

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015110824

DECISION

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on November 19, 2015, naming San Bernardino City Unified School District. OAH continued the matter for good cause on December 28, 2015.

Administrative Law Judge Adrienne L. Krikorian heard this matter in San Bernardino, California, on February 29, March 1 and 2, 2016.

Student's mother represented Student. Educational advocate Areceli Diaz assisted Mother on the first day of hearing. Mother and Father attended all hearing dates.

Attorneys Karen Gilyard and Megan Kinsey represented San Bernardino. San Bernardino's Special Education Director Michael Dominguez attended all hearing days.

The ALJ granted a continuance for the parties to file written closing arguments and the record remained open until March 18, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted.

ISSUES¹

1. Did San Bernardino deny Student a free appropriate public education from July 7, 2015 to the date the complaint was filed by failing to:
 - a) Provide Student with a one-to-one assistant after parental request;
 - b) Develop a behavior intervention plan;
 - c) Provide Student with an appropriate amount of speech and language services to meet his unique needs?
2. Did San Bernardino deprive Student's parents of the ability to participate in the educational decision-making process by failing to provide copies of services records relating to speech and language services offered in Student's individualized education plan?

SUMMARY OF DECISION

Student met his burden on Issue 1(c). The evidence established that San Bernardino did not provide Student with an appropriate amount of speech therapy services. At hearing, Special Education Director Mr. Dominguez admitted Student should have received more speech therapy sessions and he was entitled to make up missed sessions. San Bernardino eventually gave Parents the speech therapist's service logs which reflected missing weeks of services, without explaining to Parents that a discrepancy existed in Student's initial IEP regarding the amount of speech therapy he

¹ The issues have been rephrased and reorganized for clarity consistent with the complaint. 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.)

was entitled to receive. However, Student did not prove he had communication needs that required more speech therapy services during the regular school year than those San Bernardino offered in his July 7, 2015 initial IEP.

Student also met his burden on Issue 2. San Bernardino deprived Parents the opportunity to meaningfully participate in the development of the October 28, 2015 IEP meeting regarding speech services. Parents asked for but did not receive service logs from the speech therapist until the October 28, 2015 IEP meeting. At the meeting, staff did not explain to Parents the discrepancies in the July 7, 2015 IEP relating to the provision of speech therapy services, or why Student did not receive weekly speech therapy. By failing to keep Parents informed relating to speech therapy, San Bernardino deprived Parents of the ability to be fully informed in order to participate meaningfully in the development of his October 28, 2015 IEP as it related to speech therapy.

Student did not meet his burden on Issues 1(a) and 1(b). Student did not prove he required a dedicated one-to-one personal assistant in the classroom, or required a behavior intervention plan to ensure his safety or to make progress in the school setting. Student made progress both in behaviors and academically from the first day of school on August 3, 2015 until at least November 19, 2015. Although he eloped four times during the beginning of the school year, class staff successfully and quickly retrieved him each time and his immediate safety was never at risk. Trained staff always had him in their eyesight and sat with him in the classroom during group and individual activities. Although he was largely non-verbal, he was a happy child, responded to and followed directions, participated in class activities, and stayed seated during instruction. When he became distracted, classroom staff successfully redirected him. Student offered no credible evidence that the school environment during the relevant time period was unsafe, or that he had unmanageable behaviors in the classroom that required a dedicated one-to-one personal assistant or a behavior intervention plan.

FACTUAL FINDINGS

1. Student is a five-year-old boy who resided with Parents within San Bernardino's boundaries at all relevant times. He was eligible for special education under the category of autism. He attended Hillside Elementary School at the time of hearing.

2. Parents enrolled Student in San Bernardino in June 2015. Mother informed staff Student was diagnosed with autism. She communicated her concern for Student's safety because he had a history of elopement and self-injurious behavior. He was a picky eater and was largely non-verbal. San Bernardino assessed Student for special education eligibility, including in the areas of psychoeducational, speech and language, health, and academics. Staff reported the results in a July 7, 2015 multidisciplinary assessment report.

INITIAL IEP MEETING – JULY 7, 2015

3. On July 7, 2015, San Bernardino held an initial IEP meeting. Parents, educational advocate Areceli Diaz, and all required San Bernardino staff attended the meeting. The IEP team reviewed the assessment reports and found Student eligible for special education under the primary category of autism.

4. Parents and Ms. Diaz actively participated in the meeting. They expressed their concerns about Student's habits and behaviors at home and in public settings including: elopement; self-injurious behaviors; inability to communicate; and resistance to eating certain foods. They reviewed and discussed assessment results and participated in discussions regarding placement and services. Parents' main concern was for Student's safety. Father wanted Student to eventually be capable of making academic progress with typically developing children.

5. Speech and language pathologist Ines Choy-Davis assessed Student. She found he had severe delays in comprehension and expressive language. He used

gestures and vocalizations to request objects. He could say some three-word utterances. He could vocalize different consonants although some of his utterances sounded like babbling. These utterances were consistent with "jargon" typical in children with autism. Student could produce age-appropriate sounds. Ms. Choy-Davis did not administer formal assessments in articulation/phonology because those tests required spontaneous responses and Student did not want to talk spontaneously during testing. She observed that he could produce developmentally appropriate sounds in spontaneous language. She recommended that he receive speech therapy services in a language-enriched classroom in contrast to individual speech therapy outside of the classroom.

6. The IEP team developed annual goals in attending skills, communication, following directions, and functional academics. The IEP team offered specialized academic instruction for 180 minutes, 175 times per year in a moderate/severe classroom; 30 minutes of individual language and speech therapy 13 times a year; 30-minutes of collaborative speech services 13 times per year; round trip curb to curb transportation; and accommodations including allowing Student additional time for communication, 60 minutes per session. The IEP Services page noted Student was eligible to participate in extended school year but did not specify whether he would receive any related services, including speech therapy, during summer. The 2015-2016 regular school year consisted of 36 school weeks from August 3, 2015 to June 2, 2016.

7. The IEP notes relating to speech and language services conflicted with the "Services" page. Parents and Ms. Diaz requested that Student's speech therapy sessions take place out of the classroom on a one-to-one basis with the therapist. San Bernardino IEP team members expressed concern that Student would benefit from collaborative sessions in the classroom in order to integrate his learned skills among his peers. As a compromise, the IEP team agreed to provide Student with speech therapy that consisted of 30-minute weekly sessions, alternating between individual pullout

sessions with the therapist, and collaborative sessions with the therapist in the classroom. Ms. Choy-Davis acknowledged at hearing that the "Services" page of the IEP called for a total of 26 weeks of speech therapy rather than 36 sessions for the entire regular school year, but understood that Student was supposed to receive speech therapy weekly for the entire regular school year. The notes do not mention extended school year. Special Education Director Mr. Dominguez also acknowledged that the "Services" page conflicted with the notes, and reported San Bernardino's policy in such a conflict was to provide the child with the greater of the two amounts, and to make up sessions when Student was absent from school, regardless of the length of absence.

8. Student's initial IEP required San Bernardino to provide 36 school weeks of speech therapy, in 30-minute sessions, alternating weekly between individual pullout and in-class collaborative services through the 2015-2016 regular school year.

9. Ms. Diaz requested a one-to-one personal assistant for Student due to his anxiety, hyperactivity, and self-injurious behaviors. Program Specialist Patrick Smith advised Parents that Student would be in a small classroom with low student/adult ratio. San Bernardino wanted to observe Student in the classroom, put into place whatever supports were required and then meet again to review Parents' request for an assistant. San Bernardino wanted to give Student a chance to participate and be successful in the classroom first because Student had not yet been in school. Parents consented without exception to San Bernardino's July 7, 2015 IEP offer of FAPE.

AUGUST 3, 2015 UNTIL OCTOBER 28, 2015 IEP

10. Student started school at Hillside on August 3, 2015. He attended a kindergarten moderate/severe classroom from 8:50 a.m. to noon. The classroom had 10 students with varying disabilities, and four adults. Special education teacher Margaret Palhegyi remained in the classroom for the entire morning working directly with the 10 students in the class. Pre-school special education teacher Takara Russ was in the

classroom from 8:50 a.m. to 11:00 a.m. and usually from 11:30 a.m. to noon, preparing for her afternoon pre-school class. Ms. Russ sat within direct eyesight of the kindergarten students, including Student, and often participated in their "circle time." She was familiar with Student and his needs. Instructional aide Maria Ayela, who had 22 years of experience working with children with moderate/severe disabilities including autism, was in the classroom from 8:50 a.m. until noon, and frequently worked directly with Student, both inside and outside of the classroom. She occasionally left the classroom for 30-40 minutes to substitute for another aide during a lunch break. Instructional assistant Diane Aguilar, who also had experience working with children with autism, was in the classroom from 8:50 a.m. to 11:00 a.m. each day and worked with all students in the classroom.

11. In the first few weeks of school, Student occasionally bit himself on the wrist. He eloped from the classroom or student lineup outside of class four times. On one occasion, he opened the classroom door and ran approximately 10-15 feet from the classroom. Ms. Russ saw him leave and brought him back into the classroom within less than one minute. Student ran toward the playground from a line-up of students during a fire drill. Ms. Ayela saw him run and brought him back to the line within one minute. Speech therapist Susan Staley's office was located between Student's classroom and an adjacent classroom. Student opened the door to her office during a speech therapy session and walked a few feet into his classroom. Ms. Ayela observed him and returned him to the therapy room. Student ran from the classroom on a fourth occasion, and Ms. Palhegyi found him standing at the nearby playground observing other children. She returned him to the classroom. Student's safety was not at risk on any of the four occasions.

12. Classroom staff successfully implemented preventive strategies to address Student's elopement during the first few weeks of school. Ms. Palhegyi talked to Student

about running and explained the dangers. Staff routinely held Student's hand when going to and from the classroom at the beginning and end of the school day and when students left the classroom for any purpose. Student was compliant and did not attempt to run away. On occasion, he grabbed Ms. Ayela's hand to take her to something he wanted her to see. Although Student was generally obedient and followed prompts, when he required redirection it was successful. Student stopped eloping after the first few weeks of school, staff was successful in communicating and redirecting him, and he was a happy child who enjoyed being at school.

13. Ms. Palhegyi maintained a daily "Event Frequency Data Sheet." She reported incidents of hand biting and elopement on the Data Sheet. She provided copies to Parents.

14. Student made progress in behavior and academics. He liked to explore the classroom environment, followed directions, was not aggressive and did not hit, push or shove. He occasionally pinched Ms. Palhegyi. The occasional pinching did not hurt her. She interpreted the pinching as his attempt to get her attention. He participated in circle time occasionally interacting with classmates. Although he did not always eat complete meals, Ms. Ayela worked with him to find a favorite food at each meal to ensure he ate something at breakfast and break times. Student independently and successfully managed his toileting needs without direct or indirect adult assistance. Student's behaviors did not impede his or his classmates' learning.

15. Ms. Staley was a credentialed speech therapist with a master of science in communication disorders. She began providing speech therapy services to Student on August 20, 2015. Although school started on August 3, 2015, staff needed time to schedule services, resulting in Student missing two weeks of services. Ms. Staley understood that the IEP "Services" page required her to provide only 26, 30-minute speech therapy sessions during the school year, and therefore she skipped weeks. She

was unaware of the discrepancy with the initial IEP notes page.

16. Ms. Staley recorded notes from each session, including absences, in a log that she kept in a file in her office; the logs were not part of Student's cumulative file or records. From August 20, 2015 to February 22, 2016, Ms. Staley's speech service logs reflected that she did not provide Student speech therapy on a weekly basis. Ms. Staley provided a total of twelve speech therapy sessions to Student through February 22, 2016. She recorded four absences. Six sessions were collaborative in the classroom. Student was the only student in the class who needed speech therapy and he usually received individual attention in the classroom. Six sessions were in Ms. Staley's office adjacent to the classroom.

17. Student's communication goal was to use two to three word utterances in sign language, verbally or using a communication device with 80 percent accuracy to request, label or respond on four to five trials. During the first few months of school, Parents asked staff about Student's progress, and for copies of the speech therapy logs. San Bernardino did not provide the logs until October 28, 2015.

18. Student made some progress in communication in the first three months of school. He acquired beginning skills in echoing statements and forming two-three word phrases. He communicated wants and needs verbally with one-word phrases including when he needed bathroom breaks. He also communicated occasionally by signing. By December 2015, Ms. Staley recorded Student's articulation as "fair."

ANNUAL IEP MEETING – OCTOBER 28, 2015

19. Parents requested an emergency IEP meeting through Ms. Diaz on October 19, 2015. They notified San Bernardino they were concerned about and wanted to discuss: Student's elopement history; eating habits; need for more speech therapy sessions; and development of a behavior intervention plan.

20. The IEP team met on October 28, 2015. Parents and Ms. Diaz attended and

actively participated in the meeting. Parents and Ms. Diaz did not observe Student's behaviors in the classroom at any time before the meeting. Parents brought Student to the meeting. He was restless, ran around the room touching objects in the area, and was distracted. Parents expressed concerns about Student's lack of eating at school based upon daily behavior logs. They also reported that Student was receiving one hour a week of speech therapy through Easter Seals, and was starting to vocalize and use sign language.

21. The IEP team reviewed San Bernardino's assistive technology assessment report, which indicated Student would benefit from augmentative or alternative technologies in the form of a communication system. The IEP team agreed to provide a communication device for Student.

22. The IEP team reviewed Student's present levels of performance in behavior, academics and speech. Ms. Staley provided a copy of her speech therapy logs dated through October 28, 2015 to Parents and Ms. Diaz. She reported on Student's progress toward his speech goals and the IEP team adjusted his communication goals. The "Services" page noted that 13 of 26 speech therapy sessions during the regular school year would be collaborative. It did not correct the inconsistency in the number of services from the July 7, 2015 IEP notes. The IEP team offered Student programming and training for an augmentative communication device. The IEP included extended school year for 20 three-hour sessions. The IEP did not specify whether Student would receive any related services for summer school. The IEP team also agreed to consider providing Student with compression gloves to assist with his hand biting, and arranged for follow-up.

23. Parents requested a personal assistant and additional speech therapy. The San Bernardino IEP team members did not agree with Parents' requests based on their observations of his progress, and referred Parents' requests to Mr. Dominguez to send a

written response.

24. On November 10, 2015, Mr. Dominguez wrote a letter to Parents declining their request for a personal assistant. Mr. Dominguez was a school psychologist with a master's degree in counseling and a credentialed board certified behavioral analyst. He relied on the IEP team's evaluations of Student's present levels of performance at the October 28, 2015 annual IEP meeting, explaining that based upon Student's demonstrated skills and progress at school a personal assistant would be unnecessarily and inappropriately restrictive for Student. Mr. Dominguez also declined Parents' request for additional speech services, referring to Ms. Staley's service logs and report at the October 28, 2015 IEP meeting and the additional speech and communication goals added at the meeting. Mr. Dominguez responded to Parents' request for a behavior intervention plan by proposing an IEP team meeting to discuss the behavior that concerned Parents and to develop an appropriate behavior intervention plan if needed.

25. Parents did not meet with the IEP team to discuss the possible behavior intervention plan before they filed their complaint shortly after the November 10, 2015 letter.

LEGAL AUTHORITIES AND 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.

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

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

3. In *Board of Education of the Hendrick Hudson Central School Dist. v.*

edition.

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

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the

request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

5. 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].) As the petitioning party, Student has the burden of proof on all issues.

ISSUE 1: DID SAN BERNARDINO DENY STUDENT A FAPE?

Issues 1(a) and 1(b) - Personal Assistant and Behavior

6. Student contends San Bernardino denied Student a FAPE by failing to provide Student with a personal assistant to prevent injury to him or others based upon his history of elopement and hand biting and a behavior intervention plan. San Bernardino contends it offered and provided Student a FAPE during the relevant time frame.

Legal Authority

7. 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.) For a school district's offer of special education placement and services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

8. An IEP must include a clear written 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; and, 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).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP 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) & (i).)

9. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior, consistent with the IDEA and its enabling regulations. (20 U.S.C. §§ 1414(d)(3)(b)(i) and (d)(4); Education Code 56521.1 § (b).) If the IEP team determines that a behavior intervention plan would be appropriate for the child, it must be included in the IEP. (20 USC §§ 1415(k)(1)(D)(ii) and (k)(1)(F)(i) and (ii); 34 CFR §§ 300.530(b)(2), 300.530 (d)(ii), 300.530 (d)(5), & 300.530(f).)

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

Analysis and Conclusions

11. Student did not meet his burden of persuasion on Issues 1(a) and (b). Although Student eloped during the first few weeks of school, his safety and that of others was not at risk. Recognizing Parents' concerns, and based on Student's behaviors during those first weeks, classroom staff who were trained and experienced working with children with behaviors similar to Student's behaviors successfully identified his needs, developed a plan to address his needs, and successfully established a relationship with Student. He responded to redirection from staff, stopped eloping and bit his hand less frequently. Student was always escorted to and from the classroom with his hand held by an adult. For the first two hours of the school day, the classroom had four adults present, with 10 students. Ms. Ayela had Student in her sight at all times while in the classroom, and understood his needs. During the last hour and during Ms. Ayela's absences, at least two adults familiar with Student's needs were present and had eyes on Student at all times. Ms. Russ was often in the classroom from 11:30 to noon. The October 28, 2015 IEP team agreed to provide Student with compression gloves to deter hand biting. This level of support was sufficient to address Student's eloping behavior and his hand biting.

12. Student enjoyed school, was a happy child, made progress at school academically and in his interactions with adults, and participated along with his classmates in classroom activities. Although Parents may have had legitimate concerns based on Student's behaviors at home and outside of school, they offered no evidence that his behavior at home was replicated in the classroom after the first few weeks of school, putting his safety in jeopardy. Student did not prove that, up to the time they filed the complaint, San Bernardino was required to provide a one to one assistant to address Student's behaviors.

13. In their written closing argument, Parents offered numerous citations to

treatises generally addressing the needs of children with autism and speech disorders. However, at hearing, Student offered no professional opinions or other credible evidence corroborating the information or specifically correlating those authorities to Student's unique needs at school. They also argued that classroom staff lacked current training. Experienced San Bernardino staff with firsthand knowledge of Student at school credibly testified that Student's classroom behaviors were manageable. Parents did not prove that Student required a full time personal assistant in the kindergarten classroom for safety or to successfully access his education in the least restrictive environment.

14. Regarding the behavior intervention plan, Student offered no credible evidence that his behaviors impeded his learning or that of other students in the classroom, justifying a behavior intervention plan. However, after the October 28, 2015 IEP meeting, Mr. Dominguez offered in writing to hold a parent-requested IEP meeting with school staff to discuss specific behaviors of concern to them and to explore strategies to address those behaviors, including a behavior intervention plan if needed. Parents did not act on that offer before filing the complaint, and they did not offer any credible evidence supporting a finding that, at the time of the October 28, 2015 IEP meeting, the IEP team had knowledge of any behaviors that required the team to develop and include a behavior intervention plan in Student's IEP.

Issue 1(c) - Speech

15. Student contends San Bernardino did not provide him with an appropriate level of speech services, including therapy to challenge Student to learn the methods of articulation of words to understand their meaning, at any time after Student's July 7, 2015 initial IEP. San Bernardino acknowledged that it did not provide the amount of services called for in his initial IEP. However, San Bernardino argued that Parents consented to the October 28, 2015 IEP, which carried over the error in the initial IEP by maintaining the 26 hours of speech services in the "Services" page, and, therefore, the

October 28, 2015 IEP superseded the initial IEP, relieving San Bernardino of responsibility for the discrepancy.

Legal Authority

16. Legal Citations 7 through 10 are incorporated by reference.

17. When a student alleges a denial of FAPE based on the failure to implement an IEP, in order to prevail the student must prove that any failure to implement the IEP was "material," meaning that "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, 780.) "Minor discrepancies between the services provided and the services called for by the IEP do not give rise to an IDEA violation." (*Ibid.*)

Analysis and Conclusions

18. Student met his burden on Issue 1(c). The evidence established that the inconsistency between the July 7, 2015 initial IEP "Services" page and the meeting notes created a material ambiguity as to the amount of speech services San Bernardino should have provided to Student. Parents did not receive an initial IEP that clearly identified the nature and frequency of Student's services. Ms. Choy-Davis' testimony corroborated the ambiguity because, in her opinion, the IEP team agreed that Student would receive weekly speech therapy sessions through the school year. The IEP notes corroborated her testimony, confirming that the IEP team discussed modifying the initial offer to reflect alternating weeks of the method of delivery of services. Parents expressed concern to staff more than once that Student needed more speech therapy, which, in fact, was accurate because San Bernardino did not provide what the IEP team agreed to provide Student.

19. The evidence also established that, at hearing if not before, Mr.

Dominguez recognized a material discrepancy in the July 7, 2015 IEP, and he conceded at hearing that San Bernardino should have provided Student with more speech therapy sessions up through the time of hearing. Mr. Dominguez acknowledged that, in the case of an ambiguity like the one in Student's initial IEP, San Bernardino's position was to resolve the ambiguity in Student's favor. Mr. Dominguez also acknowledged that Student was entitled to make up any sessions he missed if he was absent, regardless of the length of absence. As of the hearing, that had not yet occurred, despite Parents' repeated requests for more speech therapy.

20. San Bernardino's argument that the discrepancy regarding speech in the July 7, 2015 IEP was inconsequential because Parents consented to the October 28, 2015 IEP was not persuasive. Parents did not knowingly waive any of Student's rights by signing the October 28, 2015 IEP. No one offered any evidence that, at the October 28, 2015 IEP, any members of the IEP team recognized the discrepancy or brought it to Parents' attention in order to address whether to update the speech therapy services in Student's October 28, 2015 annual IEP. As a result, Parents accepted the IEP with the exception of requesting additional speech and a one-to-one assistant. Parents were unaware at that meeting that San Bernardino mistakenly failed to provide Student with appropriate speech services as determined by the initial IEP team. They believed Student needed more speech services. Parents cannot be faulted under these circumstances for signing their agreement to the annual IEP, with the exception of their requests for more speech services and a personal assistant. Their qualified consent to the IEP does not relieve San Bernardino from its mistake, or make the mistake trivial, as San Bernardino argues.

21. San Bernardino did not implement Student's initial IEP as to speech services. Its failure to do so constituted a material procedural violation, resulting in a denial of FAPE. The discrepancy in the initial IEP involved 10 speech therapy sessions

during the regular school year, and resulted in Student not receiving weekly services, as contemplated by the initial IEP team. Additionally, San Bernardino did not make up sessions for Student's absences by the time of hearing. Ms. Staley testified Student made some progress in communication during the first three months of school, after approximately eight sessions. At the October 28, 2015 IEP meeting, she recommended modifying his communication goal, to which Parents consented. However, if Student had received the weekly sessions as contemplated by his initial IEP team, he could have achieved even more progress. In addition, given Student's serious communication deficits as identified by Ms. Choy-Davis, when San Bernardino agreed to provide Student with 20 three-hour sessions of extended school year in the July 7, 2015 initial IEP, and again in the October 28, 2015 annual IEP, the IEP team did not consider or expressly offer speech therapy services during those four weeks to help Student continue to make progress in communication and not regress during the summer.

22. Student did not prove, however, that he required more than 30 minutes a week of school based speech therapy services, which the IEP team offered in the initial IEP. Parents' concerns about Student needing more speech were based on what they saw at home and outside the classroom. They did not observe Student in the classroom and were not experts in the area of speech. They offered no expert testimony to support their contentions, including that Student required therapy to address a specific need in articulation. Ms. Choy-Davis did not test Student specifically in articulation because she found he was initially capable of forming sounds. Student's deficits were in expressive and receptive language. Ms. Staley, who was a certified and experienced speech therapist with a master of science in communication disorders; Ms. Palhegyi, an experienced credentialed special education teacher; and Ms. Ayela, an instructional aide with 22 years of experience working with children with moderate/severe disabilities, all credibly testified that Student made some progress in his communication skills after he

started school, both during class time while working with the adult staff in the classroom, and during individual therapy sessions with Ms. Staley. He echoed words, formed three-word phrases, and repeated sounds.

23. In conclusion, Student prevailed on Issue 1(c) by proving that San Bernardino denied Student a FAPE by failing to provide him with an appropriate amount of speech therapy services for the 2015-2016 school year and 2016 extended school year. Student's remedies are discussed below.

ISSUE 2: DID SAN BERNARDINO DEPRIVE PARENT OF MEANINGFUL PARTICIPATION?

24. Student contends San Bernardino deprived Parents of the opportunity to meaningfully participate in the development of Student's October 28, 2015 IEP because San Bernardino did not give Parents copies of the service logs for the speech and language services provided to Student to confirm whether Student was receiving the services. San Bernardino contends that Parents received service logs at least through October 28, 2015. Student prevailed on this issue.

Legal Authority

25. 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) (2006); Ed. Code, § 56500.4.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County School Dist. supra*, 267 F.3d 877, 882.)

26. 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* (3rd 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].)

27. Parents have the right to examine education records within five business days of requesting them. (Ed. Code, § 56504.) The federal Family Educational Rights and Privacy Act defines pupil or education records under the IDEA. (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Pupil records include any item of information "directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Pupil records do not include informal notes related to a pupil compiled by a school officer or employee, which remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. (20 U.S.C. § 1232g(4)(b); Ed. Code, § 49061, subd. (b).)

Analysis and Conclusions

28. Ms. Staley's speech therapy logs were not part of Student's school records, and therefore San Bernardino had no statutory obligation to provide them to Parents under Education Code section 56504. Ms. Staley maintained her speech therapy logs in her own files, and they did not become part of Student's cumulative file. Parents were not entitled to the speech therapy logs as a matter of law because they were not school records.

29. However, during the first few months of school, Parents asked for progress updates, and for copies of the speech services logs in order to see how Student was

doing in speech. San Bernardino did not provide them until the October 28, 2015 IEP meeting, when Ms. Staley gave Parents and Ms. Diaz a copy of her logs dated through October 28, 2015.

30. Because of the ambiguities in Student's July 7, 2015 IEP regarding speech services, the logs were not entirely instructive. Ms. Staley understood that she was only to provide 26 sessions of therapy for the school year. Parents were not aware that Student did not receive all of the services to which he was entitled. They did not clearly understand that Student should have received 30 minutes of speech weekly in accordance with his initial IEP. At the October 28, 2015 IEP, the IEP team deferred Parents' request for more speech therapy to Mr. Dominguez. He rejected their request. The speech therapy logs through February 22, 2016, reflected that Student did not receive regular weekly speech therapy after the first day of school.

31. The lack of consistent and accurate communication between San Bernardino staff and Parents regarding the delivery frequency of Student's speech therapy services, particularly when Parents requested status updates, significantly deprived Parents of the ability to meaningfully participate in the October 28, 2015 IEP meeting to determine whether Student required more speech therapy services. For this reason, Student prevailed on this issue. Student's remedies will be discussed below.

REMEDIES

1. Student prevailed on Issues 1(c) and 2. Student seeks an undefined amount of additional speech therapy and a personal assistant in the classroom. San Bernardino contends Student is not entitled to additional speech because any discrepancies in its delivery of speech services was trivial and Parents accepted the October 28, 2015 annual IEP. San Bernardino also contends classroom staff successfully managed Student's elopement and hand-biting behaviors.

2. School districts may be ordered to provide compensatory education or

additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School Dist.*, *supra*, 31 F.3d at 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. Dist. of Columbia*, *supra*, 401 F.3d at 524.)

3. As to Issue 1(c), based upon the recommendations of his July 7, 2015 initial IEP team, San Bernardino offered but failed to provide Student 30-minute weekly sessions of speech during the regular school year up to the time of hearing. However, Student did not establish that he needed more than 30-minutes a week of speech therapy. Student was entitled to receive 30-minute sessions of speech therapy for each week of the regular school year. As an equitable remedy, District shall provide, as compensatory services, speech therapy sessions for all of the school weeks Student missed in 2015-2016 regular school year through the date of this Decision. San Bernardino shall amend Student’s October 28, 2015 annual IEP to reflect the 36 weekly sessions of speech during the regular school year as described in the July 7, 2015 IEP notes. San Bernardino is entitled to credit against the 36 hours for the 2015-2016 regular school year based upon the number of sessions it actually provided to Student through the date this Decision was issued. San Bernardino shall accurately account to

Parents for the number of sessions Student receives and the number of sessions still owed. The makeup sessions shall take place in addition to the ongoing weekly sessions called for in Student's amended IEP for the remainder of the school year. In addition, as compensatory services for San Bernardino's failure to provide weekly speech services, and for failing to clearly offer any speech therapy during extended school year, Student is entitled to four 30-minute weekly speech therapy sessions for the 2016 extended school year, in either collaborative or individual sessions as determined by the speech therapist.

4. Student shall be entitled to receive the above compensatory services, consisting of the makeup sessions and the two additional hours, through the end of the first semester of the 2016-2017 regular school year if San Bernardino is unable to schedule them before the end of the 2016 extended school year. Scheduling of those sessions shall be coordinated with Parents.

5. As to Issue 2, Parents would have been more informed and prepared to meaningfully participate regarding speech services at the October 28, 2015 IEP meeting if school staff had responded before the October 28, 2015 IEP meeting to Parents' request for Student's speech therapy logs or reports on his progress in speech, particularly because a discrepancy in frequency of services existed. Therefore, San Bernardino shall create and provide Parents on at least a monthly basis a written progress report from the speech therapist regarding Student's speech therapy sessions until Student's next annual IEP.

ORDER

1. San Bernardino shall amend Student's annual October 28, 2015 IEP to reflect that Student shall receive 36, 30-minute weekly speech therapy sessions through the 2015-2016 regular school year, alternating weekly between collaborative and individual services. District shall implement the amended IEP.

2. San Bernardino shall, as compensatory education, provide Student with:
 - a) A total of 36, 30-minute weekly sessions of speech therapy provided by a San Bernardino staff speech therapist or, if no staff therapist is available, a mutually agreeable non-public agency. If the services are delivered at school, the sessions shall alternate weekly between collaborative and individual. If they are delivered by a non-public agency, the agency speech therapist shall determine the mode of delivery. San Bernardino shall credit against the 36, 30-minute sessions the number of sessions it actually provided to Student during the 2015-2016 regular school year through the date of this Order; and
 - b) Four 30-minute weekly speech therapy sessions to be delivered during the 2016 extended school year by a San Bernardino speech therapist or, if no staff therapist is available, a mutually agreeable non-public agency. If the services are delivered at school, the sessions shall alternate weekly between collaborative and individual, or, if not feasible, then as determined by the speech therapist. If the services are delivered by a non-public agency, the agency speech therapist shall determine the mode of delivery.
3. If Student is unable to access all of the compensatory hours in Paragraph 2 of this Order before the end of the 2016 extended school year, San Bernardino shall deliver the compensatory hours in either collaborative or individual sessions, as determined by the speech therapist, before the end of the first semester of the 2016-2017 school year.
4. San Bernardino shall create and provide Parents with a written progress report regarding speech, which may be in the form of speech therapy services logs, on a monthly basis until Student's next annual IEP, and shall include an accurate accounting of the date of each speech therapy session provided and whether it was collaborative or individual.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1(c) and Issue 2. San Bernardino prevailed on Issues 1(a) and 1(b).

RIGHT TO APPEAL

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

DATED: April 13, 2016

_____/s/____

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings