ms. Unterseher, Ms. Vargas, Ms. Thompson, Ms. Hopkins, Mr. Turner, Ms. Scoppen and Mr. Swem testified at hearing.

10. Ms. Unterseher is a behavior specialist, has a bachelor of arts degree in elementary education with a minor in psychology, a master of arts degree in special education, and a second masters in educational administration. She holds administrative, multiple subject, and instructional specialist clear credentials and certificates for resource specialist, primary reading and English Language Development. Ms. Unterseher worked as a special education administrator for 14 years and has been with District for the past year. She observed Student several times during his school day and consulted with his teachers, aides, and behavior and autism program specialists, prior to the meeting.

11. Ms. Unterseher chaired the IEP team meeting, compiled the IEP, including the behavior intervention plan and individual transition plan, and sent it to Parent within two to four days after the meeting. Parent was provided with the Procedural Safeguards and occupational therapy assessment at the IEP

12. Ms. Vargas reviewed the occupational therapy assessment and her recommendation to discontinue services. She explained that District staff were able to carry out the use of sensory strategies, such as hand fidgets and frequent movement breaks, in combination with behavior strategies, such as positive reinforcement, which allowed Student to access his education without ongoing occupational therapy services. Parent agreed with the discontinuation of occupational therapy consultation services and has not disputed the appropriateness of the occupational therapy assessment.

13. Next, the IEP team reviewed progress toward prior goals. Student had needs in the areas of social language, expressive language, reading comprehension, functional math, and behavior (self-regulation). Of nine prior goals, Student met four,

including reading comprehension, transitions/social skills (appropriately transition to a goal, location), social pragmatic skills (asking questions about his needs/wants) and math calculation. He made good progress on goals in functional math (understanding monetary values), occupational therapy (choosing a sensory strategy), social pragmatics (greetings, saying "goodbye") and some progress on the two additional speech goals (social pragmatic skills – identifying emotions and using appropriate speech volume in class).

14. The IEP team developed seven annual goals for the new IEP. Ms. Hopkins developed the two speech goals. Ms. Hopkins has a bachelor of arts in speech language hearing services and a master of science in communicative disorders. She has been a speech language pathologist since July 2000. She opened her practice, Hopkins Speech Language Services, in September 2007, and began employment with District on July 20, 2012, while maintaining her practice.

15. At the IEP meeting, Ms. Hopkins described Student's present levels of performance and the development of new speech goals. Student did not typically greet peers without prompting. However, he would say "hello" and initiate eye contact when prompted. A social language goal was developed to increase Student's ability to initiate greetings and verbally expand on communication exchanges while using appropriate body language (such as eye contact, body orientation). The second speech goal addressed Student's expressive language needs. He typically spoke in two to four word utterances using scripted language. The new goal addressed expansion of functional expressive language by having Student verbally relate information sequentially about his school day using transition words (first, next, then last). Both goals were to be implemented by Student's teachers, his speech language therapist and aide. The goals would be measured by therapy tallies and observation.

16. Ms. Thompson, in collaboration with Parent, drafted academic goals in the

areas of reading comprehension and functional math. Ms. Thompson was Student's case carrier and had been his special day class teacher for math and English for the past three years. She has a bachelor of arts in Liberal Arts Human Development and holds a mild to moderate credential, a moderate to severe credential, and both autism and English language learner certifications. She has been a specialized academic teacher since summer of 2012, working for District since October of 2012. Previously, she worked as a resource specialist teacher for approximately five years.

17. At the IEP, Ms. Thompson described Student's present levels of performance and new proposed academic goals. Student could answer "wh" questions at his instructional reading equivalency 60 percent of the time. However, he needed continued support in this area, so a new goal was developed to increase Student's ability to answer who, what, when, where and how questions at his instructional reading level, with 80 percent accuracy.

18. In math, Student was able to make an item-to-money exchange, using values up to \$5.00, at a success rate of 20 percent. A new goal sought to increase this level to 50 percent accuracy. A second math goal addressed Student's ability to use a count-down visual timer to transition from computer time to class time. He was unable to tell time on a clock. A goal was drafted for Student to read time to the hour on analog clocks at 40 percent accuracy, with prompting. A final math goal addressed Student's ability to independently determine the appropriate approach to math word problems, which he could do at a level of 10 percent. The new goal called for Student to determine the appropriate operations and number sentence for five word problems (requiring addition, subtraction or multiplication), with 50 percent accuracy. All academic goals would be implemented by the special education teacher and aide and measured by teacher made test and observation.

19. Finally, a behavior goal was developed to address Student's need for self-

regulation. When frustrated, Student was able to self-regulate using visual supports less than 10 percent of the time. The new goal called for Student to use his "Emotions Folder" or a sensory strategy (such as bouncing a ball) with 50 percent frequency, using verbal or visual prompting. The goal would be implemented by the special education and general education teachers and be measured by data collection.

20. Ms. Unterseher and Ms. Thompson reviewed and updated Student's behavior intervention plan with input from the school psychologist Alison Wing. They described Student's behaviors as being related to his eligibility of autism, including escalation of anxiety that resulted in him chewing his shirt, talking very fast and echolalia. During periods of frustration or agitation, Student engaged in rocking, patting the wall with an open hand, hand-flapping, loud vocalizations, pulling his own hair, and hitting or pinching himself or others. His need for a behavior intervention plan was seen as moderate.

21. The IEP team reviewed the proposed behavior intervention plan. Parent requested a self-advocacy goal, which was added. Parent explained Student's behaviors in the morning before school. Ms. Hopkins, the speech language pathologist, provided examples of task avoidance behaviors and transition protest behaviors Student exhibited during the school day. Strategies for these issues were provided in the new behavior intervention plan. Mr. Stormer asked for an additional accommodation in the reinforcement strategies in the behavior intervention plan, which was also added. Parent noted improvement in Student's behavior from last year. District team members also noted an improvement in behaviors.

22. A Secondary Transition Plan was developed based on a Career Choices Inventory and interview of Parent regarding post-secondary goals. The transition plan contained post-secondary goals in training, education, employment, and independent living. A word math problem goal to aid Student in transitioning was added at Parent's

request. The program and goals offered in Student's IEP supported the transition plan in that the IEP offered community based instruction, speech therapy, exploration of job interests and functional life skills classes. Parent declined Workability, which would offer Student work opportunities in the community.

23. The team discussed placement and services. Ms. Hopkins described Student's difficulties attending during a 90 minute session of speech. The team recommended a reduction in service to 45 minutes weekly. Parent asked that the session being broken up into two-45 minutes blocks, one for direct speech therapy and a second for social skills in a small group setting. District team members agreed. Parent requested that the behavior intervention services be listed as a direct service, rather than an accommodation. District team members agreed.

24. The IEP team discussed a continuum of placement options and agreed that placement in a general education setting for 50 percent of the school day with specialized academic instruction in the functional skills program for 50 percent of the school day was the least restrictive environment for Student. Student demonstrated that he benefitted from being educated with his general education peers, with aide support, by receiving opportunities to learn pragmatic social skills and obtain an increased level of independence.

25. Student was offered placement for 165 minutes daily in a moderate to severe special day class with transportation; 45 minutes weekly classroom speech therapy, 45 minutes weekly pull-out speech therapy; 60 minutes yearly vocational services; 30 minutes weekly behavior intervention services by a school psychologist; a one-on-one aide throughout each school day; 15 days of extended school year services;

a behavior intervention plan and a post-secondary transition plan.² Student's program involved participation in general education settings including lunch, recess, passing periods, physical education, and two other general education classes such as art, computer class or woodshop. Accommodations and modifications included preferential seating and consultation between special and general education teachers for 20 minutes monthly.

26. At the end of the meeting, the team discussed Parent's request for a one-on-one aide for Student to participate on the after-school mountain biking team. Mr. Turner was Student's physical education teacher. In his response to the request for a mountain biking aide, he described Student's eligibility and needs as they related to the mountain biking team.

27. Mr. Turner had been part of the all-volunteer staff for the mountain biking team in prior years. At the IEP meeting, he described the mountain biking team as an interscholastic activity overseen by the National Interscholastic Cycling Association. According to the Association's rules, team participants aged out if they were over 19 at any time during the school year. Student was 19 years old at the beginning of the 2014 – 2015 school year. Further, the team did not have enough resources to support a non-racing extra team member. The staff was needed to support and train the racing members to enhance their performance during training so that they could earn points for the team, during races.

28. District team members believed that Student could meet his goals within the regular school day. In Mr. Turner's opinion Student did not need to compete in mountain biking in order to meet his goals, as he was able to address them during

² On the record at hearing, Parent and District stipulated that Student did not need occupational therapy services as part of the January 13, 2015 IEP.

regular physical education.

29. On February 23, 2015, Parent wrote a letter to District asking to have the IEP notes corrected to accurately characterize both the communications involved in setting up the IEP and the discussion regarding an aide for mountain biking. District agreed to make the dissenting letter part of the IEP record but did not agree to change the IEP notes as the IEP had been completed.

STUDENT'S WITNESSES

30. At hearing, Parent explained that she did not disagree with implementation of the IEP, but that she wanted the notes corrected before she would sign the IEP document. She confirmed agreement with present levels, goals, accommodations, placement and services, with the exception that the IEP should require a male one-on-one aide and that it should address Student's participation on the after-school mountain biking team with a male one-on-one mountain biking aide.

31. Parent described the social and emotional benefit she believed her son would receive by participating on the mountain biking team. She, and witnesses on behalf of Student, described at length Student's participation in various outdoor sports such as mountain biking, water skiing and snowboarding. In each of these activities, Student required one-on-one attention for safety purposes. For instance, in mountain biking, he would need to be told when and where to turn, when to change gears, and when to slow down. He had gotten lost for several hours on at least one occasion. Only one of these witnesses had knowledge of Student's educational program, had seen Student participating in sports at school, or had spoken to his educational providers. However, none of the witnesses were able to say that Student required participation in after-school mountain biking in order to receive a FAPE.

32. Parent believed that strenuous physical exertion helped Student with depression. However, depression was never mentioned by District or Parent as being a

school based need.

33. Parent also believed that Student required a male one-on-one aide due to safety concerns. Parent opined that Student would not listen as much to the directions of a female over a male, whether at home, in the community or at school. Further, she believed Student hit more female staff at school than males and she feared the potential for Student to act in sexually inappropriate ways with female staff.

DISTRICT'S WITNESSES

34. Mr. Turner had extensive experience as an educator, with the mountain biking team and with Student's abilities to mountain bike. Mr. Turner holds a bachelor of arts and a master of arts in education, a Tier 1 Administrative Credential, and has been an educator since 1983. He has taught math and physical education, worked as an assistant principal, principal and athletic director. In Mr. Turner's opinion, Student had good physical strength, agility and stamina. He was able to participate in regular education with his one-on-one aide, Ms. Scoppen. In fact, he was able to shoot baskets and rally in badminton better than most other Students. Mr. Turner credibly demonstrated that Student did not need to participate in mountain biking to receive a FAPE.

35. Ms. Vargas had the training, experience, and knowledge of Student to offer opinions regarding Student's self-regulation and sensory needs. She credibly explained that Student's sensory needs could continue to be met through the strategies, sensory diet, and behavior interventions identified in his IEP. She did not believe Student needed participation in after-school mountain biking in order to receive a FAPE.

36. Ms. Scoppen was Student's aide during part of the 2013 – 2014 school year and during the 2014 – 2015 school year, until late February 2015. Ms. Scoppen holds a bachelor of science in criminal justice/legal studies and a paralegal certification. She started working for District in 2012 as a special education instructional assistant. She

received paraprofessional training and training in autism and behavior intervention, including Pro Act training, which is used to de-escalate students without restraint or seclusion.

37. Ms. Scoppen enjoyed working with Student and was successful in helping him regulate his behavior. Ms. Scoppen collaborated with Ms. Vargas, Ms. Thompson, and East Valley SELPA behavioral specialists regularly regarding how Student was progressing and various strategies that may be successful with him.

38. Ms. Scoppen would meet Student at the bus and take him to his first class early so that he could prepare and adjust prior to other students arriving. She used strategies such as a hand fidget device, redirection, prompting, and standing in close proximity. She regularly used a white board to list the order of Student's activities to help with transitions. She used a timer to transition Student off of the computer, a preferred activity.

39. When Student showed signs of elevated emotions, she would take him out of class for options such as bouncing a ball, kicking a soccer ball, "jumping the dots," or walking the track. If Student were especially elevated, she would get another aide or a security guard to come into a quieter area with her and Student while she used strategies to help Student de-escalate. She felt that Student had never gotten out of control with her. She credibly demonstrated that Student did not need a male one-on-one aide. Further, he was able to self-regulate without after-school mountain biking being part of his IEP.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA³

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)⁴ et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them 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 general, an IEP is a written statement for each child with a disability that is developed under the IDEA's

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural

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

ISSUE: DID THE IEP OF JANUARY 13, 2015 OFFER A FAPE?

5. District contends that the January 13, 2015 IEP offered Student a FAPE and that it should be allowed to implement the IEP over Parent's objections. Parent contends the IEP did not offer a FAPE as the IEP should provide for: (1) Student's participation on the mountain biking team with a male one-on-one mountain biking aide; or, alternatively, (2) a male one-on-one aide throughout the school day, for safety reasons.

6. There are two parts to the legal analysis of a school district's compliance with the IDEA: (1) whether the district has complied with the procedures set forth in the IDEA and (2) 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. (*Rowley, supra*, 458 U.S. at pp. 206-207.)

7. 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, § 56341.5.) 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 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].)

8. The IEP team is required to include one or both of the student's parents or their representative: a regular education teacher if a student is, or may be, participating in the regular education environment: a special education teacher: and a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

9. 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, that 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).)

10. 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).)

11. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education 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 could 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 [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.)

12. 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.) In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (*Ibid.*)

13. Beginning no later than the first IEP to be in effect when a child with a disability turns 16, and updated annually thereafter, the IEP must include appropriate measurable post-secondary goals related to training, education, employment, and, where appropriate, independent living skills. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb); 34 C.F.R. § 300.320(b); Ed. Code, §56345, subd. (a)(8).) The post-secondary goals must be based upon age-appropriate transition assessments and must be updated annually. (*Ibid.*) In addition to identifying such post-secondary goals, every IEP beginning with age 16 must also include transition services to assist the child in reaching those postsecondary goals. (*Ibid.*)

14. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

15. District met its burden of showing that the January 13, 2015 IEP met procedural requirements and offered Student a FAPE in the least restrictive environment in that the IEP addressed student's academic and functional needs in a manner that was reasonably calculated to provide some educational benefit.

16. In developing its January 13, 2015 IEP, District complied with the procedural requirements of the IDEA and California law. Parent was provided with notice of the January IEP and an opportunity to participate in its development. Parent discussed several goals with Ms. Thompson prior to the IEP and requested changes, which were made, during the IEP. Parent also participated in the development of Student's behavior intervention plan, sensory strategies, secondary transition plan, related services, and placement. Parent's input resulted in changes to the speech and language service model, behavior intervention services, and transition services. Further, Parent's letter of disagreement was made part of Student's IEP record.

17. The IEP team was comprised of all necessary participants, included an accurate statement of present levels of performance, Student needs, Parent concerns, new annual goals, and provided a statement of the frequency and duration of the offered placement and related services. The secondary transition plan also met statutory procedural requirements in that it was based upon a transition assessment given to Student and on a parent interview, it considered Student's preferences, and it was aligned with transition services identified in the IEP.

18. Student's needs in the areas of social language, expressive language, reading comprehension, and functional math were all addressed in goals that were measurable and could be implemented in the placement offered to Student.

MOUNTAIN BIKING

19. Participation in interscholastic sports or other extracurricular activities may be included in an IEP if the IEP team determines that it is a necessary component of FAPE and includes participation as a specific related service in the student's IEP. (*Letter to Anonymous*, 17 IDELR 180 (OSEP 1990).) If a student does not require interscholastic sports to meet his goals such participation is not a required component of an IEP. (*Board of Educ. Of the St. Joseph Pub. Schools*, 34 IDELR 282 (SEA MI 2001).)

20. Student did not require after-school services in the form of mountain biking with a male one-on-one aide to accompany Student in order to address his need for social skills and physical activity. The evidence demonstrated that Student did not require access to social activities outside the school day in order to address his pragmatic social skills or need for physical activity. Student did very well in physical education and physical activity remained an integral part of the strategies used to provide emotional regulation to Student throughout his school day. Further, Student's IEP offered significant opportunities for social interaction with disabled and typically developing peers in general education classes, participation in a social skills group, and

implementation of Student's social skills and communication goals by his aide in a variety of settings. Since Student did not require after school activities, particularly mountain biking, in order to receive a FAPE, it was not required to be included in his IEP, and District is not required to identify supports and services to allow his participation in this activity.

MALE AIDE

21. State and federal law requires school districts to address behavior problems that affect the education of the child with a disability or of other students. An IEP team must consider whether a child's behavior impedes his or her learning or that of others, and if the team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subds. (b)(1) and (c).) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP which does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1161-1162; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

22. As long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at pp. 207-208; *Adams v. State of Oregon, supra*, 195 F.3d at p. 1149.) 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 child with special needs.

(*Rowley, supra*, 458 U.S. 176, 208.)

23. The IEP appropriately addressed Student's behaviors that impeded learning. Student's behavior intervention plan identified problem behaviors, antecedents to the behaviors and positive behavioral interventions and supports and other strategies to address the behaviors so that Student could access his education. The plan was updated to include recently emerging problematic behaviors, regarding computer use and reaction to fire alarms. The plan added specific, step by step strategies that incorporated interventions shown to be successful with Student from both the prior behavior plans and the occupational therapist's sensory strategies. These strategies include use of options ("The Four Best Things"), a visual schedule, an "Emotions Folder," a visual timer, ear phones for use during fire alarms, quiet hands-quiet mouth, activity breaks, and sensory input (bean bag chair, hand fidgets).

24. Further, District persuasively showed that Student did not require a male one-on-one aide during the school day for safety reasons. Ms. Scoppen worked with Student for a long period of time and demonstrated proficiency in applying appropriate behavioral interventions to provide sensory regulation and to de-escalate Student. There was no showing that Student only lunged at or hit female staff, or that contact with female staff was sexually related. Further, isolating Student to work with only male staff or only a male aide would impede his ability to successfully transition to post-secondary environments, which require engagement with both genders.

25. District has met its burden of proof by establishing that the January 13, 2015 IEP was reasonably calculated to provide Student with some educational benefit in the least restrictive environment and complied with all applicable substantive and procedural statutory requirements. Therefore, District offered Student a FAPE and may implement the January 13, 2015 IEP over parental objection.

ORDER

1. Should Student be enrolled for public education within District, District may implement Student's January 13, 2015 IEP, without parent's consent.

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 the only issue heard and decided in this matter.

RIGHT TO APPEAL

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

DATED: June 15, 2015

/s/

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings