

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SANTA BARBARA UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2016050450

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on May 2, 2016, naming Santa Barbara Unified School District. OAH continued the matter for good cause on June 20, 2016.

Administrative Law Judge Alexa J. Hohensee heard this matter in Santa Barbara, California on September 7, 8 and 12, 2016.

Student's Father, Attorney at Law, represented Student. Student's Mother attended the hearing on behalf of Student.

Karen E. Gilyard, Attorney at Law, represented District. John Schettler, District's Director of Special Education, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until October 3, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUES<sup>1</sup>

1. Did District fail to implement Student's individualized education program in the 2015-2016 school year by:

- a. Allowing her to miss her general education physical education class;
- b. Failing to have accessible physical education equipment and an accessible swimming pool; and
- c. Failing to have her attend a general education art class in the fall semester?

2. Did District commit the following procedural violations that resulted in a denial of FAPE to Student in the 2015-2016 school year:

- a. Inserting inaccurate statements into the meeting notes of IEP's;
- b. Inserting behavioral intervention terms into IEP's which were not supported by a Functional Behavior Assessment;
- c. Providing amendments to IEP's which were not completed and without obtaining parental consent to amend;
- d. Failing to provide Parents with a complete, accurate copy of IEP's;
- e. Making unilateral decisions regarding IEP language and services;
- f. Holding IEP team meetings on short notice without Parents;
- g. Failing to accommodate parental availability for IEP team meetings;
- h. Failing to provide attendees' names for noticed IEP team meetings in advance of the meeting;
- i. Scheduling redundant and unnecessary IEP team meetings;
- j. Seeking to excuse IEP team members at the time of the IEP team meeting,

---

<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- when there was no advance notice to Parents that those team members could not attend;
- k. Not allowing Parents to speak to Student's teacher, aide and all service providers and, instead, requiring all communication to go through the Assistant Principal;
  - l. Failing to respond to Parents' concerns regarding injuries, participation in general education classes and parental observations;
  - m. Limiting Parents' observations of Student's program; and
  - n. Not allowing Parents to see demonstrations of "goal-specific" exercises?

## SUMMARY OF DECISION

Student contends that she was denied a FAPE by various procedural violations that significantly interfered with Parents' opportunity to participate in the development of Student's educational program. Student also contends that she was denied a FAPE by District's failure to implement portions of Student's April 9, 2015 IEP; specifically that she did not spend the amount of time specified in general education classes with her typical peers, and that she did not have access to the pool or a recumbent bicycle during her Physical Education class. District denies that any procedural violations or implementation failures occurred. The period at issue runs from the beginning of the 2015-2016 regular school year through the filing of Student's due process complaint on May 2, 2016.

Student did not prove that District materially failed to implement the April 9, 2015 IEP. District included Student in general education Physical Education classes, and provided Student with the same access to the pool and recumbent bicycle as her typical peers. For a portion of the fall 2015 semester, Student's maladaptive behavior of dropping to the ground interfered with her attendance in a general education Art class. However, Student did not prove that she was denied an opportunity to participate with

typical peers in other elective activities when she did not attend Art. During that time, District was working collaboratively with Parents to incorporate parental input into a proposed behavior plan, and was not required to file for due process regarding the disputed plan.

District did not commit the procedural violations alleged. District scheduled a reasonable number of IEP team meetings, made efforts to accommodate Parents' availability, gave Parents sufficient notice of the meetings and attendees, and adjourned meetings without discussion or action if Parents failed to attend. The IEP meeting notes accurately documented the events of each meeting, and the IEP's accurately and completely described District's offers of FAPE. Although Parents' consent was required before District could implement the IEP's, Parents' consent was not required for District to amend its offers of FAPE to Student. Parents were not entitled to unencumbered access to Student's classroom or school staff, or to classroom-based demonstrations of how staff worked with Student. District timely and sufficiently responded to Parents' inquiries, and communication was properly restricted to a designated administrator pursuant to a settlement agreement between Parents and District.

This Decision denies all of Student's requests for relief.

## FACTUAL FINDINGS

1. Student was 18 years of age and in 12th grade at the time of the hearing. Student has resided with Parents within District's boundaries at all relevant times.

2. Student is a severely disabled young woman with limited ability to care for herself. She suffers from cerebral palsy, and has pervasive global developmental delays, low muscle tone and impaired vision. Her cognitive ability is in the low range, her use of language is limited, and Student generally functions at the level of a toddler. Student is eligible for special education under the categories of multiple disabilities and visual impairment.

## 2014-2015 SCHOOL YEAR

3. During the 2014-2015 school year, Student was in 10th grade and attended a special day class for students with moderate to severe disabilities at District's San Marcos High School taught by Carina Guimaraes. Ms. Guimaraes holds a master's degree in education from the University of California at Santa Barbara (UCSB), and is a special education teacher credentialed to teach students with moderate to severe disabilities. She has experience teaching students with multiple disabilities that affected their abilities, including motor and vision impairments, and with sensory or behavior issues. At hearing, Ms. Guimaraes appeared genuinely committed and devoted to her students, and testified credibly regarding Student's behaviors and events related to Student's program. Her testimony regarding Student's educational needs, and the appropriate educational program and supports for Student was credible and convincing.

4. The school day at San Marcos was divided into four blocks of instruction, called "periods." Student was mainstreamed in general education classes with her typical peers in Physical Education for one period, and in Art for half a period.<sup>2</sup> The school day began at 8:00 a.m. and ended at 3:00 p.m. Student was assigned a one-on-one paraeducator who accompanied her throughout the school day, including Student's sessions of speech therapy, adapted physical education, occupational therapy and vision therapy.

5. Toward the end of March 2015, Student began to exhibit intermittent maladaptive behaviors at school, including screaming, whining, eloping, falling to the floor, cursing, pushing things off her desk and self-injurious behaviors such as banging

---

<sup>2</sup> "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

her head or dropping to the ground. Mother informed school staff that Student was experiencing severe cramps, mood swings and general unhappiness due to monthly menstruation.

6. Mother believed that if Student's paraeducator and teacher kept Student interested and engaged in instruction at all times, maladaptive behaviors would not occur. Mother opposed the use of music, preferred items or down time as techniques to calm Student, considering them "pacifiers" that allowed staff to ignore Student. Mother attributed Student's behaviors to inadequate instruction, or "program failures." Mother picked Student up during Period 4, and often engaged Student's paraeducator and Ms. Guimaraes in extended conversations or loudly berated them as lacking the qualifications or competence to work with Student. Mother's conduct interfered with classroom instruction, and Ms. Guimaraes ultimately filed a harassment complaint with San Marcos administration.

7. Mother testified at hearing, and was clearly committed to providing the best educational program for her daughter. Mother was passionate when relating her daughter's needs, and in audio recordings of IEP team meetings was a strong advocate for Student. Mother was highly critical when she perceived that her child's needs were not being understood or addressed. However, she was also generous in offering praise when she believed someone was meeting Student's needs, and demonstrated appreciation for staff time invested in IEP team meetings and discussions with Parents. Mother's testimony was generally credible, although her tendency to discount divergent opinions and to speculate adversely impacted her persuasiveness.

#### APRIL 9, 2015 IEP TEAM MEETING

8. District convened an annual IEP team meeting on April 9, 2015, to review Student's educational progress over the past school year, and to develop a new IEP for the 2015-2016 school year. The April 9, 2015 IEP offered Student placement in a special

day class for students with moderate to severe disabilities, a paraeducator throughout the school day, and services in adapted physical education, occupational therapy, speech therapy and instruction for the visually impaired. The IEP mainstreamed Student for one-and-one-half periods in general education, during Physical Education and an elective "such as Arts, Flags, etc."<sup>3</sup>

9. Parents did not consent to the April 9, 2015 IEP, and filed a request for due process hearing with OAH on May 15, 2015.

10. During the spring 2015 semester, a new paraeducator was assigned to Student, but Student's maladaptive behaviors continued to increase. Ms. Guimaraes prepared a data collection form for Student's paraeducator to track the frequency and time of Student's behaviors. At Ms. Guimaraes' request, District asked behavior specialist Sunny Kim, to draft a proposed behavior intervention plan to address Student's behaviors. Ms. Kim was already consulting with Ms. Guimaraes to support the severe to moderate classroom.

11. Ms. Kim is a highly qualified behavior specialist, with a bachelor's degree in psychology, a master's degree in education and a doctorate in special education from the UCSB. Ms. Kim had seven years of experience working for UCSB's Koegel Autism Center, where she implemented behavior interventions and eventually acted as program supervisor. Ms. Kim became a Board Certified Behavior Analyst in 2014, and has been employed by District as a behavior specialist since 2015. Her demeanor at hearing was calm and professional, and her answers were thoughtful and informative. Ms. Kim clearly

---

<sup>3</sup> The April 9, 2015 IEP was amended at IEP team meetings convened on May 8, May 21 and June 4, 2015. For purposes of this decision, the April 9, 2015 date will refer to the April 9, 2015 IEP as amended through June 4, 2015, unless specific reference is made to a particular amendment date.

cared about Student's wellbeing, and considered Mother a helpful resource in identifying and addressing Student's needs. Ms. Kim's testimony was credible and persuasive, and in light of her education, experience, training and familiarity with Student, her opinions regarding Student's behavior and educational program needs were given great weight.

12. Ms. Kim and Ms. Guimaraes observed that Student's maladaptive behaviors occurred more frequently after lunch when Student was tired, and when Student was presented with a non-preferred task. Student tantrummed when her paraeducator or service providers interacted with anyone other than Student, and Ms. Kim and Ms. Guimaraes formed an opinion that Student also used inappropriate behavior to gain attention.

13. Student received school-based occupational therapy from Christin Hunt. Ms. Hunt has a master's degree in occupational therapy, and has been a licensed and registered occupational therapist for nine years. She is experienced in school-based occupational therapy, and at the time of the hearing had worked with Student for three years. She observed that Student had poor body awareness, and was motivated by physical activities that provided her with input on where her body was in space. For example, Student enjoyed walking around campus and the school track, which stimulated her joints and positively affected her mood and ability to focus. Ms. Hunt also provided Student with small vibrators in animal shapes, which Student used on her head, neck and joints for sensory input, and Ms. Hunt instructed Student's paraprofessional to provide Student with frequent sensory breaks to maintain alertness. Ms. Hunt introduced tools, such as squeezable putty, for Student to use independently to calm herself if she became overstimulated. Ms. Hunt preferred to teach Student the means to regulate herself, so that Student would not be dependent on the paraprofessional. Ms. Hunt observed that Student laughed when engaging in some



maladaptive behaviors, such as pushing things off her desk for adults to pick up, which in her opinion indicated behavioral issues, rather than sensory issues such as overstimulation. In light of Ms. Hunt's education, training, and extensive experience working with Student in the classroom, her opinions regarding Student's sensory needs, and that Student engaged in some maladaptive behaviors that were not sensory based, were accorded significant weight.

14. On June 1, 2015, using the frequency data collected, Ms. Kim and Ms. Guimaraes drafted a proposed behavior intervention plan to replace Student's inappropriate behaviors with appropriate, functionally equivalent replacement behaviors. For example, if Student tantrummed to avoid a task, she would be taught to ask for an alternative assignment or for a break before performing the task. If Student whined or tantrummed for attention from a peer or staff, she would be taught to tap on the person's shoulder or say their name instead.

#### JUNE 4, 2015 IEP TEAM MEETING

15. On June 4, 2015, District convened an IEP team meeting that included Parents, Ms. Guimaraes, Ms. Kim, Student's service providers, and school administrators. The purpose of the meeting was to address Student's behaviors.

16. Ms. Kim presented the behavior support plan to the IEP team, proposed a behavior goal, and requested that Parents consent to a functional behavior assessment. A functional behavior assessment is an in-depth data-driven assessment that focuses on targeted inappropriate behaviors, identifies the triggers of those behaviors (antecedents), and analyses what benefit the student gains from engaging in the behaviors (consequences) that in turn reinforce the behavior. From the results of a functional behavior assessment, an IEP team can develop positive behavior interventions to teach the student coping strategies and appropriate replacement behaviors. A functional behavior assessment cannot be conducted without parental consent. Parents

were given an assessment plan for the functional behavior assessment at the IEP team meeting.

17. Parents were angry at the inclusion of a behavior plan in the proposed IEP. They strongly believed that the existence of a behavior plan in their daughter's record unfairly placed "blame" for behaviors on their daughter when, in Parents' opinion, any maladaptive conduct by their daughter was the result of improper instruction and attention to their child. Parents were particularly upset by a behavior plan provisions for ignoring Student's inappropriate attention-seeking behaviors as a component of teaching her appropriate attention-seeking behaviors. Parents perceived that strategy as a formula for neglecting their daughter that would increase the number and intensity of tantrums. Mother opined to the team that if the paraeducator and Ms. Guimaraes kept Student engaged in activity at all times, and if the instructional program was properly and interestingly presented, Student would not protest, tantrum or need down time. Mother also opined that Student's behaviors were sensory based, particularly when she was in pain or unwell, and that an increased sensory diet would extinguish behaviors.

18. District members of the IEP team wanted to implement the proposed behavior intervention plan, and District amended the April 9, 2015 IEP during the June 4, 2015 team meeting to include the plan and behavior goal. Parents did not consent to the amended IEP.

19. On June 9, 2015, Parents and District entered into an agreement to settle the pending due process claim. The Settlement Agreement provided, in pertinent part, that during the 2015-2016 school year: (i) Parents consented and agreed to implementation of the April 9, 2015 IEP as amended, except for the behavior intervention plan and behavior goal; (ii) Student's next annual IEP team meeting would be held on or before April 9, 2016; (iii) District would hold an IEP team meeting within the first 30 days of the fall 2015 semester; (iv) District would convene an IEP team

meeting every six weeks to discuss Parents' ongoing concerns and provide Parents with a daily log of Student's activities; (v) Parents would direct questions regarding Student's 2015-2016 program to a designated San Marcos administrator, instead of Student's teachers, service providers or paraeducator; and (vi) District would fund independent occupational therapy (sensory integration), adapted physical education and functional behavior assessments with evaluators of Parents' choice. The Settlement Agreement also included a waiver and release of existing claims against District regarding Student's education through July 17, 2015 (the end of the 2014-2015 school year and extended school year).

20. On June 15, 2015, Parents wrote to District to reiterate that they did not consent to a functional behavior assessment by District, or to the inclusion of a behavior plan or behavior goal in the April 9, 2015 IEP. Parents also tendered 64 pages of documents that they wanted attached to and incorporated in the April 9, 2015 IEP. Among the documents were Mother's observations of staff, Parents' version of Student's present levels of performance, Parents' preferred strategies and protocols for working with their daughter, and various reports by non-District providers on Student's occupational and physical therapies in the home and community.

21. On July 7, 2015, Parents wrote to District that they did not consider the April 9, 2015 IEP to be a complete or finalized document until it incorporated their requested revisions, and reminded District that they did not agree to District assessments. The letter included an additional two pages to be attached to the IEP, criticizing District's data collection and staff training on Student's needs.

22. On July 7, 2015, District responded in writing that Parents had consented to the April 9, 2015 IEP as amended in the Settlement Agreement, with the exception of the behavior plan, and that District would not be making the changes requested. The letter also explained that the IEP document constituted District's offer of FAPE, and

Parents were free to withhold consent to any part of the IEP, but District would not delete those portions to which Parents did not consent.

23. On July 9, 2015, Mother emailed District stating that District was out of compliance with the Settlement Agreement because it had not provided Parents with a “complete” IEP that included Parents’ additional materials. Parents sent a similar letter to District again on July 22, 2015.

24. On July 29, 2015, District again wrote to Parents that Parents had consented to the April 9, 2015 IEP as amended, except as to behavior goals and intervention plan, as part of the Settlement Agreement. The letter explained that the IEP document embodied District’s offer of FAPE to Student, and that the additional materials submitted by Parents were not part of District’s offer, and so not included in the IEP. The letter contained a description of the action refused by District, an explanation for District’s action, and the basis for its refusal to comply with Parents’ requested change to the IEP.

#### 2015-2016 SCHOOL YEAR

25. For the 2015-2016 school year, San Marcos’s policy was changed to require all parents to drop-off and pick-up students next to the school’s Wellness Center, rather than at the classrooms. Each morning Student’s paraeducator met Student at the Wellness Center, and each afternoon waited there with Student for Mother’s arrival.

26. During the 2015-2016 school year, Student was in 11th grade in Ms. Guimaraes’ classroom. A new paraeducator accompanied Student throughout her school day. For the fall 2015 semester, Student went to general education Physical Education during Period 1, and general education Art for half of Period 4, at the end of the day. Student’s paraeducator kept a log with notes on Student’s performance in each period, which was sent home to Parents daily.

27. Student's maladaptive behaviors escalated, despite general behavior strategies implemented by Ms. Guimaraes and the paraeducator. Mother had informed staff that telling Student to behave in a "firm voice" always worked for Mother, but this strategy was often unsuccessful when implemented by District staff.

28. During the fall 2015 semester, Student regularly threw herself to the ground on her way to Art class for Period 4, often at the same location, and although she would interact with people who passed by and seemed to enjoy the attention, she refused to get off the ground. By the time school staff were able to get Student to stand up, Student was either too agitated to attend a general education class or it was time to return to Ms. Guimaraes' classroom. School staff believed that some of this behavior constituted Student 'testing' her limits with the new paraeducator. They also thought that it was difficult for Student to participate in a general education environment late in the day when she was tired. Student missed approximately half of her Art class due this maladaptive behavior. District staff were frustrated that Parents refused to consent to a District functional behavior assessment, to agree on an independent assessor, or to implementation of the proposed behavior intervention plan to address this behavior.

29. On September 2, 2015, District gave Parents written notice of an IEP team meeting scheduled for September 24, 2015. The notice indicated the positions of the District team members who would attend, such as "special education teacher," and "general education teacher," but did not include the names of specific individuals. Parents returned the notice on September 3, 2015, stating that they would attend the meeting.

#### SEPTEMBER 24, 2015 IEP

30. On September 24, 2015, District convened a 30-day review IEP team meeting in compliance with the Settlement Agreement. It was attended by Parents, Student's teachers and service providers, Ms. Kim and District administrators.

31. Student's teachers and service providers reported that Student was functioning in the new school year consistent with her functioning at the end of the prior school year, but with increased maladaptive behaviors. Parents expressed many concerns, including that: Student's aide should be female due to toileting needs; Student would not exhibit maladaptive behaviors if staff was better trained, paid more attention to Student, and implemented Parents' preferred strategies; the paraeducator should be observed and trained by Mother; the behavior data taken was not as complete as a functional behavior assessment; and all references to Student's behaviors should be removed from the IEP because, in Parents' opinion, Student's maladaptive behaviors were a result of program failures, and would not occur with appropriate instruction and attention to their child. Mother requested that she be allowed pick Student up at 2:15 p.m. each day, as Student was unable to handle instruction during the afternoon heat.

32. The September 24, 2015 IEP amended the April 9, 2015 IEP, with updated present levels of performance and the addition of a requirement that Student's aide be female. District team members refused to remove behavior as an area of need for Student, or to delete the proposed behavior intervention plan or behavior goal from the IEP. District team members requested that Parents submit a written summary of the behavior strategies Parents used successfully in the home for the team's consideration. The September 24, 2015 IEP described Student's maladaptive behaviors and retained the behavior intervention plan and behavior goal. The meeting notes in the IEP explained why District team members felt Student required a behavior plan, and the information relied upon. The IEP also shortened Student's day to end at 2:15 p.m.

33. On September 28, 2015, Parents wrote to District that they still did not consider Student's April 9, 2015 IEP to be complete, and demanded that the IEP be modified as requested by Parents in June 2015.

34. On October 5, 2015, District's special education director, John Schettler, responded to Parents by email. He restated District's position that Parents had consented to the April 9, 2015 IEP in the Settlement Agreement, and explained that Parents could give or withhold consent to all or any portion of the September 24, 2015 IEP. That same day, Mother emailed back that Parents considered the April 9, 2015 IEP to have been incomplete at the time of the Settlement Agreement.

35. On October 5, 2015, Mr. Schettler emailed Mother again, explaining District's position as to the Settlement Agreement and Parents' consent to the April 9, 2015 IEP, as amended through June 4, 2015, and noting Parents' extensive input at the September 2015 IEP team meeting. Mr. Schettler reiterated that Parents could consent to all or part, or none, of the September 24, 2015 IEP, but that the September 24, 2015 IEP constituted District's current offer of FAPE to Student.

36. During fall 2015, District contracted with independent occupational therapist Kris Pilkington to conduct an independent educational evaluation of Student's occupational therapy needs, including motor performance and sensory processing. Ms. Pilkington began her assessment in November 2015, although she did not complete it until February 2016, and did not report to Student's IEP team until almost six months later, on May 24, 2016.

37. Kris Pilkington is a board certified and licensed occupational therapist with 43 years of experience. She had a professional demeanor at hearing, and clearly cared for Student, who she had treated when Student was younger. Although Student's IEP team did not have the benefit of Ms. Pilkington's assessment report until after this due process matter was filed, Ms. Pilkington's testimony was consistent with that of District's staff, and generally corroborated the opinions of Ms. Guimaraes, Ms. Kim, and Ms. Hunt.

38. Ms. Pilkington observed Student at home, in several community settings, and at school. Ms. Pilkington shadowed Ms. Guimaraes and Student's paraeducator, and

observed that Student's maladaptive behaviors were intermittent, and that both Ms. Guimaraes and the paraeducator worked well with Student. District staff were already offering Student a sensory diet to provide Student with sensory input and optimize Student's awareness and ability to focus. Ms. Pilkington observed that District staff were aware of Student's sensory challenges, and that the paraeducator's ability to read Student's nonverbal cues when Student was becoming dysregulated enabled staff to address Student's sensory deficits and keep Student in the zone of optimal participation. Ms. Pilkington opined that Student's occupational therapy and adapted physical education goals were appropriate, and that engaging Student in physical activities, such as walking on campus and around the track, was very beneficial. Ms. Pilkington did not observe Student being left alone or ignored. She testified consistently with Ms. Kim and Ms. Hunt that using a "stern voice" frequently did not work the same way for all adults who interact with a child. She observed Student dropping to the ground on her way to Period 4 Art class, and demonstrated for staff a technique to position Student to stand up safely.

39. Ms. Pilkington tended to characterize Student's maladaptive behaviors as sensory seeking. However, both Ms. Kim, a behaviorist, and Ms. Hunt, an occupational therapist, observed that Student engaged in many maladaptive behaviors with a smile on her face, or stopped whining or vocalizing when given additional attention, and they opined that such conduct was not typical of students seeking sensory input. The opinions of Ms. Kim and Ms. Hunt that Student needed to be taught appropriate behaviors to replace maladaptive behaviors for such things as task avoidance and getting the attention of others were credible, logical and persuasive. These District staff members had extensive time and experience working with Student, and their opinions regarding the nature of Student's maladaptive behaviors were given greater weight than that of Ms. Pilkington, which was based on limited observations.



40. On November 10, 2015, Mother emailed San Marcos assistant principal Jennifer Foster to inquire about minor scrapes Student had received on her knees and elbows the day before, and scrapes received in October 2015. Ms. Foster was the person designated as Parents' contact in accordance with the Settlement Agreement.

41. On November 17, 2015, Ms. Foster responded that she had investigated, but was unable to find out how Student had scraped herself. She also noted that she had not been able to determine how Student had received a scrape in October. Pictures of Student's alleged injury in November 2015 show small scrapes on Student's knees and elbows. The remaining pictures offered at hearing were of small scrapes and bruises, and scuffed shoes, from the 2014-2015 school year. Both Ms. Foster and Ms. Guimaraes credibly and persuasively testified that they were not aware of any injuries to Student during the 2015-2016 school year other than an occasional scrape, despite Student frequently dropping to the ground. Ms. Guimaraes testified that Student dragged her feet on school stairs and ramps.

42. On November 30, 2015, District gave Parents written notice of an IEP team meeting scheduled for December 14, 2015. The notice gave the titles of persons invited to attend, but not the names. Parents signed the notice on December 1, 2015, and returned it to District.

43. Prior to the December team meeting, Ms. Kim met with Mother to revise the proposed behavior intervention plan to address Parents' concerns. Mother worried that staff might be injured if they tried to lift Student when she dropped to the ground, and District arranged for an occupational therapist who provided services to Student at home, Janine Coulides, to visit San Marcos and demonstrate how she redirected Student when Student dropped to the ground. In addition, Ms. Kim provided training to the paraeducators who covered during lunch or breaks for Student's paraeducator. Both Ms. Guimaraes and the paraeducators found this additional information helpful.

44. During the fall 2015 semester, Student was out sick for multiple days on several occasions. Student also experienced severe cramps and general unhappiness associated with her menstrual cycle. District staff used the techniques learned from Ms. Pilkington and Ms. Coulides when Student dropped to the ground. They also implemented general behavior intervention techniques suggested by Ms. Kim, which included giving Student choices of activities other than Art, such as Zumba class or cooking club. Student had difficulty with projects in Art that required cutting paper, due to her lack of fine motor control. However, by early December, Student was no longer dropping to the ground on the way to Art, and her attendance in Art became consistent. Mother suspected that Student had dropped to the ground on the way to Art class because Student was bored.

45. In general education Physical Education, Student was one of several students who accessed the pool with in-pool aide assistance. During the fall 2015 semester, Student missed three days of swimming because a physical education aide was not available to assist Student in the pool. Otherwise, Student was in the pool when the other students were in the pool, unless she was on her menstrual cycle or sick. In those instances, Student would join activities in the gym under the supervision of a second physical education teacher who was not in the pool, with similarly situated female peers and any students with a medical or other excuse from swimming. During Physical Education, Student participated in the scheduled general education activities with her typical peers, including walking the track, doing warm-up exercises, dance, and playing basketball or hockey. One of Student's annual goals required her to increase her strength by riding a recumbent bicycle. Student's paraeducator and a physical education teacher would help Student get onto the recumbent bike in the gym. Student was correctly positioned on the bike with seat pads, and her feet were strapped to the pedals because she had trouble keeping her feet on the pedals. Parents wanted District

to purchase a bicycle identical to the one Student had at home, which was a perfect fit and easy to mount, to optimize Student's ability to use the bike independently.

#### DECEMBER 14, 2015 IEP TEAM MEETING

46. On December 14, 2015, District convened an IEP team meeting attended by Parents; Ms. Guimaraes; Ms. Kim; Student's paraeducator; Student's providers for adapted physical education, occupational therapy, speech therapy and visual impairment services; and District administrators.

47. Student's general education Art teacher had called in sick that morning, and an administrator explained to Parents that the meeting could adjourn and reconvene when the Art teacher was available, or Parents could excuse the teacher. Parents chose to excuse the general education teacher and continue with the meeting.

48. Ms. Kim presented the collaborative behavior intervention plan. Mother was very pleased with her collaboration with Ms. Kim, which had produced a new behavior plan that Mother felt emphasized proactive implementation of program components to encourage appropriate behavior, rather than reactive strategies in response to inappropriate behavior. Ms. Guimaraes and Student's paraeducator reported that they had implemented general behavior modification techniques, and had seen a dramatic decrease in Student's dropping-down behavior. Student continued to have maladaptive behaviors in the classroom, and District team members again asked Parents to consent to a functional behavior assessment. Parents responded that they wanted Student's maladaptive behaviors to be extinguished before the functional behavior assessment took place. Parents expressed that if what they perceived as program failures were corrected, there would be no further behaviors warranting a behavior assessment. Parents also requested that any proposed plan be titled "behavior training protocol," and the team agreed.

49. Parents complained that Student came home in October and November

2016 with scrapes on her elbows and knees, and team members agreed that the cause of any injuries would be included in the daily log for Parents. Parents also complained that Student had missed three days of swimming that semester because the swim paraeducator had been out, and District administrators agreed to provide a back-up swim paraeducator. The team discussed changing Student's schedule in the spring semester to Art at Period 1 and Physical Education at Period 3. The adapted physical education teacher noted that pool access for the fall semester was ending that week, and that no pool access was offered in January or February. The team was also informed that the swim schedule for Period 3 was variable in spring because it was arranged around swim meets and swim team practices.

50. The December 14, 2015 IEP amended the April 9, 2015 IEP to incorporate the "behavior training protocol," and to offer 75 minutes of training on the protocol by Ms. Kim for staff working with Student. The meeting notes described the amendment, explained the observations on which the protocol was based, and explained why District staff thought the change was appropriate. Parents indicated that they were inclined to agree to implementation of the behavior intervention protocol, but wanted to review the IEP. The meeting was adjourned without Parents' consent to the IEP.

51. In December 2015, there were a number of emails between school administrators and Parents to clarify the communication provisions of the Settlement Agreement.

52. On January 6, 2016, District gave Parents written notice of an IEP team meeting scheduled for January 27, 2016. The notice gave the titles of persons invited to attend, but not the names. Parents signed and returned the notice, stating that they would attend.

53. On the morning of January 15, 2016, Student's paraeducator called in sick, and there was nobody to meet Student when she was dropped off in the morning.

Mother was understandably upset, and frustrated at having to resolve the matter through Ms. Foster.

54. On the afternoon of January 20, 2016, Mother emailed Ms. Foster requesting to observe Ms. Guimaraes working with Student. Ms. Foster promptly responded that she would arrange an observation in two weeks, as the new semester classes were beginning the following week, which was acceptable to Mother.

55. For the spring 2016 semester, Student's schedule was changed to general education Art in Period 1 and general education Physical Education in Period 3. Although Student continued to exhibit some maladaptive behaviors in the classroom, she did not drop to the ground on her way to Art in the mornings, and did not drop to the ground on her way to Physical Education after lunch.

#### JANUARY 27, 2016 IEP

56. On January 27, 2016, District convened an IEP team. Fourteen people attended the meeting, including Parents; Ms. Foster; Ms. Guimaraes; Ms. Kim; Student's paraeducator; Student's service providers (speech, adapted physical education and vision); Student's general education Art teacher; and District administrators. The purpose of the meeting was to review Student's performance over the first half of the 2015-2016 school year, and resolve any remaining issues regarding the behavior intervention plan.

57. The IEP team went over the April 9, 2015 IEP in detail. The IEP team made minor updates and changes. Parents expressed their concerns, including that the IEP had not been modified as requested by Parents in June 2015, and they objected to the inclusion of a behavior intervention plan in the IEP. Mother had worked with Ms. Kim to revise the behavior support plan to focus on instructional strategies, and the team agreed that the plan should be called an "Instructional Support Protocol." Parents told the team that they agreed to implementation of the instructional support protocol, but requested that the behavior goal be removed. Ms. Kim told the team that staff could

focus on Student's behavior during implementation of other goals, and the team modified an expressive language goal to address behavior by having Student learn to communicate frustration in an appropriate manner.

58. The team also agreed to review the independent educational evaluation by Ms. Pilkington at Student's triennial IEP in March 2016, and to get any recommendations she had for modifying Student's sensory diet. District team members again requested that Parents consent to a functional behavior assessment to be completed for the triennial, and Parents again declined.

59. Student's new Period 1 Art teacher reported that Student was doing well. The team agreed to maintain the new schedule, and to maintain Student's current program. The January 27, 2016 IEP was written up to amend the April 9, 2015 IEP to include the instructional intervention protocol preferred by Parents, to delete the behavior goal, and to modify the expressive language goal to address behavior. The meeting was adjourned, and Parents asked for an opportunity to review the IEP prior to giving written consent to the instructional support protocol.

60. On January 27, 2016, Ms. Foster sent Parents an email proposing March 11, 2016, as the date for Student's triennial IEP.

61. District emailed Parents a final copy of the January 27, 2016 IEP on February 1, 2016.

62. On February 16, 2016, out of frustration with District's refusal to change the IEP's to include Parents' requested changes, Mother emailed a nine-page letter of proposed corrections to the January 27, 2016 IEP to the director of the Special Education Local Plan Area to which District belonged.<sup>4</sup> Some proposed changes

---

<sup>4</sup> In California, all school districts and County offices of education are required to join together in geographical regions in order to develop a regional special education service delivery system, called special education local plan areas. (See Ed. Code § 56195,

corrected minor errors (such as a reference to Student as a “sophomore” rather than a “junior”). Others sought to have the IEP reflect Parents’ point of view (a slant board is “essential” to Student rather than “helpful”), or to change reporting on goals to reflect Parents’ interpretation of the team members’ reports (generally, that goals were partially rather than fully met). Some changes were simply disagreements with the services offered and demands for additional or different services. The SELPA director forwarded the letter to District.

63. No pool access was offered to students in January and February 2016. Beginning March 1, 2016, Period 3 Physical Education swimming was scheduled for Tuesdays and Fridays. Parents were notified of the schedule by Ms. Foster on February 29, 2016. On April 5, 2016, Ms. Foster emailed parents to notify them that there would only be four days of pool access offered to students in Period 3 Physical Education in April, and that a different paraeducator would be assisting Student in the pool.

64. Mother emailed questions to Ms. Foster that evening regarding the swim schedule and the use of a different paraeducator in the pool. Ms. Foster replied the following morning that the Period 3 schedule was still in flux, and that scheduling and support issues could be addressed with the team at the upcoming IEP team meeting.

65. In early March, there was a significant amount of email communication between Mr. Schettler, the SELPA director and both Father and Mother regarding the upcoming IEP team meeting. Father emailed Mr. Schettler on March 4, 2016, that he was available on March 8 and 9, 2016. Mr. Schettler emailed back to propose meeting on Tuesday, March 8, 2016.

66. On the evening of March 7, 2016, Mother emailed District that Parents had not received a meeting notice for March 8, 2016, but would be available for an IEP team

---

et. seq.)

meeting on March 9, 2016 if District provided a formal notice for Parents to sign the next morning.

67. District prepared a meeting notice for March 9, 2016, and on the morning of March 8, 2016, Ms. Foster met Mother in the parking lot to hand it to her. Mother refused to take the notice or sign it because it did not list the names of the persons who would be attending as District team members. That same morning, Mr. Schettler emailed Mother the names of the proposed attendees, and informed her that Student's speech therapist could not attend because she was on bereavement leave.

68. On March 8, 2016, Ms. Foster emailed Mother written notice of a triennial IEP team meeting scheduled for March 9, 2016. The notice gave the titles of persons invited to attend, but not the names, and attached a form to excuse the speech therapist.

69. On March 8, 2016, Mother emailed Ms. Foster to object to holding a meeting without Student's speech therapist. Mr. Schettler responded that if Parents did not want to excuse Student's speech therapist, another speech therapist would be present to participate in the meeting.

#### MARCH 9, 2016 TRIENNIAL IEP TEAM MEETING

70. On the morning of March 9, 2016, the District convened a triennial IEP team meeting. Eleven people were in attendance, including Student's teachers, service providers, the school behavior specialist, the school psychologist, the school nurse, Ms. Foster, and Mr. Schettler. The team members waited for Parents, and when Parents did not appear, the meeting was adjourned without discussion. That evening, Father emailed that he was available for an IEP team meeting on March 11, 2016.

71. On March 10, 2016, District provided written notice of an IEP team meeting scheduled for March 11, 2016, per Parents' request. Parents signed and returned the notice, indicating that they would attend.



72. Also on March 10, 2016, District sent a written response to Parents' February 2016 letter to the SELPA. District agreed to a few changes to the January 27, 2016 IEP, such as updating Student's age, modifying Student's progress on goals to reflect Parent's observations in the home, and adding to the list of parent concerns; however, District declined to make most of the requested changes. The letter explained why District was making the changes or not, and what information it had relied upon. Mr. Schettler enclosed a copy of the January 27, 2016 IEP with the agreed upon changes interlineated by hand.

#### MARCH 11, 2016 TRIENNIAL IEP TEAM MEETING

73. On March 11, 2016, the District convened a triennial IEP team meeting for Student. All required team members, including Parents, attended.

74. Parents reiterated that they preferred not to have assessments of Student conducted until her behaviors were eliminated by improved responsiveness of staff, and the team members were limited to the review of old records, progress reports and anecdotal information provided by teachers and service providers. Most of the District team members stated that they thought that triennial assessments would provide helpful information, and requested that Parents allow assessments. Parents requested that the assessment plan be sent to them again for further consideration. The team then reviewed Student's progress on goals, and the meeting was adjourned.

75. On March 14, 2016, Parents sent a letter to District that they were withholding consent to triennial assessments. Parents explained that several assessments were pending pursuant to the Settlement Agreement, so triennial assessments were redundant.

76. On March 16, 2016, Ms. Foster emailed Parents to schedule an annual IEP team meeting for April 7 or April 8, 2016. Father responded by email that he was not available for over a month, but was available April 25-27, and on May 3 and 4, 2016.

77. On March 17, 2016, Ms. Foster emailed Parents stating that the annual IEP was due on April 9, 2016. She inquired if Parents would be available on March 21, 22, 23, 24, 25, or April 4 or 5, 2016.

78. On March 17, 2016, Mother responded to Ms. Foster, asking why District was attempting to schedule an annual IEP team meeting when District had just completed a triennial IEP team meeting. Ms. Foster responded on the same day that Student needed a new annual IEP with new annual goals and services to support progress on those goals, and that triennial and annual IEP's were two separate types of IEP's.

79. On March 31, 2016, Ms. Foster emailed Parents to propose an IEP team meeting on April 4 or 5, 2016, when independent occupational therapy evaluator Kris Pilkington was available to present her report to the team. Mother responded by email that Father was not available until the end of the month, on the dates he had provided earlier.

80. On April 4, 2016, District mailed a notice setting Student's annual IEP for April 7, 2016. Father signed and returned the notice on April 4, 2016, writing on the notice a request that the meeting be scheduled on a different date.

81. On April 5, 2016, Mother emailed Mr. Schettler to reiterate that Father was not available until April 25-27 or May 3 and 4, 2016.

#### APRIL 7, 2016 IEP TEAM MEETING

82. On April 7, 2016, District convened an IEP team meeting for Student. Twelve team members were present, including Ms. Guimaraes Ms. Kim, Student's general education Art teacher; Student's service providers (occupational therapy, adapted physical education, speech therapy and vision); a school psychologist; and District administrators. The team waited for Parents, and when they did not arrive, the meeting adjourned without discussion.

83. On April 16, 2016, Student participated in a Special Olympics event with her class. After the event was over, Student's class went across the street to picnic tables at an adjacent beach. Student was seated beside her paraeducator, at a table with other students and their paraeducators. Student tantrummed and attempted to bang her head on the picnic table, and when her paraeducator and another paraeducator intervened to stop Student from hurting herself, Student then attempted to throw herself from the bench onto the ground. One paraeducator had to hold Student's back, while Student's paraeducator attempted to calm Student. During the scuffle, Student threw her glasses to the ground multiple times. One arm of the eyeglasses was bent and one lens popped out. Student was calm when Mother arrived to take Student home, and staff explained what had happened. Mother noticed that evening that Student had a small red area on her cheek.

84. The next day, a former classmate of Student who had been near the picnic tables when Student's tantrum occurred told Mother that he had seen District staff beating Student's face against the bench. In Mother's opinion, the bent glasses and a small red patch on Student's cheek supported his version of events. Mother was very upset, and speculated that Student was being mistreated by school staff, straining her interactions with Ms. Foster. The former classmate testified at hearing, but could not estimate how close he was to the picnic tables, had unclear recall of the event, and was unable to describe particulars of what occurred, which adversely affected his credibility. Ms. Guimaraes and a paraeducator at the picnic table testified consistently and in greater detail concerning the incident, and their version of Student's behavior on that day was consistent with other testimony regarding Student's maladaptive behaviors (including Mother's testimony that Student frequently threw and damaged her glasses). The version of events by Ms. Guimaraes and the paraeducator was more credible than that of the former classmate.

85. On April 21, 2016, District provided Parents with notice of an IEP team meeting scheduled for May 24, 2016. The notice contained the positions and names of the IEP team members. Parents signed and returned the notice, indicating that they would attend.

86. On April 27, 2016, District provided notice of an IEP team meeting scheduled for May 3, 2016, when Ms. Pilkington could present her independent assessment report. The notice contained the positions and names of the IEP team members. Parents signed and returned the notice, indicating that they would attend.

87. On May 2, 2016, Parents filed the current request for due process hearing against District.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>5</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;<sup>6</sup> 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, §

---

<sup>5</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>6</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that

is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

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

5. An IEP is evaluated in light of the information available to the IEP team at

the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9<sup>th</sup> Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031 at p. 1041 (*Fuhrmann*).) Whether a student was denied a FAPE is ultimately evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams, supra*, 195 F.3d at 1149.)

## PRELIMINARY MATTERS

### The School District Determines the Content of an Offer of FAPE

6. The majority of Student’s procedural challenges are premised on a misunderstanding that District required Parents’ consent to include program components, and even specific language, in Student’s IEP offer documents.

7. An IEP fulfills two separate obligations of a school district to a student with special needs. First, it embodies the district’s *offer* of FAPE to the student, and second, it guides the district in *providing* a FAPE to the child by implementing the program. (See *I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1170 (*I.R.*) (emphasis in original).)

8. Parents retain the right to refuse consent to implementation of the IEP, in whole or in part (*I.R., supra*, 805 F.3d at p. 1170, citing 34 C.F.R. 300.300(d)(3)), but cannot dictate the terms of the offer itself. Development of an IEP is a team decision, but if the team members do not agree, it is the school district that is ultimately responsible for ensuring that a student is offered a FAPE. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *Letter to Richards*, 55 IDELR 107 (OSEP 2010).) The IDEA gives parents the right to participate in decisions about their child’s program, but it does not give parents the right to control or veto any individual IEP offer provision. (*Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) Accordingly, District

required Parents' consent to implement Student's IEP's, but did not require Parents' consent to the content of the IEP's embodying its offers of FAPE.

#### Settlement Agreements may be Raised in Defense to Claims made at Due Process

9. Student argues that the Settlement Agreement is irrelevant as to rights and obligations arising under the IDEA, and that District cannot assert the Settlement Agreement as a waiver or defense to claims that it failed to fulfill its procedural obligations. However if, and to the extent, a settlement agreement between the parents of a student with special needs and the school district determines the rights and duties of the parties as to the child's educational program, OAH is empowered to interpret and enforce that agreement.

10. A special education settlement agreement is considered a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1997) 109 F.3d 896, 898. (*D.R.*.) A parent can waive his or her child's right to a FAPE. (*Ballard v. Phila. Sch. Dist.* (3rd Cir. 2008) 273 Fed.Appx. 184, 188.) Parties routinely enter into agreements to resolve litigation, and an agreement is not void because a party settled for less than he or she later believes the law provides. (*Ibid.*)

11. In *D.R.*, a settlement agreement between the parents and the school district settled existing claims, and included a waiver of future claims by parents for the upcoming school year in exchange for the school district's reimbursement of certain costs of a private school placement. A dispute arose between the parties when the private school billed the parents for an additional service, which parents contended was required to provide the student with a FAPE, and the district refused to pay the additional cost as not included in the recoverable costs itemized in the settlement agreement. The Third Circuit agreed with the school district's interpretation of the settlement agreement, and rejected the parents' attempt to void the settlement



agreement as to that school year. It held that nothing in the IDEA prevents the parties from waiving future FAPE claims, or prevents enforcement of such a provision, unless there has been a change of circumstances.

A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes. We are concerned that a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements.

(*D.R., supra*, 109 F.3d at p. 901.)

12. California district courts have held that OAH has jurisdiction to interpret and enforce settlement agreements concerning the educational program of a disabled child. (See *Pedraza v. Alameda Unified Sch. Dist.* (N.D.Cal. Mar. 27, 2007) 2007 U.S. Dist. LEXIS 26541; *Hayden C. v. Western Placer Unified Sch. Dist.* (E.D.Cal. May 12, 2009) 2009 WL 1325945; *Lara v. Lynwood Unified Sch. Dist.* (C.D.Cal. July 29, 2009) 2009 WL 2366454.)

13. Here, Parents voluntarily executed the Settlement Agreement, which set out certain rights and obligations of the parties through the 2015-2016 school year, including: Parents' consent to the April 9, 2015 IEP as amended on June 4, 2015, with the exception of behavior intervention plan; how certain IEP team meetings would be scheduled; how parents would communicate with District regarding Student's program; and District's funding of independent evaluations. The terms of the Settlement

Agreement are enforceable in this proceeding. The Settlement also included a waiver and release of all claims against District arising under the IDEA through July 17, 2015. Accordingly, Student's claims that District committed procedural violations of the IDEA in the creation of the April 9, 2015 IEP, and its June 4, 2015 amendment, are barred. In addition, special education law does not recognize the doctrine of continuing violations, and Student is barred from raising claims based on defects existing in the April 9, 2015 IEP, as amended June 4, 2015, during the 2015-2016 school year when that IEP was in effect. (See *J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269 [no continuing violation for IEP created outside of the statute of limitations].)

#### ISSUE 1(A): MAINSTREAMING INTO PHYSICAL EDUCATION

#### ISSUE 1(B): ACCESS TO POOL AND BIKE

14. Student contends she was denied a FAPE during the 2015-2016 school year when District failed to fully mainstream her into general education Physical Education because she was not allowed the same access to the pool as her typical peers, and because she could not independently access the recumbent bicycle in the gym. District contends that Student was fully mainstreamed into Physical Education, was not treated disparately from her typical peers, and all absences were excused due to illness, tardiness, or make-up sessions of occupational therapy or adapted physical education, except for one day missed due to a "hard day." District also contends that three missed swim days due to unavailability of the in-pool paraprofessional was not a material failure to implement Student's IEP, and that Student had unrestricted access to the recumbent bicycle.

15. School districts are required to provide students with special needs a FAPE in the least restrictive environment (20 U.S.C. § 1412(a)(5)(A); see *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) To provide the least

restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).)

16. A school district must implement all components of a student's IEP. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c).) When a student alleges the denial of a 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," which means that the services provided 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) 502 F.3d 811, 822 (*Van Duyn*).) A minor discrepancy between the services provided and the services required in the IEP is not enough to amount to a denial of a FAPE. (*Ibid.*) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Ibid.*)

17. Here, the Settlement Agreement designated the April 9, 2015 IEP as the operative IEP for the 2015-2016 school year. That IEP called for Student to be mainstreamed in general education Physical Education for one full period.

18. The weight of the evidence did not demonstrate that Student had more than one unexcused absence from her Physical Education class, or engaged in activities different from those of her typical peers. The daily log relied upon by Parents is replete with notes that Student participated in general education activities with her class, which provided the inclusion opportunities intended by the IEP. Occasional days on the recumbent bicycle were in conformance with the IEP, and necessary for progress on

Student's recumbent bicycle goal. As to pool access, Student's Physical Education teacher testified persuasively, and without contradictory testimony, that Student had the same access to the pool as her classmates, and only used the exercise equipment in lieu of swimming when she had an excuse, such as menstruation, illness, or when she did not have her bathing suit. Student was not treated disparately because she, like several other students, required an in-pool paraeducator for safety and assistance. Rather, this support enabled her to access the pool as often as her typical peers.

19. Parents protested the use of a different paraeducator to assist Student in the pool, but there was no showing that Student did not benefit from the support of a different paraeducator in the pool, or used the pool significantly less than her peers for that reason after the first few days of fall 2015, during which in-pool assistance was arranged. Parents generally have no right to compel an assignment of particular teachers or other educational personnel to implement the IEP. These decisions are normally within the discretion of the school district. (*Moreno Valley Unified School District* (OAH 2009) 109 LRP 50610, citing *Letter to Hall*, 21 IDELR 58 (OSEP 1994), and *Rowley, supra*, 458 U.S. at pp. 207-208.)

20. Student relies on daily log entries to establish missed days of swimming in Physical Education, but those documents were not sufficient to carry Student's burden for several reasons. First, no testimony was given by any person who entered notes into the log. The scope of information intended to be included in the log, and the completeness of that information, is unknown. Second, the logs appear to show that Student swam approximately two days per week with her typical peers, except when Student was late, absent, sick or not feeling well, had other scheduled services, or failed to bring her bathing suit, and on only three occasions because the paraeducator was not available. No students had access to the pool in January or February 2016, or during rain, and other evidence showed that only a few swim days were offered in December

2015 and April 2016. The log entries also indicated that Student was practicing for the Special Olympics in March and April 2016. Third, Student did not submit a 2015-2016 school year calendar, and the exact number of swim days offered could not be determined. However, at the time of the December 14, 2015 IEP team meeting, Student had only missed swim three days, and as each semester consisted of approximately 90 days, this amount of time missed time was immaterial. Fourth, Parents' extensive correspondence with District, contemporaneous with the daily logs, did not raise issues of pool access except during an email exchange on the in-pool assistant change in March 2016, raising a reasonable inference that missed sessions were due to excused circumstances. Lastly, Ms. Mandarino's testimony was persuasive that Student was always in the pool with her peers when she was not excused from swimming.

21. Parents may have desired that Student spend more time swimming because Student enjoyed it, but Student's time in general education Physical Education was for inclusion with typical peers, and physical education was taught through a variety of activities and programs. As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) While a district should maintain an open discussion with parents regarding the use of various educational methodologies, the district ultimately decides which methodology to utilize. (*Carlson v. San Diego Unified Sch. Dist.*, 54 IDELR 213 (9th Cir. 2010 (*unpublished*)), *A.S. v. New York City Dept. of Educ.*, 63 IDELR 246 (2d Cir. 2014).)

22. School occupational therapists Ms. Hunt, outside agency occupational therapist Ms. Coulides and independent assessor Ms. Pilkington all opined that Student was able to get onto the stationary bike with assistance, and to use the bike properly with cushions or straps to place her into the correct position. Mother's opinion that Student could not use the bike was not persuasive, and seemed to be based upon Mother's desire that District purchase a bike specifically sized for Student to maximize

her ability to use the bike independently. However, District was not required to maximize Student's program or provide the best equipment (*Rowley, supra*, 458 U.S. at p. 200), and Ms. Mandarino and Ms. Hunt testified persuasively that Student could access the stationary bike at school once she was properly positioned, and benefitted from its use. Also, Ms. Pilkington's report had not been presented to Student's IEP team at the time this due process case was filed and so District cannot be charged with knowledge of her recommendation that Student access the bike independently. (See *Adams, supra*, 195 F.3d at p. 1149).

23. In conclusion, the weight of the evidence did not establish that the pool or physical education equipment were inaccessible to Student. Student was provided with in-pool assistance that gave her the same access to the pool as her typical peers. Student was able to, and did successfully, access the stationary bike in the school gym. Even assuming Student missed a few days of swim instruction with her peers due to paraeducator unavailability, per *Van Duyn*, this minor discrepancy between the services provided and those required in the IEP was not enough to amount to a denial of a FAPE.

24. Student failed to meet her burden of proving by a preponderance of the evidence that District failed to implement the inclusion provisions of her IEP with respect to general education Physical Education, or that Student was denied access to the pool or the stationary bike. District prevailed on Issues 1(a) and 1(b).

#### ISSUE 1(C): MAINSTREAMING INTO ART CLASSES IN FALL 2015

25. Student contends that she was denied a FAPE because she was not mainstreamed into general education Art classes in fall 2015, and attended only 11 sessions of Art that semester. District asserts that it reasonably attempted to implement Student's inclusion in Art, but Student's behaviors interfered with her ability to attend that class and Parents prevented District from implementing a behavior plan to address those behaviors. Additionally, District contends that shortened school days and

Student's early pick-up time interfered with its ability to get Student to Art class.

26. Legal Conclusions 15 and 16 are incorporated herein by reference.

27. When a child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (34 CFR §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) However, a school district may not assess a child without parental consent. (Ed. Code § 56321.) And, regardless of whether a parent refuses to cooperate with the district or agree with the program offered with the district, the school district has an obligation to offer a student with disabilities a FAPE, which includes opportunities to interact with typical peers to the maximum extent appropriate. (See *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 (*Anchorage*).)

28. If a parent will not consent to a proposed special education program component that the school district determines is necessary to provide a FAPE, the school district must initiate a due process hearing on the disputed component. (Ed. Code, § 56346, subd. (f).) The school district must file expeditiously once an impasse with the parent is reached, and cannot opt to hold additional IEP team meetings or continue the IEP process in lieu of initiating a due process hearing. (*I.R., supra*, 805 F.3d at p. 1169.) However, the school district must also have some flexibility to allow for due consideration of the parents' reasons for withholding consent to an IEP component. (*Ibid.*) Parents are an integral part of the IEP process, and part of the cooperative team that determines the IEP contents. (*Ibid.*, citing *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 851.) In *I.R.*, the Ninth Circuit found that a delay of more than a year, with little more than a vague hope that an agreement would be reached with parents adamantly opposed to the district's offer, was unreasonable.

29. Student relies on daily log entries to establish missed days of Art class, but for the same reasons delineated in Issue 1(a), those log entries are of limited evidentiary

value. The extent, if any, to which the entries were intended to document class attendance is unknown. Student was sick for multiple school days in October and December 2015, and the logs indicate many shortened school days or Student being picked early, and no attendance log was produced. Log entries indicate many times that Student requested access to the bathroom during Period 4 in fall 2015, vocalized that she was not feeling well, or needed sensory breaks, each of which would have required that Student miss her general education Art class. Both Art teacher Ms. Alexander and Ms. Guimaraes credibly testified contrary to the log entries that Student attended the general education class 50 percent or more of the time during the fall 2015 semester. Although Mother interpreted the log to indicate that Student attended general education Art class only 11 times in the first semester of the 2015-2016 school year, the first semester Period 4 log entries appear to identify at least 25 entries documenting participation in general education Art, with fairly consistent participation at the beginning of the semester and after December 7, 2015.

30. The log also indicates that Student went to Zumba classes and a cooking club during Period 4 in fall 2015, and it is unclear if these were regularly scheduled mainstreaming activities that provided exposure to typical peers. The April 9, 2015 IEP required half a period, or 45 minutes, in a general elective class, and although Parents preferred that Student attend general education Art on a daily basis, other general education activities would have provided the inclusion opportunities required by the IEP.

31. Lastly, Student's maladaptive behaviors, in particular falling to the ground and needing to calm down for up to 60 minutes, interfered with her ability to participate in 45 minutes of Period 4 general education Art. District made a concerted effort to address the behaviors that interfered with Student's participation in Art class. It arranged for Ms. Pilkington to observe Student's dropping to the ground behavior during Period 4 and demonstrate a method for getting Student back on her feet. District arranged a



demonstration by Ms. Coulides of another method for getting Student back on her feet by addressing Student's sensory needs. District repeatedly requested that Parent consent to a functional behavior assessment to identify antecedents and consequences to address Student's behavior. District convened IEP team meetings on September 24, 2015 and December 14, 2015 to consider appropriate sensory and behavioral interventions, and a comprehensive written plan of supports and strategies to meet Student's behavioral needs. Ms. Kim collaborated with Parents to modify District's proposed behavior intervention plan to incorporate parental input. Parents would not consent to a behavior assessment or a behavior intervention plan, and Ms. Pilkington did not present her assessment report until after the due process complaint in this matter was filed. However, the demonstrations, Ms. Kim's collaboration with Mother, and the use of general positive behavior intervention strategies by Student's paraprofessional under the guidance of Ms. Kim and Ms. Guimaraes, successfully addressed Student's dropping to the ground behavior. By December 7, 2015, prior to the IEP team meeting of December 14, 2015, Student's dropping to the ground no longer interfered with her attendance in general education Art.

32. Even assuming that Student missed a material amount of mainstreaming opportunities during Period 4 of the fall 2015 semester, in general education Art or other inclusion activities, it was reasonable for District to work with Parents to modify Student's IEP to address her behaviors, and to address behaviors to the extent it could without a comprehensive behavior intervention plan, rather than file for due process to obtain an order permitting implementation of District's plan as proposed in June 2015.

33. Here, District's delay of a couple months during the fall 2015 semester to collaborate with Parents on a mutually acceptable behavior intervention plan was reasonable. Mother and Ms. Kim reported to the IEP teams of September 24 and December 14, 2015 that their collaboration was very productive, and that consent to the

revised behavior intervention plan was imminent. In fact, Mother expressed to the December 14, 2015 IEP team that Parents consented to implementation of the behavior training protocol as discussed and revised by the IEP team, and only needed to see it in writing prior to providing written consent. District was in the process of giving Parents' input due consideration, and integrating their input into the behavior intervention plan. District did not artificially prolong the IEP process, and it had more than a vague hope that Parents would provide written consent to the revised plan.

34. In addition, District's actions resolved behaviors that interfered with Student's access to general education Art by the time of the December 14, 2015 IEP team meeting. Ms. Kim, Ms. Guimaraes and Student's paraeducator, with the input of Parents, Ms. Pilkington and Ms. Coulides, effectively and as promptly as possible without parental consent to a behavior assessment or implementation of a behavior intervention plan, extinguished Student's maladaptive behaviors to such an extent that she could again attend general education Art with her typical peers. The time invested by District in collaborating with Parents to design a behavioral component of the IEP was reasonable and productive, and District's delay in filing for due process did not deny Student a FAPE during the fall 2015 semester despite missed Art classes.

35. Student failed to meet her burden of proving by a preponderance of the evidence that she was denied a FAPE due to missed inclusion in Period 4 Art for the fall 2015 semester. District prevailed on Issue 1(c).

#### ISSUE 2(A): INACCURATE MEETING NOTES

36. Student contends that she was denied a FAPE because the meeting notes, statements of present levels of performance, and summaries of abilities with respect to goals were inaccurate in the IEP's developed over the course of the 2015-2016 school year. In particular, Student contends that the notes inaccurately summarized the statements of team members or failed to include substantive statements that Parents

deemed important, and that District failed to update present levels of performance and goals as requested by Parents. District contends that the IEP documents met all statutory requirements.

37. An IEP must detail a student's goals, his or her current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, and a statement of the special education and related services that are to be provided to the student to meet those goals. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) The IDEA does not require a school district to include additional information in a student's IEP beyond what is explicitly required. (34 C.F.R. 300.320(d)(1).) An IEP does not need to include recommendations submitted to or discussed at IEP team meetings, but not adopted. (*Letter to Anonymous* (OSEP 1994) 20 IDELR 1460.) An IEP is not required to be a verbatim recording of the IEP team meeting. (*Jefferson County School Dist. R-1* (SEA CO April 13, 2004) 104 LRP 30613.)

38. Because the IDEA does not require non-essential information in the IEP, school districts are not obligated to prepare meeting minutes or notes. Nonetheless, meeting notes can provide helpful information to persons reviewing the IEP, such as who attended the meeting, what presentations were made, which topics were discussed and what agreements were reached by the team. (See *Antelope Valley Union High School Dist.*, Cal.Ofc.Admin.Hrngs. Case No. N2005060581 (Oct. 19, 2005) [106 LRP 8323].)

39. A preponderance of the evidence, including review of over eight hours of audio recordings of the 2015-2016 IEP team meetings, established that District's meeting notes accurately documented who attended the meetings, what presentations were made, which topics were discussed, and what agreements were reached by the team.

40. Student's abilities and functional performance were accurately reflected in the IEP's. Ms. Guimaraes and Ms. Kim testified persuasively that Student's ability summaries and functional levels were accurately reflected in the present levels of performance, reports of Student's progress, and the behavior intervention plans. To the extent Parents disagreed with Student's reported abilities based on what they saw in the home, District agreed by letter dated March 10, 2016, to modify the report of Student's progress on goals presented at the January 27, 2016 IEP team meeting to incorporate Parents' requested progress observations, and made those changes.

41. Student provided no statutory or regulatory support for her contention that the IEP notes or present levels of performance were required to incorporate all or any of the additional information submitted by Parents, including Parents' preferred protocols, outside reports or transcribed statements from the IEP team meetings. Parents' extensive documentation of Student's needs and their program preferences is not a required component of the IEP. Therefore, District's failure to include all of Parents' requested language changes and attachments in Student's IEP's was not a procedural violation of the IDEA.

42. Student failed to meet her burden of proving by a preponderance of the evidence that District denied her a FAPE by inserting inaccurate statements into the meeting notes, or by failing to properly document Student's abilities and levels of functional performance in her IEP's. District prevailed on Issue 2(a).

#### ISSUE 2(B): BEHAVIOR INTERVENTION PLAN

43. Student contends that District violated the procedural requirements of the IDEA and denied her a FAPE by including a behavior intervention plan in Student's IEP's for the 2015-2016 school year. Specifically, Student contends that the IEP's of April 9, 2015, September 24, 2015, December 14, 2015 and January 27, 2016, are deficient because they were not preceded by a functional behavior assessment. Student also

contends that the behavior intervention plans should have been removed from Student's IEP's until consented to by Parents, and that District failed to give parents prior written notice of its refusal to delete the behavior plans at Parents' request. District contends that it did not need to conduct a functional behavior assessment prior to proposing the behavior intervention plans, that it properly retained those plans in its offers of FAPE, and that it gave Parents prior written notice of its refusal to remove the plans in response to Parents' requests.

44. Legal Conclusions 7, 8, 10, 11, 27 and 28 are incorporated herein by reference.

45. As discussed at Issue 1(c), the IEP team must consider the use of positive behavioral interventions, supports and strategies when a child's behavior impedes his or her learning or that of others. (34 CFR §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The team may address the behavior through annual goals (34 CFR §300.320(a)(2)(i)), and may include modifications, support for teachers, and any related services necessary in the IEP to achieve those behavioral goals (34 CFR §300.320(a)(4).)

46. The IDEA does not require a functional behavior assessment prior to development of a behavior intervention plan unless the child's placement has been changed for disciplinary reasons and the conduct that resulted in discipline is determined to have been a manifestation of the child's disability. (See 20 U.S.C. 1415(k)(1)(f).) The United States Department of Education (Department of Education), in promulgating regulations implementing the IDEA, explained that the IEP team determines whether a behavior implementation plan is required, and although a functional behavior assessment may assist the team to address behavioral issues, the IDEA does not require functional behavior assessment in order to formulate a behavior intervention plan. (71 Fed. Reg. 46683 (Aug. 14, 2006); see also *J.C. v. New York City Dept. of Educ.* (2d Cir. 2016) 643 Fed.Appx. 31 [67 IDELR 109] [pre-plan functional

behavior assessment is not necessary if the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior].)

47. The Department of Education, Office of Special Education and Rehabilitative Services, in providing guidance on discipline policies, also touched upon the issue of functional behavior assessments generally. It interpreted the federal regulations implementing the IDEA to require a behavior intervention plan in a child's IEP where behaviors interfered with the child's own learning or that of others, but not to require a functional behavior assessment prior to developing the behavior intervention plan. (See also, *Questions and Answers on Discipline Procedures* (OSERS 2009), "Section E: Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIPs)," Question E-2: *Under what circumstances must an IEP Team use FBAs and BIPs?*) OSERS explained that a functional behavior assessment identified the function or purpose behind a child's behavior, looked closely at a wide range of child-specific factors (e.g., social, affective, environmental), and noted that knowing why a child misbehaved was directly helpful to the IEP team in developing a behavior intervention plan to reduce or eliminate the misbehavior. (*Ibid.*) The federal regulations implementing the IDEA requires the IEP team to consider the use of positive behavior interventions, supports and other strategies, but they do not specify the particular interventions, supports or strategies that must be used. (71 Fed. Reg. 46683 (Aug. 14, 2006).)

48. A school district is required to give the parents of a child with a disability written notice a reasonable time before it refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. (20 U.S.C. § 1415(b)(3)(b); 34 C.F.R. § 300.503(a)(2); Ed. Code, §56500.4(a).) A prior written notice must contain, as relevant here: (1) a description of the action proposed or refused by the agency; (2) an explanation for the action; and (3) a description of the assessment procedure or report which is the basis of the action. (Ed. Code, § 56500.4, subd. (b).) An

IEP document can serve as prior written notice as long as the IEP contains the required content of appropriate notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).)

49. The procedures relating to prior written notice “are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions.” (*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 70.) When a failure to give proper prior written notice does not actually impair parental knowledge or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

April 9, 2015 IEP

50. Parents’ Settlement Agreement included a waiver of claims through July 17, 2015, barring Parents’ claim that District violated the IDEA by failing to conduct a pre-plan functional behavior assessment before proposing the behavior intervention plan in the June 4, 2015 amendment to the April 9, 2015 IEP.

51. Even if a waiver was not in effect, as discussed under Preliminary Matters (Legal Conclusions 6-8), District was not required to obtain Parents’ consent prior to including a component in the IEP that it deemed necessary to offer Student a FAPE.

52. Student argues that District committed a procedural violation when it refused Parents’ request to remove the behavior intervention plan from the April 9, 2015 IEP, as amended on June 4, 2015. This argument fails for several reasons. As discussed above, no authority requires a school district to remove a component of a proposed IEP offer because the parent disagrees with inclusion of that component in the proposed IEP. A parent may express their disagreement with all or part of an IEP by withholding their consent, as Parents did in the Settlement Agreement as to the behavior intervention plan and behavior goal included in the June 4, 2015 amendment to the April 9, 2015 IEP. Secondly, District responded to Parents’ revision request in writing on July 7 and July 29, 2015, and both letters met the requirements of prior written notice.

The letters described District's refusal to remove the behavior intervention plan and behavior goal from the IEP, and explained the reasons and basis for the refusal. Lastly, Parents had been notified of District's decision to include a behavior intervention plan at the June 4, 2015 IEP and had an opportunity to object to that decision. Parents further objected by the terms of the Settlement Agreement, and the behavior intervention plan and behavior goal were not implemented. Any failure by District to give Parents prior written notice of its refusal to remove the behavior plan from the June 4, 2015 amendment to the April 9, 2015 IEP did not actually impair Parents' knowledge or participation in educational decisions related to that IEP, and would not constitute a substantive harm under the IDEA.

#### Other IEP's

53. Neither the IDEA, nor the regulations implementing the IDEA, require a school district to conduct a functional behavior assessment unless the child's placement is being changed for disciplinary reasons. Student was not subject to discipline during the 2015-2016 school year, and no change of placement was proposed or implemented for disciplinary reasons. Accordingly, District was not required to conduct a functional behavior assessment prior to, or as part of, the IEP teams' consideration of behavior intervention plans to address Student's maladaptive behaviors.

54. At the IEP team meeting of September 24, 2015, District team members determined that Student's maladaptive behaviors, in particular dropping to the ground on the way to general education Art class, impeded Student's learning. They also determined that a behavior intervention plan was necessary to an offer of FAPE, as Student's behaviors interfered with her access to a less restrictive environment and an opportunity to interact with typical peers. In this circumstance, the IDEA regulations required that District propose a behavior intervention plan for consideration by the IEP team, and that the proposed behavior intervention plan be included in District's offer of



FAPE. Accordingly, District did not commit a procedural violation by incorporating the behavior intervention plan and behavior goal in the September 24, 2015 amendment to the April 9, 2015 IEP.

55. District was not required to remove the behavior intervention plan or behavior goal from the September 24, 2015 amendment to the April 4, 2015 IEP on Parents' request. District did not need Parents' consent to include the revised behavior intervention plan or the behavior goal in the IEP. District's October 5, 2016 written refusal to remove those components of the IEP complied with the requirements of prior written notice. Parents were notified of District's decision to include a behavior intervention plan at the September 24, 2015 IEP team meeting, and had opportunities to object to its inclusion, and did object. A failure by District to give Parents prior written notice of its refusal to remove the behavior intervention plan and behavior goal from the September 24, 2015 amendment to the April 9, 2015 IEP would not have impaired Parents' knowledge or participation in educational decisions related to that IEP, and would not have constituted a substantive harm under the IDEA.

56. At the IEP team meeting of December 14, 2015, District team members reported that that Student's maladaptive behaviors no longer included dropping to the ground on the way to general education Art class, but determined that Student still had maladaptive behaviors that impeded Student's learning. They determined that a behavior intervention plan and behavior goal were necessary to an offer of FAPE, and therefore District was required to propose a behavior intervention plan for consideration by the IEP team, and include the proposed behavior intervention plan in its offer of FAPE to Student. Accordingly, District did not commit a procedural violation by incorporating the behavior intervention plan and behavior goal in the December 14, 2015 amendment to the April 9, 2015 IEP.

57. Parents did not make a written request to remove the behavior

intervention plan, then entitled the behavior training plan. In fact, Parents indicated to the December 14, 2015 IEP team members that they would consent to the revised plan.

58. At the IEP team meeting of January 27, 2016, District team members continued to find that Student's maladaptive behaviors impeded her learning, and that a behavior intervention plan was necessary to an offer of FAPE. The team also discussed and agreed to the removal of the behavior goal, and instead revised an expressive communication goal to align with Student's need to communicate frustration instead of acting out. In light of these determinations, District was required District to propose a behavior intervention plan for consideration by the IEP team, and to include that plan in its offer of FAPE. District did not commit a procedural violation by including the behavior intervention plan in the January 27, 2016 IEP. Parents did not request that the behavior intervention plan, then entitled the instructional support protocol, be removed from the January 27, 2016 IEP.

59. Student failed to meet her burden of proving by a preponderance of the evidence that District denied her a FAPE by including a behavior intervention plan, or behavior goal, in Student's IEP's of September 24, 2015, December 14, 2015 and January 27, 2016. Student also failed to meet her burden of proving by a preponderance of the evidence that District was required to remove the behavior support plan from the IEP's due to Parents' lack of consent, or that District failed to give prior written notice of its refusal to remove the behavior plans at Parents' request. District prevailed on Issue 2(b).

#### ISSUE 2(C): UNILATERAL AMENDMENTS TO IEP

#### ISSUE 2(D): COMPLETE AND ACCURATE COPIES OF IEP'S

#### ISSUE 2(E): UNILATERAL CHANGES TO IEP LANGUAGE AND OFFER

60. Student contends that District violated the IDEA by failing to provide her with complete and accurate copies of the IEP's and unilaterally amending the IEP

language and services offered without notice to Parents of the amendment and by doing so without Parents' consent. Student argues that her IEP was "under construction" when the Settlement Agreement was executed, and until it was finalized to Parents' satisfaction, could not be unilaterally amended. District disagrees.

61. Legal Conclusions 7, 8, 37 and 38 are incorporated herein by reference.

62. An IEP is a written document detailing the student's current levels of academic and functional performance, and includes: a statement of measurable academic and functional goals; a description of the manner in which goals will be measured; a statement of the special education and related services that are to be provided to the student and the date they are to begin, the anticipated frequency, location and duration of services and modifications; an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities; and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

63. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement or services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (*Union, supra*, 15 F.3d at p. 1526.)

64. A school district may not dispense with the procedural requirement of a FAPE offer as an empty gesture because it anticipates that the parents will not accept it. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra*, 15 F.3d at p. 1526.) The IDEA does not make a district's duties contingent on parental cooperation with, or

acquiescence in, the district's preferred course of action. (See *Anchorage, supra*, 689 F.3d at p. 1055.)

65. Parents' disagreement with Student's IEP's as written by the District does not, in and of itself, make them procedurally defective. The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

66. Because an IEP is an offer of FAPE that must be reviewed annually, a school district has the statutory obligation to update its offer to meet the evolving educational needs of the child. (See *Anchorage, supra*, 689 F.3d at p. 1057.) The only restrictions to a school district's unilateral amendment imposed by the IDEA are that the District first attempt to develop the IEP in the context of an IEP team that includes the child's parents (20 U.S.C. § 1414(d)(10)(B); 34 C.F.R. § 300.321(a)), that parents be given prior written notice of any revision to the IEP outside of an IEP team meeting (34 C.F.R. § 300.503(a); see also *Questions and Answers on Individualized Education Programs (IEPs), Evaluations and Reevaluations* (OSERS Sept. 1, 2011) 111 LRP 63322, p. 10), and that the new offer not be implemented without parental consent (20 U.S.C. 1415(j); 34 C.F.R. 300.518(a); *Anchorage, supra*, 689 F.3d at p. 1057).

67. The Settlement Agreement provided that Parents consented to implementation of the April 9, 2015 IEP, as amended through June 4, 2015 and except for the behavior goal and behavior intervention plan. Parents also waived and released District from all educational claims through July 17, 2015. As discussed at Legal Conclusions 9-13, this waiver bars Student's claim that District committed a procedural

violation of the IDEA because the April 9, 2015 IEP was incomplete.

68. The IEP's dated September 27, 2015, December 14, 2015, and January 27, 2016, each documented a final, or "complete," offer of FAPE to Student. Each of those written documents detailed Student's current levels of academic and functional performance. Each included a statement of measurable academic and functional goals, a description of the manner in which the goals would be measured, a statement of the special education and related services to be provided to Student and the date they were to begin. Each included the anticipated frequency, location and duration of services and modifications, an explanation of the extent to which Student would not participate with nondisabled children in a regular class or other activities, and a statement of accommodations necessary to measure Student's academic achievement and functional performance on State and district-wide assessments. Each of these IEP's alerted Parents of the need to consider seriously whether the proposed placement and program was appropriate under the IDEA, and helped Parents determine whether to reject or accept the placement or services.

69. As discussed at Issue 2(a), the information contained in the IEP's of September 27, 2015, December 14, 2015, and January 27, 2016, also accurately documented Student's levels of academic and functional performance and her progress on goals, and the meeting notes accurately documented the participants, discussions and agreements made at each meeting. Accordingly, the weight of the evidence did not establish that the copies of those IEP's received by Parents were incomplete or inaccurate.

70. As discussed at Issue 2(b), and per *Anchorage*, District was required to make an offer of FAPE to Student, regardless of whether Parents agreed with the offer. Also per *Anchorage*, District had a statutory obligation to update its offer to meet Student's evolving educational needs. During the period at issue, District convened IEP

team meetings to discuss Student's evolving needs, particularly the increase in maladaptive behaviors prior to the September 27, 2015 IEP team meeting, and made three offers of FAPE on September 24, 2015, December 14, 2015 and January 27, 2016. The September 24, 2015 IEP amendment specified that Student's paraeducator would be female. The December 14, 2015 IEP amendment offered revisions to the behavior intervention plan developed by Ms. Kim and Mother, and 75 minutes of training of staff on how to implement the protocol. The January 27, 2016 IEP offered further revisions to the behavior intervention plan, and was subsequently modified by District to include Parents' input on Student's abilities and functional performance by a prior written notice letter dated March 10, 2016. The fact that these IEP's did not conform to Parents' wishes did not render them insufficient or inappropriate, and these amendments were not procedurally defective because they were made without Parents' consent. Accordingly, the weight of the evidence did not establish a procedural violation as a result of District's amendments without Parents' consent of the language and services contained in the IEP's developed during the 2015-2016 school year.

71. Each of the IEP's was prepared at team meetings with parental participation, and the IEP documents provided Parents with a description of proposed amendments or educational program components, explanations for the changes, and the basis for those changes. Additional changes to the January 27, 2016 IEP were made in response to Parents' request, by a prior written notice letter dated March 10, 2016, and attached a complete copy of the 60-page amended version of the January 27, 2016 IEP. Very little evidence was produced regarding the March 11, 2016 triennial IEP, and no changes to Student's program or services appear to have been offered or requested. Similarly, the April 7, 2016 IEP team meeting was adjourned without discussion or action taken, and no prior written notice was required as a result of that meeting. Accordingly, District did not commit any procedural errors by failing to provide Parents with prior

written notice of changes to Student's IEP's.

72. Student failed to meet her burden of proving by a preponderance of the evidence that District committed a procedural violation by failing to provide her copies of complete IEP's or by amending the language and services in the IEP documents without Parents' consent to such amendments. District prevailed on Issues 2(c), 2(d) and 2(e).

#### ISSUE 2(F): IEP TEAM MEETINGS ON SHORT NOTICE

#### ISSUE 2(G): SCHEDULING IEP TEAM MEETINGS TO ACCOMMODATE PARENT AVAILABILITY

73. Student contends that the District violated the IDEA by holding meetings on short notice and without Parents attendance, and failing to make reasonable efforts to accommodate Parents' schedule. District disagrees.

74. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code § 56500.4.) The parents' right to be involved in the development of their child's educational plan is among the most important of procedural safeguards. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044. (*Doug C.*)) 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, supra*, at p. 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].)

75. A procedural violation based on interference with parental rights does not deny a child of a FAPE unless it significantly impeded the opportunity of the parents to

participate in the decision making process regarding the provision of a FAPE to their child. (Ed. Code, §56505, subd. (f)(2)(B).)

76. The IDEA requires districts to schedule an IEP team meeting at a mutually agreed time and place. (34 C.F.R. § 300.322(a)(2).) A meeting may be conducted without a parent in attendance if the school district is unable to convince the parents they should attend. (34 C.F.R. 300.345(d).) When confronted with the situation of complying with one procedural requirement of the IDEA or another, such as parental participation or timely review of an IEP, a school district must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in a denial of a FAPE. (*Doug C.*, *supra*, 720 F.3d at p. 1046.) For example, it may be reasonable to convene a meeting where a parent's refusal to reschedule an IEP team meeting for an entire month may do more harm to the student's interests than proceeding without the parent, but such situations should be rare. (*Id.*, at pp. 1046-47.)

77. The IDEA does not impose specific timelines in connection with the IEP team meeting notice requirement. It simply requires that the school district notify the parents of the IEP team meeting early enough to ensure that they will have an opportunity to attend. (34 C.F.R. 300.322(a)(1).) Ten days is a customary period, and is generally considered adequate time for parents to make whatever arrangements are necessary to attend. (*Letter to Constantian* (OSEP 1990) 17 IDELR 118.)

78. Parents were given 22 days' notice of the September 24, 2015 IEP team meeting, 15 days' notice of the December 14, 2015 IEP team meeting, and 21 days' notice of January 27, 2016 IEP team meeting. The notice given for each of these meetings was early enough to afford Parents ample opportunity to participate in the IEP team meetings, and Parents responded to the notice that that they would attend the meetings without request for different dates or times.

79. District and Parents exchanged a number of emails in early March to



schedule the triennial IEP team meeting, with the March 8, 2016 date proposed to accommodate Father's availability. The meeting was rescheduled on March 8, 2016 to take place on March 9, 2016, to accommodate Mother's request for a formal meeting notice and Father's availability. Parents did not appear at the March 9, 2016 meeting because the notice did not contain the names of the attendees, and not because District failed to schedule the meeting at a mutually agreed time and place. That meeting was adjourned without discussion and rescheduled to March 11, 2016, again at Parents' request to accommodate Father's availability. Despite some confusion that resulted over the short notice of the March 11, 2016 triennial IEP team meeting, the weight of the evidence established that District rescheduled the triennial IEP team meeting to accommodate Parents' schedules and afforded them an opportunity to participate in the three-year review of their daughter's educational needs.

80. District began trying to schedule an annual IEP team meeting with Parents to develop an educational program for Student for the 2016-2017 school year approximately one month prior to the annual review date of April 9, 2016. On March 17, 2016, Ms. Foster emailed a series of proposed meeting dates in late March and early April 2016, giving Parents up to three weeks' notice. When Parents did not agree to a date, District ultimately sent a notice on April 4, 2016 for an annual IEP team meeting on April 7, 2016. Although District only gave Parents three days' notice of this meeting, it had attempted to schedule the meeting beginning a month earlier to afford Parents an opportunity to attend and participate in the development of the next year's program. The April 7, 2016 IEP team meeting was adjourned without discussion when Parents did not attend, and there was no discussion or action taken at that meeting. District subsequently scheduled Student's annual IEP team meeting to take place approximately four weeks later, which accommodated Father's availability and afforded Parents ample opportunity to plan for, attend and participate in the IEP team meeting. Accordingly, this

meeting on short notice did not deprive Parents of the opportunity to meaningfully participate in the development of their daughter's IEP.

81. Although the March 9, 2016 and April 7, 2016 IEP team meetings were originally set contrary to the District's obligation to schedule IEP team meetings at a mutually convenient date and time, there was no discussion or action taken at either meeting. Both meetings were rescheduled to afford Parents ample opportunity to participate in Student's triennial review and the development of Student's educational program for the 2016-2017 school year. Accordingly, these procedural errors did not significantly impede Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student, and did not rise to the level of a denial of FAPE to Student.

82. Student failed to meet her burden of proving by a preponderance of the evidence that District denied her a FAPE by holding meetings on short notice or failing to accommodate Parents' availability. District prevailed on Issues 2(f) and 2(g).

#### ISSUES 2(H): NOTICE OF NAMES OF MEETING ATTENDEES

83. Student contends that District was required to include the names of IEP team members in the notice of IEP team meetings. District contends that such specificity is not required.

84. The IDEA directs school districts to notify parents about who will be in attendance at the IEP team meeting. (34 C.F.R. § 300.322(b)(1)(i).) The Department of Education's Office of Special Education Programs does not interpret this regulation to require that the notice identify individuals who will be attending the IEP team meeting by name, as long as the notice identifies the individuals by position. (*Letter to Livingston* (OSEP 1994) 21 IDELR 1060.) "Position," in this context, refers to the position held in the school district, not within the IEP team. (*Letter to Livingston* (OSEP 1995) 23 IDELR 564.) Here, District was not required to provide Parents with the names of the persons who

would be attending the IEP team meetings.

85. Student failed to meet her burden of proving by a preponderance of the evidence that District was required to provide the names of attendees on the IEP team meeting notices. District prevailed on Issue 2(h).

#### ISSUE 2(i): NUMBER OF IEP TEAM MEETINGS

86. Student contends that District scheduled redundant and unnecessary IEP team meetings. District contends that the meetings were scheduled either per the Settlement Agreement, at Parents' request, and to meet annual or triennial deadlines.

87. Legal Conclusions 9-13 are incorporated herein by reference.

88. A school district has an affirmative duty to review and revise, at least annually, an eligible child's IEP to determine whether the annual goals for the pupil are being achieved. (20 U.S.C. §§ 1414(d)(2)(A) and (4)(A); 34 C.F.R. §§ 300.323(a) and 300.324(b)(1); Ed. Code § 56380(a)(1); see *Anchorage*, 689 F.3d at p. 1055.) An IEP must be reviewed and revised because the needs of a child with a disability often change, and the IEP must be responsive to those changes in order to offer a FAPE. (20 U.S.C. §§ 1414(d)(4)(A)-(B).) IEP teams must meet no less frequently than once per year to design a new program, even where it is clear the services of the student will remain the same. (34 C.F.R. § 300.324(b)(1)(i).) The team meeting to review annual goals does not preclude the IEP team from meeting for other purposes. (See Ed. Code § 56380(c).)

89. A reassessment of the child must occur at least once every three years, unless the parent and district agree that reassessment is not necessary, with an IEP team to review the results to determine whether the child continues to have a qualifying disability, the present levels of performance and educational needs of the child, whether the child continued to need special education, and whether additions or modifications of the IEP are needed to enable the child to meet his or her annual goals and to participate, if appropriate, in the general education curriculum. (Ed. Code § 56381, subd.

(b)(2)(A)-(D).) The IEP team review of these assessments is generally referred to as the triennial review.

90. To the extent possible, the school district should encourage the consolidation of the [triennial] reevaluation meetings and other IEP team meetings for the child. (20 U.S.C. § 1414(d)(3)(E); 34 C.F.R. 300.324(a)(5).) However, the district may convene as many meetings in a year as any child may need. (*Letter to Boruki* (OSEP 1990) 16 IDELR 884.)

91. When parents request extensive revisions to an IEP, the school district has two options: (1) continue working with the parents in order to develop a mutually agreeable IEP, or (2) unilaterally revise the IEP and then file an administrative complaint to obtain approval of the proposed IEP. (*Anchorage, supra*, 689 F.3d. at p. 1056.)

92. The Settlement Agreement called for an IEP team meeting to be convened within 30 days of the beginning of the 2015-2016 school year to review concerns and revise the April 9, 2015 IEP if appropriate. Therefore, the District was required to convene the September 24, 2015 IEP team meeting. In addition, the new information available to the team, particularly the maladaptive behaviors that interfered with Student's inclusion in general education Art classes, eliminated redundancy.

93. The December 14, 2015 IEP team meeting was convened at Parent's request. An IEP team must meet whenever the parent or a teacher requests a meeting to develop, review, or revise the IEP. (Ed. Code § 56343(c).) Although a behavior intervention plan had been proposed at the September 24, 2015 IEP, the December 14, 2015 IEP team was asked to review a revised behavior intervention plan that represented a collaborative effort between Mother and Ms. Kim. The team also discussed, and District offered, a program to train staff on implementation of the protocol. Accordingly, the December 14, 2015 IEP team meeting was neither unnecessary nor redundant.

94. The January 27, 2016 IEP team meeting was the beginning of the annual

review of Student's program for purposes of developing Student's educational program for the 2016-2017 school year. The team reviewed Student's present levels of performance, her progress on goals and proposed goals in areas of need. This IEP team meeting was not redundant of any previous meeting, and District had a statutory obligation to convene an annual review of Student's program.

95. The March 9, 2016 IEP team meeting was convened as a triennial review of Student's abilities and needs. Parents refused consent to triennial evaluations, and District administrators understood that the three-year review of Student's cognitive abilities, functional behavior, progress and educational needs would lack standardized assessment information and be based upon review of old records, service logs and anecdotal evidence from classroom teachers and service providers. In light of the difficulties that District was experiencing with Parents in revising Student's program and services to meet Student's behavior needs, it was not unreasonable for District to seek to hold the triennial progress and eligibility review as a separate team meeting, despite the pendency of an IEP team meeting relating to the development of Student's educational program. Although consolidation of annual and triennial IEP team meetings is encouraged, it is not required, and this did not constitute a procedural violation of the IDEA. Additionally, the March 9, 2016 meeting was convened because District was unclear on whether Parents intended to attend the scheduled on that date, and it adjourned the meeting without discussion or action when Parents did not appear. On this evidence, the meeting was not redundant or unnecessary.

96. The March 11, 2016 triennial IEP team meeting was scheduled when Parents did not attend the scheduled March 9, 2016 triennial meeting. No discussion or action was taken on March 9, 2016, so the March 11, 2016 meeting was not redundant, and was necessary to ensure Parents' participation in the triennial review.

97. The April 7, 2016 IEP team meeting was scheduled as an annual meeting

to develop Student's 12th Grade program. As discussed at Legal Conclusions 80 and 81, District's conduct in convening that meeting without consideration of Parents' schedule may have been a procedural violation of its obligation to schedule meetings at a date and time convenient to Parents, but the meeting itself was necessary to complete the development of Student's educational program for the 2016-2017 school year.

98. The audio recordings of the IEP team meetings at issue demonstrated that the discussions at each meeting were civil, but also involved, lengthy and sometimes contentious. The meetings of Student's IEP team routinely took longer than the two hours scheduled, and multiple meetings were required to resolve disputes regarding the nature and appropriate strategies to address Student's behavior. District team members solicited Parents' input, and allowed Parents generous amounts of time to explain Parents' concerns and offer opinions and recommendations on Student's program. Throughout the time at issue, Parents requested extensive IEP revisions, and multiple meetings allowed robust discussions of Student's behaviors, behavior interventions and program options. In accordance with *Anchorage*, District complied with the letter and spirit of the IDEA by convening as many meetings as necessary to address Parents' concerns and ensure Parents' meaningful participation in the IEP development process.

99. A school district is compelled to initiate a due process hearing when parents and the school district reach an impasse on a student's program (Ed. Code, § 56346, subd. (f); *I.R., supra*, 805 F.3d at p. 1169). Here, the collaboration on, and evolution of, the behavior intervention plan, and the development of Student's 2016-2017 educational program as father's schedule allowed, demonstrated that District and Parents were not yet at an impasse on May 2, 2016, and District was not required to initiate a due process hearing at that time.

100. The weight of the evidence established that District reasonably scheduled and convened all IEP team meetings during the period at issue to address concerns

regarding Student's educational program or in accordance with the Settlement Agreement. Accordingly, the number of IEP team meetings convened was not excessive, and did not constitute a procedural violation of the IDEA.

101. Student failed to meet her burden of proving by a preponderance of the evidence that any of the IEP team meetings that were scheduled between September 24, 2015 and May 2, 2016 were redundant or unnecessary. District prevailed on Issue 2(i).

#### ISSUES 2(j): EXCUSAL OF IEP TEAM MEMBERS

102. Student contends that Parents were forced to excuse missing IEP team members on notice as late as at the IEP team meeting, but were entitled to notice of missing team members as soon as District had knowledge of those absences. District contends that Parents were timely advised of all absences, and informed of their right to reschedule team meetings in lieu of excusing an absent member.

103. Each meeting to develop, review or revise the IEP of an individual with exceptional needs must be conducted by an IEP team. (Ed. Code, § 56341, subd. (a).) The IEP team must include: one or both of the parents or a representative chosen by the parents; not less than one regular education teacher if the pupil is, or may be, participating in the regular education environment; not less than one special education teacher, or where appropriate, one special education provider to the student; a representative of the school district who is (a) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the student, (b) knowledgeable about the general education curriculum, and (c) knowledgeable about the availability of school district resources; an individual who can interpret the instructional implications of assessment results; at the discretion of the parent, guardian or school district, other individuals with knowledge or special expertise regarding the student; and, if appropriate, the student. (20 U.S.C., § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

104. The IEP team must include at least one teacher or specialist with knowledge in the suspected area of disability. (See *Seattle Sch. Dist. No. 1 v. B.S.* (9<sup>th</sup> Cir. 1996) 82 F.3d 1493, 1499.) Any team member who is qualified to interpret the results of an assessment may do so. (20 U.S.C. § 1414(d)(1)(B)(v); 34 C.F.R. 300.321 (a)(5); Ed. Code, § 56341, subd. (b)(5).) An IEP team member may fulfill more than one role if he or she meets the criterion. (See *Z.R. v. Oak Park Unified Sch. Dist.* (9<sup>th</sup> Cir. 2015) 622 F.Appx. 630, 630-631 (*unpublished*).) However, the Office of Special Education Programs does not interpret the federal regulations implementing the IDEA to permit the IEP team to include only the child's parent and one other required IEP team member. (*Letter to Anonymous* (OSEP, January 24, 2011) 57 IDELR 260 [111 LRP 68372].)

105. The IDEA does not expressly require related services personnel to attend IEP team meetings. However, they may be required members in individual cases, such as where the individual is designated the child's "special education provider." (See 34 C.F.R. § 300.321(a)(3).) In such a circumstance, a district may violate the IDEA if it routinely prohibits related services personnel from attending IEP team meetings. (See *Letter to Rangel-Diaz* (OSEP 2011) 58 IDELR 78.)

106. A member of the IEP team is not required to attend an IEP team meeting, in whole or in part, if the parents and school district agree that the attendance of such a member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. (20 U.S.C. § 1414(d)(1)(C)(i).) A member of the IEP team may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related service if (i) the parent and the school district consent to the excusal, (ii) the member submits written input to the team prior to the meeting for development of the IEP, and (iii) the consent is in writing. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii).) These procedures are slightly different. An "agreement" to



excuse a team member refers to an understanding between the parent and the district. (71 Fed. Reg. 46,673 (Aug. 14, 2006).) The requirements for “consent” are more stringent, requiring the school district to fully inform the parent of all information relevant to the team member’s excusal, in the parent’s native language or other mode of communication, and to ensure that the parent’s understanding that the granting of consent to the team member’s absence is voluntary and can be revoked at any time. (71 Fed. Reg. 46,674 (Aug. 14, 2006); see also *Letter to Finch* (OSEP 2012) 59 IDELR 15.)

107. Neither the IDEA, its implementing regulations, nor California special education law specify the amount of notice that should be given to a parent when an excusal is sought. According to the Department of Education, the IDEA is intended to provide flexibility in scheduling IEP team meetings, but school districts must give “as much notice as possible” of an excusal request. (71 Fed. Reg. 46, 676 (Aug. 14, 2006).) The Department of Education also cautioned that if a last minute excusal is requested, or if the parent needs additional time to consider the request, the parent has the right to disagree or withhold consent to the excusal and the IEP team meeting should be rescheduled or reconvened. (*Ibid.*)

108. Here, District sought to excuse a general education teacher, a mandatory team member, from the December 14, 2015 IEP team meeting without advance notice. District was unable to provide notice to Parents prior to the morning IEP team meeting because the teacher had called in sick that same day, and the late notice did not constitute a procedural violation of the IDEA. Student’s paraeducator and Ms. Kim were present at the meeting to report on Student’s improved behaviors and inclusion in the general education Art class, but the testimony of Mr. Schettler and the audio recording of the meeting established that Parents were advised of their right to reschedule, but chose to continue with the meeting. On these facts, the late excusal request did not significantly impede Parents’ opportunity to participate in the decision making process

regarding the provision of a FAPE to their child.

109. As for the March 9, 2016 triennial IEP team meeting that Student's speech therapy provider could not attend, District was sensitive to Parents' desire to have Student's service providers at the IEP team meetings, and requested the excusal of Student's speech therapy provider as soon as District knew that the speech pathologist would be unavailable due to bereavement leave. It is the nature of bereavement leave to be taken on short notice, and the evidence demonstrated that District gave Parents as much notice as possible of the speech pathologist's absence and the substitution. The speech pathologist was a discretionary member of the IEP team, and District did not commit a procedural error by offering to have another speech pathologist attend the meeting with Parents' consent to present the missing team member's report on Student's progress on speech goals.

110. The weight of the evidence established that, in addition to these two instances, District occasionally requested that Parents excuse team members during a meeting after giving their report and input, and Parents willingly gave that consent. The audio recordings demonstrate that Mother was concerned about keeping team members away from their students, and was conscientious and gracious in providing the excusals. Parents were informed that they had the right to have the meeting rescheduled, or adjourned and reconvened, so that the members could participate for the entire meeting. Parents' agreement to excuse members of the IEP teams was always voluntary and made with knowledge of Parents' rights. In addition, Student made no showing that, had the excusals been involuntary or uninformed, the absence of the excused members significantly impeded their opportunity to participate in the process of developing a FAPE for Student.

111. Student failed to meet her burden of establishing by a preponderance of the evidence that she was denied a FAPE because District requested that members of

the IEP team be excused on relatively short notice. District prevailed on Issue 2(j).

#### ISSUE 2(k): RESTRICTED COMMUNICATION PURSUANT TO SETTLEMENT AGREEMENT

#### ISSUE 2(l): RESPONSE TO PARENTS' INQUIRIES AND REQUESTS FOR ACCESS

112. Student contends that she was denied a FAPE because Parents were required to communicate with Student's teachers and service providers through Ms. Foster, and Ms. Foster failed to respond to Parents' inquiries regarding injuries, Student's participation in general education classes and parental observations. District contends that the communication arrangement was required by the Settlement Agreement, and that District timely responded to Parents' inquiries and requests.

113. Legal Conclusions 9-13, 74 and 75 are incorporated herein by reference.

114. The IDEA mandates that parents be afforded an opportunity to participate in meetings with respect to the identification, evaluation and educational placement of their child, and the provision of FAPE to their child. (34 C.F.R. § 300.501(B)(1)(ii)-(ii).) School districts must also ensure that parents are the member of any group that makes decisions on the educational placement of their child. (34 C.F.R. § 300.501(c)(1).)

115. Parents voluntarily agreed, while represented by counsel, to the terms of the Settlement Agreement that limited all communication regarding Student's educational program to a designated administrator at San Marcos. This limitation was expressly negotiated and agreed upon by Parents and District, and reasonable in light of the difficult interactions between Mother and school staff during the 2014-2015 school year. District's insistence that Parents communicate through Ms. Foster, the designated administrator for the 2015-2016 school year pursuant to the Settlement Agreement, was not a procedural violation of the IDEA.

116. The weight of the evidence established that Ms. Foster responded to Parents' inquiries in a timely manner. Parents did not like Ms. Foster's responses, for

instance that she was unable to discover how Student had received minor scratches, but her responses were prompt and sufficiently addressed issues raised. Ms. Foster timely arranged program observations when requested. Ms. Foster's occasionally responded by deferring action on Parents' non-urgent program concerns to the IEP team, and delegation of Parents' non-urgent concerns regarding Student's educational program to an IEP team was appropriate. Accordingly, Parents were not deprived of an opportunity to meaningfully participate in the decision making process in the development of Student's educational program by the communication restriction.

117. There was scant evidence that Student had sustained significant injuries during the 2015-2016 school year. District staff testified credibly and persuasively that they were unaware of significant injuries that Student sustained during the 2015-2016 school year, including during her drops to the ground. Parents' photographs were generally from the 2014-2015 school year, and the post-April 2016 Special Olympics photograph showed a barely discernable, small red spot on Student's cheek. Ms. Guimaraes stated that Student fell on a ramp on the way to speech one afternoon that resulted in skinned knees, but Ms. Guimaraes had not observed that Student was injured after that incident and Student had not vocalized "owie" or "hurt" or made other indications that she had sustained an injury. Mother was promptly notified by Ms. Guimaraes that Student had tantrummed and damaged her glasses when Mother arrived after the Special Olympics to take Student home. Student's log included frequent entries about Student feeling ill, having cramps, or having a bad day, and the lack of entries regarding injuries raises a reasonable inference that no injuries occurred. Scuff marks on Student's shoes would be expected when Student was regularly dropping to the ground, or because she dragged her feet while walking on school stairs and ramps, and the photograph of scuffed shoes from the 2014-2015 school year did not demonstrate unreported injuries during the school year at issue. Mother's fear of

unreported injuries was understandable, as Student has limited ability to report events. However, Mother's testimony was speculative and uncorroborated except for the unreliable observation by Students' former classmate during the Special Olympics. Student's evidence was unpersuasive and insufficient to establish that Student's educational needs were not being met because Parents were not informed of injuries as they occurred as a result of communication through Ms. Foster.

118. The IDEA ensures that Parents are given the opportunity to participate in the development of Student's program and educational placement by designating Parents as mandatory members of Students' IEP team. Student cites no provision of the IDEA, its implementing regulations or California special education law, granting Parents unrestricted communication with classroom teachers, related service providers, paraeducators or other school staff outside of the IEP team meeting. Even if such a right to communicate directly with school staff existed, that right was modified by Parents' execution of the Settlement Agreement, which restricted their school site communications to a designated administrator.

119. Student failed to meet her burden of proving by a preponderance of the evidence that Student was denied a FAPE because District limited Parents' communication regarding Student's educational program to Ms. Foster, or that District failed to timely or sufficiently respond to Parents' inquiries. District prevailed on Issues 2(k) and 2(l).

#### ISSUE 2(M): LIMITED OBSERVATIONS OF STUDENT'S PROGRAM

#### ISSUE 2(N): LACK OF DEMONSTRATIONS OF "GOAL SPECIFIC" EXERCISES

120. Student contends that she was denied a FAPE because District limited Parents' observations of Student's program, and provided demonstrations of goal-specific exercises at the IEP team meetings rather than in the classroom. District

contends that it complied with the Settlement Agreement, and was not required to provide Parents with unlimited access to the classroom or classroom-based demonstrations.

121. Legal Conclusions 9-13, 74, 75 and 114 are incorporated herein by reference,

122. The Department of Education interprets the IDEA to expect parents of children with disabilities to have an expanded role in the evaluation and educational placement of their children and to be participants, along with school personnel, in developing, reviewing, and revising the IEPs for their children. However, neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement. (*Letter to Mamas* (OSEP May 26, 2004) 42 IDELR 10 [104 LRP 45071].) The State or local policy determines who has access to the classroom. However, school district personnel and parents are encouraged to work together in ways that meet the needs of both the parents and the school, including providing opportunities for parents to observe their children's classrooms and proposed placement options. (*Id.*) In addition, there are circumstances in which access may need to be provided, for example, if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement. (*Id.*)

123. Neither the IDEA nor its implementing regulations grant Parents a right to participate in their child's classroom activities, or to receive demonstrations of the staff working with their child. The daily log provided Parents with current, up-to-date information on Student's participation in general education and other classes, and Ms. Foster was available to provide any additional information on Student's program and

activities sought by Parents. Therefore, District did not significantly interfere with Parents' opportunity to participate in the development of Student's educational program by failing to provide Parent with demonstrations of staff's work with Student, or additional information on Student's program unless requested of Ms. Foster.

124. As set forth at Issues 2(k) and 2(l), parents do not have a right under the IDEA to communicate with their child's teacher and service providers outside of the IEP team meetings. Parents were provided with goal-specific demonstrations within the context of the IEP team meetings. Parents were also allowed periodic observations of Student's program. Although communication between parents and staff is encouraged, the unsupervised communications between Mother and school staff at the end of the 2014-2015 school year were strained, at best. District and Parents reasonably addressed this untenable situation in the Settlement Agreement by limiting Parents' access to the classroom by requiring program questions to be addressed to Ms. Foster, rather than program staff. Ms. Foster timely responded to all questions and comments about Student's program, and Student's paraeducator provided Parents with a detailed daily log. Opportunities for confrontation were also reduced after San Marcos instituted a policy of having students dropped-off and picked-up adjacent to the Wellness Center for the 2015-2016 school year, and Student and Parents were treated no differently from other parents and students in this regard.

125. Student failed to meet her burden of proving by a preponderance of the evidence that she was denied a FAPE because Parents' observations of Student's programs were limited, and because demonstrations of goal-specific exercises were limited to the IEP team meetings. District prevailed on Issues 2(m) and 2(n).

## ORDER

All of Student's requests for remedies are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues heard in this case.

## RIGHT TO APPEAL THIS DECISION

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: October 26, 2016

/s/

---

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings