

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BURLINGAME ELEMENTARY SCHOOL  
DISTRICT.

OAH Case No. 2017050159

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on April 28, 2017, naming Burlingame Elementary School District. The matter was continued for good cause on June 12, 2017. District filed and served a response to the complaint on August 23, 2017. Administrative Law Judge Adrienne L. Krikorian heard this matter in Burlingame, California, on September 19, 20, and 21, 2017.

Student's father represented Student and testified. Attorney Jan Tomsy represented District. Program Specialist Lori Sullivan attended the hearing on behalf of District and testified.

The ALJ granted a continuance for the parties to file written closing arguments and the record remained open until October 18, 2017. 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 deny Student a free appropriate public education until April 28, 2017, by failing to meet all statutory timelines related to (a) assessments, (b) requests for independent educational evaluations, (c) individualized education program team meetings, and d) the provision of services to Student?
2. Did District deny Student a FAPE until April 28, 2017, by conducting IEP team meetings without the presence of all of the required members of the IEP team?
3. Did District deny Student a FAPE until April 28, 2017, by failing to provide Student with adequate individual language and speech therapy services?
4. Did District deny Student a FAPE until April 28, 2017, by failing to provide him with transportation to and from school?

## SUMMARY OF DECISION

Student prevailed on Issue 1(a) as to the timeliness of the assessment for focus and attention. Student contended Father requested the assessment on August 19, 2016, when he made his initial request for assessments. District violated a procedural requirement of the IDEA by failing to timely offer an assessment plan for that area of need until January 13, 2017. The violation deprived Parents of important information regarding Student's needs. However, because District agreed to fund an independent

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<sup>1</sup> Student withdrew Issue 5, as defined in the prehearing conference order, which alleged District did not provide speech therapy to Student after school, on the first day of hearing. The remaining issues were rephrased with the parties' consent, 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 Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

psychoeducational evaluation at the March 28, 2017 IEP team meeting, Parents are not entitled to any additional compensatory remedies for this procedural violation.

Student also prevailed on Issue 4, by proving that District denied Student a FAPE when it offered Student a diagnostic placement at a school two miles from his residence and home school without offering the related service of transportation. Student proved in order to benefit from the placement he required transportation.

Student failed to meet his burden of proof on all other issues.

## FACTUAL FINDINGS

1. Student was five years and 10 months old at the time of hearing. He resided with Parents within the District boundaries. He was eligible for special education under the category of language and speech impaired. Student was an English language learner; his primary language was Arabic. Parents spoke Arabic exclusively to Student in the home; Student acquired some English language words when he played at the local park and when he attended public school.

2. In or about November 2013, the Speech Therapy Outpatient Department of Kaiser Permanente medically diagnosed Student, who was one year and 10 months old at the time, as having delayed milestones in speech. Parents did not pursue any related treatment and Kaiser reported the condition "resolved" on June 30, 2014. Parents did not provide the report to District.

3. In February 2015, the family went to Egypt for personal reasons. Father returned home and Mother and Student remained in Egypt until late August 2016. Student attended a private preschool in Egypt, Daffodil Academy, from August 1, 2015, through August 1, 2016. Father understood that Daffodil was a general education preschool that provided special education services. Student received speech therapy from Nahla Nasar one hour a day, five days a week at Daffodil. The majority of

instruction was in Arabic, but included some exposure to English.<sup>2</sup> Mother reported to Father regarding Student's education and progress. Father understood that, although when Student started at Daffodil he did not speak specific words, Student could say specific words and phrases with intended meaning by August 2016. Father considered this to be "incredible progress." Father had no training or work experience as a speech therapist or special education teacher. He never observed Student in the class or met his teachers.

4. On August 19, 2016, Father sent an email to District's Special Education Director Heather Logan. Father informed Ms. Logan that Student would return to the United States at the end of August 2016. He informed her Kaiser referred him to a speech therapist at the age of three, but Parents were unable to find a therapist that spoke Arabic. He expressed concern that Student was developing signs of attention deficit hyperactivity disorder. He reported Student was always active, could not wait his turn, and could not sit for a while. He asked for a response regarding what the next steps should be.

5. Although District was on summer recess for students and teaching staff until the first day of school on August 24, 2016, administrative staff worked year round.

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<sup>2</sup> At Father's request, Ms. Nasar wrote a one paragraph undated "report" in Arabic, translated by OAH, which the ALJ admitted into evidence. OAH served the translated report on both parties on September 21, 2017. The ALJ considered the report only to the extent that Father's testimony corroborated the facts relating to attendance and services provided as stated in the letter. Ms. Nasar's opinions regarding Student's need for speech therapy were uncorroborated by any assessment results or reports and were hearsay. Father never provided the letter or any reports from Daffodil to an IEP team. Therefore the ALJ gave Ms. Nasar's opinions no weight.

District did not immediately respond to Father's email. Father sent a follow up email to Ms. Logan on August 26, 2016, which he copied to District's superintendent. He reported Student was back in town, and asked to move forward with "the assessment."

6. Ms. Logan responded on August 26, 2016, copying Program Specialist Lori Sullivan on her email, and informing Father that Ms. Sullivan was out of the office for a few days. Ms. Logan informed Father the first step to start assessments was to verify residency. Father acknowledged the email on the same date. He provided information regarding residency to Ms. Logan.

7. Ms. Sullivan has been a certified, credentialed, licensed speech pathologist for more than 30 years. She earned a master of arts in language and speech pathology in 1982. She has worked as a speech therapist in clinical and academic settings. She worked as a speech therapist for District for seven years before assuming her current role as program specialist for District in 2014. Her job duties as a program specialist included case management, attending IEP team meetings as the administrative designee for District; assisting in development of IEP goals and objectives; assisting in identifying other related services; facilitating placement into special education programs; and data compliance and program development. She had authority as the designated administrator at IEP team meetings to authorize IEP team offers of placement and services. If a parent requested independent evaluations she forwarded the request to the special education director, who made the final decision whether to approve or reject the request.

8. On September 6, 2016, Ms. Sullivan emailed Father and attached an assessment plan and procedural safeguards. The assessment plan identified Language/Speech Communication Development as the area of assessment, and noted a speech language pathologist would conduct the assessment.

9. Father and Ms. Sullivan exchanged additional emails on September 6,

2016. Father inquired why the assessment plan was only directed to language and speech. Father repeated concerns about Student's inability to focus or pay attention. He informed Ms. Sullivan that Student received services from a "specialist" in Egypt 45 minutes daily for speech and focus training and learning support. He asked Ms. Sullivan what "we can do" about his concerns. Father signed the assessment plan on September 7, 2016. He returned additional forms, including a home language survey and personal information regarding Student, over the next few weeks.

10. Ms. Sullivan responded to Father's September 6, 2016 email on September 7, 2016, informing Father the first step would be the speech/language assessments. She informed Father she would invite the school psychologist to attend the initial IEP team meeting, for the purpose of determining whether the psychologist had any recommendations after hearing the language and speech assessment report. Ms. Sullivan also noted that some parents chose to consult with their family health care provider regarding concerns about attention/focus, and she recommended Father consider doing so. Ms. Sullivan and Father continued to communicate about the language and speech assessment, including her desire to find an Arabic speaking speech therapist to assist. Father followed up by email on the status of the assessment on October 7, 2016. Ms. Sullivan responded and, with Father's consent, scheduled the IEP team meeting for November 4, 2016.

#### OCTOBER 14, 2016 LANGUAGE AND SPEECH ASSESSMENT

11. On October 14, 2016, District language and speech therapist Mariela Arellano assessed Student. She issued a report dated October 14, 2016. Ms. Arellano held a bachelor's degree and master's degree in communication disorders. She has been a credentialed language and speech pathologist for more than 10 years, and held a certificate of clinical competence from the American Speech and Hearing Association. Her work experience before she started with District in 2015 included clinical work in

private practice and in a private preschool. She was experienced in administering language and speech assessments, had attended and participated in IEP team meetings, developed goals in language and speech and delivered direct speech therapy to children.

12. Student's family attended the assessment with him. Student appeared shy and stayed close to his family. Ms. Arellano spent a few minutes obtaining background information from Father. She reviewed Student's history from information provided by Father. Ms. Arellano met with the Arabic interpreter before the assessment began and explained the assessment procedure.

13. Ms. Arellano spent approximately 30 minutes directly testing Student; the entire assessment lasted approximately 45 minutes. She presented the information in English and the interpreter delivered the information to Student in Arabic. Student responded both in English and Arabic; his preference was Arabic. The results of the testing instruments were standardized based on English speaking children. Ms. Arellano could not rate Student's standard scores in the manner prescribed by the testing instructions because of the language difference. Instead she used the test data qualitatively to determine where errors occurred and how to respond to them.

14. Ms. Arellano administered testing instruments in expressive and receptive language. She also conducted an oral motor examination and obtained a language and speech sample. The subtests examined sentence structure, phrasing, modeling of sentences, and expressive vocabulary. She discussed with Father his concerns about Student's ability to produce the "sh" and "k" sounds. Ms. Arellano did not observe that Student could not produce the "k" sound. Father was concerned that Student was not saying words in the correct order, which Ms. Arellano did not observe when Student spoke in English.

15. Ms. Arellano opined at hearing that children who are English language

learners pose challenges during assessment. The assessor must determine whether the child has been exposed enough to the language the assessor is asking them to understand. However, in Student's case, test results showed he struggled with articulation regardless of his English learner status. Therefore, she concluded from her assessment that Student met the eligibility category of a language disorder and recommended eligibility for special education services.

#### NOVEMBER 4, 2016 INITIAL IEP TEAM MEETING

16. On October 28, 2016, Father emailed Ms. Sullivan asking whether a psychologist would attend the scheduled IEP team meeting. Ms. Sullivan responded that the preschool psychologist was unavailable but she was checking to see if another psychologist could attend.

17. The IEP team met on November 4, 2016. Father, Ms. Sullivan, Ms. Arellano, and speech therapist Diann Kelly attended. Ms. Sullivan, acting as administrative designee, took notes at the meeting. No general education teacher attended. A school psychologist did not attend. The IEP team discussed Ms. Arellano's report. Father actively participated in the meeting, asked questions which were answered, and expressed concerns about Student's speech and ability to focus.

18. The IEP team found Student eligible for special education as language and speech impaired as recommended by Ms. Arellano. District developed an annual communication goal to address Father's concern that Student did not put phrases in the right order or use full sentences. The goal was directed at Student's use of a variety of sentence structures to comment, request, reject items, describe pictures and interact during play with 80 percent accuracy over three consecutive sessions, as measured by the language and speech pathologist. District also developed an articulation goal, directed at Student's use of the sound "/g/" for "/k/." The articulation goal provided that Student would produce all sounds appropriate for his age-level in short phrases or



sentences with 80-100 percent accuracy across three consecutive sessions, as measured by the language and speech pathologist.

19. District offered Student two weekly 30-minute sessions of group language therapy, in English, to be delivered in a general education preschool separate classroom at his home school. The IEP team recommended group therapy because Student needed to participate with peers, who could be a model for language. He also needed to generally interact with peers, which was important developmentally. The IEP team did not discuss placement or offer any type of preschool placement for the remainder of the school day. The IEP team deferred a decision on whether Student required extended school year to the spring of 2017. Father signed the IEP consenting to the services with the exception that he wanted Student to attend preschool.

20. Ms. Sullivan opined that Student's two communication goals were appropriate and sufficient to address Student's needs. She would expect a child to be making a hard "/k/" sound at age four. A speech therapist could work on Student's goals several times during a 30-minute session.

21. Although Father asked for general education preschool services at the IEP team meeting, Ms. Sullivan did not agree that Student needed a preschool placement to benefit from a public education. She was concerned that, at his age, and because he was learning two languages at the same time, Student would have few opportunities to interact during the general preschool day with English speakers because his primary language was Arabic.

22. Ms. Kelly began delivering speech therapy to Student twice a week at his home school, McKinley Elementary School. She immediately began implementing the goals. Student made progress toward the objectives and goals over the next two months.

23. On November 30, 2016, Father sent an email to Ms. Sullivan, copied to Ms.

Logan, noting his concern that the frequency of speech services did not have an impact on Student. He also asked why an observation by the psychologist had not yet happened, and requested a complete copy of the November 4, 2016 IEP. On December 14, 2016, Father communicated with Ms. Sullivan by email and requested another IEP team meeting. He asked that a kindergarten general education teacher attend IEP team meetings. He noted that Student would only receive one speech therapy session in that week because Ms. Kelly was going to be absent for one of the sessions and that, in his opinion, one time a week was "very ineffective." District was on winter break from December 23, 2016, through January 6, 2017. The meeting was scheduled for January 13, 2017.

#### JANUARY 13, 2017 IEP AMENDMENT MEETING

24. Father, Student, Ms. Logan, Ms. Sullivan, Ms. Kelly, and school psychologist Debra Prado attended the January 13, 2017 IEP team meeting. Ms. Sullivan, acting as administrative designee, took notes at the meeting. No general education or special education teacher attended the meeting. Student sat quietly without disruption during the 45-minute meeting. His behavior was appropriate and attentive.

25. Father actively participated in the meeting, and asked questions which were answered. He expressed concerns regarding Student's ability to hold a pencil and eat with utensils, and requested an occupational therapy assessment. District agreed to evaluate Student in occupational therapy.

26. Father expressed concerns about Student's attention and difficulty following directions at home. Ms. Prado offered to conduct a psychological assessment, which would include rating scales from home and at a class Student attended at his local mosque. She also recommended that Father talk with Student's pediatrician regarding Father's concerns about attention.

27. Ms. Kelly reported on Student's progress during speech therapy. Student

was working on the use of pronouns “he” and “she” and sentence structure. Student demonstrated developmental sound errors with the “sh” and “th” sounds. Ms. Kelly reported she had difficulty determining whether those errors were the result of language processing or second language learning. She informed the IEP team that Student might not acquire those sounds until he was older. Student was well-behaved during his sessions. Father verbally requested an increase in language and speech services to one hour a day, five days a week. He agreed to put his request in writing.

28. Father requested an independent educational evaluation in language and speech. District agreed to provide Parents with a list of independent evaluators for language and speech. District also generated an assessment plan for assessments in cognitive nonverbal, academics, social/emotional, and occupational therapy. Father signed the assessment plan on the same date. Father declined to provide District with the name of a preferred assessor, deferring to District. The selection of an assessor, who could assess Student in Arabic, or with the assistance of a qualified Arabic interpreter, took additional time.

29. Ms. Logan asked Father if Parents intended for Student to attend a preschool with typical peers. Father informed the IEP team that Parents did not plan for Student to attend a community preschool. The IEP team did not discuss a placement offer for Student to attend a District preschool during the regular school day.

#### FEBRUARY 7, 2017 IEP AMENDMENT

30. District generated an IEP amendment on February 7, 2017, and sent it to Father by email. The IEP team did not meet in person. District offered Student a diagnostic placement in the half-day special education preschool program at Hoover Elementary School, for the purpose of having Student available on a school campus for observations during the upcoming assessments. Neither party offered evidence as to whether District and Father discussed holding an IEP team meeting in person for the

purpose of this amendment, or whether Father and District discussed a preschool diagnostic placement before February 7, 2017. Based on the lack of evidence to the contrary, District's offer of placement was a unilateral District decision.

31. Hoover was not the school Student would have attended if he was not disabled. Hoover was the only school within District that offered a special education preschool program. Hoover was two miles from Student's home, and two miles from McKinley.<sup>3</sup> The IEP team offered individual and small group instruction for 210 minutes five days a week, and two, 30-minute speech therapy sessions. Father consented to the IEP amendment through electronic means by placing his electronic signature on the IEP amendment. He consented to the offer of diagnostic preschool services. However, he included a note on the IEP amendment in which he disagreed with the amount of speech therapy services offered, renewing his request for one hour a day five days a week of individual speech therapy.

32. Student enrolled in the special education preschool program at Hoover. Ms. Arellano assumed Student's speech therapy services from Ms. Kelly because she was the speech therapist at Hoover.

#### ADDITIONAL ASSESSMENTS

33. Occupational therapist Linda Chechopoulos conducted an occupational therapy assessment of Student on February 14, 2017. Student demonstrated typical grasp, sensory processing and visual motor skills. Ms. Chechopoulos concluded Student did not require occupational therapy services.

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<sup>3</sup> The ALJ took official notice of Google Maps and determined that the distance between Parents' home and Hoover was .3 miles, and between Parents' home and Hoover, and between Hoover and McKinley was approximately two miles depending on the route taken.

34. Resource specialist Gail Kruse conducted a school readiness academic assessment documented in a report dated March 9, 2017. Her assessment report did not note whether an Arabic interpreter assisted during the assessment. She administered the Bracken Readiness Assessment, Third Edition, which used visuals to accompany each problem. Student was compliant, not anxious, tried to answer questions despite limited English language, and he communicated with limited English and hand gestures. His standard score on the five subtests administered was 92, an average score with an age equivalent of four years seven months. Vocabulary was a key factor in his performance of the sizes/comparisons subtest. He did not appear to have difficulties with terms small and big, but he had difficulty understanding as the questions became longer with more information.

35. Ms. Prado conducted an initial psychoeducational assessment. Her assessments included classroom observations on February 17 and March 3, 2017. She used non-verbal tests with Student during the assessment due to his status as an English language learner. She documented her findings in a report dated March 10, 2017. Student had no diagnosed health concerns. He sat, was focused and worked diligently during the 30-minute assessment. Ms. Prado observed him to follow all directions during classroom observations. Father completed rating scales as part of the assessment. He rated Student's behaviors as hyperactive, aggressive, depressive and withdrawn. Ms. Prado also had school staff complete the rating scales. School staff did not identify any at-risk or clinically significant behavior concerns at school. Ms. Prado concluded Student did not meet the criteria for eligibility as other health impaired, despite Father's concerns about attention and focus. Student did not demonstrate any processing deficits or significant academic deficits. Ms. Prado noted Student was an English language learner with little exposure to the English language and had difficulty understanding directions on the cognitive assessment because of his limited English

language ability rather than due to any cognitive deficits. She concluded he did not meet the eligibility criteria for specific learning disability. Her recommendations included English language immersion, academic vocabulary instruction, preferential seating close to the teacher, explicit instruction in small manageable parts, visuals, visual cues, frequent monitoring by teacher to clarify language, and verbal directions in as few words as possible and paired with visual input.

### MARCH 10, 2017 IEP AMENDMENT MEETING

36. The IEP team met on March 10, 2017, to review the new assessments. Father, Ms. Sullivan (as administrative designee), Ms. Arellano, Ms. Kelly, Ms. Chechopoulos, Ms. Prado, Ms. Kruse, and special education preschool teacher Kate Berkland attended the meeting. No general education teacher attended. Father received a copy of procedural safeguards and actively participated in the meeting.

37. Ms. Prado reviewed her assessment report with the IEP team. Father asked questions and received answers. Father requested an independent psychological evaluation for attention.

38. The IEP team discussed Student's present levels of performance. Student communicated basic needs, could independently take care of his personal needs, and had strong academic skills. During speech therapy sessions with two other children, he remained shy and did not initiate verbally. He could engage with peers and take turns in structured games, but continued to need a model to verbalize. He made progress toward his annual goal in articulation, performing at 60 percent accuracy with initial /k/ words at the phrase level. Father expressed concern in response to Ms. Arellano's report that he did not see progress in communication at home.

39. After presenting her progress report and answering Father's questions, Ms. Arellano announced she had to leave the meeting for an appointment. Ms. Kelly remained at the meeting. Father objected to Ms. Arellano's departure, requested a "due

process review of speech," transportation to preschool, a transitional kindergarten teacher in all IEP team meetings, and renewed his request for five hours a week of speech therapy. Ms. Sullivan terminated the IEP team meeting because Father was upset that Ms. Arellano left the meeting, and requested Father to put his requests in writing. The meeting agenda was not completed; the IEP team also did not review the occupational therapy and preschool readiness assessment reports.

40. Father emailed District his requests in a handwritten note dated March 10, 2017. He included a one page, undated letter expressing concerns about the speech evaluation; timing of the psychological assessment; missed appointments; the absence of a general education teacher at IEP team meetings; speech therapy sessions in a group setting; Ms. Arellano's departure from two IEP team meetings without Parents' consent; incomplete and misquoted IEP notes; no response to Father's request for five hours a week of speech therapy; and an inquiry about a resolution session to resolve disputes. Father agreed to attend the next scheduled IEP team meeting and asked that District include his email response as part of the IEP document. He also requested year-round school for Student.

41. On March 22, 2017, Ms. Logan sent a letter responding to Father's requests and enclosed a copy of procedural safeguards. District agreed to fund an independent psychological evaluation for attention. District agreed to discuss Father's request for transportation to preschool at a rescheduled IEP team meeting. District explained that it typically included a general education transitional teacher in IEP team meetings for students who were or may be attending a general education environment. Because Student was not attending general education environment, District did not include a general education teacher at his IEP team meetings. However, District agreed to include a general education teacher in Student's future IEP team meetings. Ms. Logan addressed Father's request for "due process review," clarified where Father could obtain

more information, and offered alternative options for informal resolution.

#### MARCH 28, 2017 IEP AMENDMENT TEAM MEETING

42. The IEP team reconvened on March 28, 2017. Father, Ms. Logan, McKinley Elementary School principal Paula Valerio, Ms. Prado, transitional kindergarten teacher Jennifer Kappelhof, Ms. Berkland, Ms. Arellano, Ms. Sullivan, Ms. Kruse, and Ms. Chechopoulos attended the meeting. Father received procedural safeguards and actively participated in the meeting, including asking questions and receiving answers.

43. Father renewed his request for five hours a week of speech therapy, noting District did not respond to his earlier request. The IEP team reviewed Student's present levels of performance, and discussed the occupational therapy and transitional academic assessment reports. Ms. Berkland reviewed Student's progress in preschool class. Student adapted well to preschool, participated in table top activities and circle time; worked on tracing his name; asked questions and had a good memory. She recommended a new annual goal for participating and initiating social conversation with peers.

44. Father asked the transitional kindergarten teacher, Ms. Kappelhof, about kindergarten. She answered his questions and described the program.

45. Father did not completely understand the annual communication goals; he did not understand why the goals were annual goals if Student could achieve them in less than one year. He did not understand how the goals were measured, or how percentages of progress were used as measures of the goals. He did not understand why the goals did not set 100 percent as the target. He expressed concern that Student was making no progress in speech. He inquired about the status of the report from the independent speech evaluation and asked for a complete copy of the report. He did not understand why District continued to offer only 30 minutes of speech therapy twice weekly. He reminded the IEP team that Student received five hours a week of speech



therapy in Egypt, and expressed his opinion that Student deserved the same amount of therapy from District, delivered individually rather than in group sessions. He also asked District to provide speech therapy outside of the school day.

46. Ms. Arellano opined at hearing that professionals working in the area of language and speech pathology do not customarily set goals for 100 percent achievement. The industry standard measure of mastery is 80 percent or above so the goal is generalized. Perfection is not a goal. Although a child may eventually reach a potential of 100 percent achievement at some point in his or her life, the educational goals are not developed with that level of achievement in mind. Achieving 100 percent mastery would not mean that a child could speak at the same level as typical children. Student offered no evidence that contradicted Ms. Arellano's explanation of the standards for language and speech goals.

47. Father discussed the hardships the family experienced in driving Student to Hoover, which was approximately two miles from Student's home, renewing his request for transportation. Mother did not drive, cared for another child and an ill relative at home, and Father worked. Student missed school, which consisted of a half-day program, on days where neither Parent could transport Student to and /or from Hoover. Father usually dropped Student off at school in the morning and Mother used a ride sharing service to travel to Hoover, pick Student up mid-day, and return home. On a few days, Father's work prevented him from taking Student to school, and Mother transported Student to and from school using the ride sharing service. Father requested reimbursement for transportation. The IEP does not note whether or how the IEP team responded to Father's request for transportation reimbursement. Ms. Sullivan opined at hearing that District provides transportation to children of kindergarten age or higher if a child's unique needs require transportation for him to access his education and the offered placement is not at a child's home school. District defines a home school

placement as beginning at kindergarten. District does not provide transportation because of family hardship or for preschool children, absent a specific need.

48. At hearing, Father provided ride sharing service receipts from the ride sharing service, including a route map for each trip between home and Hoover from February 8, 2017 through April 28, 2017. Parents took 47 trips, a few of which included to and from school on the same day, totaling \$426.96. School was in session 47 days during the same time period.

49. Father also requested extended school year services, which the IEP team deferred to the May 2017 IEP. The IEP team discussed Father's request for an independent psychoeducational assessment. District agreed to fund the assessment and informed Father it would provide a list of independent assessors. District advised Father to contact the chosen assessor regarding an interpreter.

50. The IEP team added a third annual goal for initiating conversation in preschool class. District agreed Student could continue attending preschool at Hoover to avoid disruption and because two independent evaluations were pending. District informed Father that a transitional kindergarten IEP team meeting was scheduled for May 10, 2017.

#### MAY 10 AND MAY 26, 2017 IEP TEAM MEETINGS

51. The IEP team met twice after Student filed his complaint in this matter. On May 10, 2017, District found Student eligible for extended school year services, and offered placement at Student's home school, McKinley, for kindergarten, with speech therapy twice weekly in 30-minute group sessions.

52. On May 26, 2017, the IEP team met to discuss the independent language and speech evaluation performed by GATEPATH assessor Mor Marom. She documented her assessment in a report dated April 28, 2017. Ms. Marom, who did not testify at hearing, administered tests with the assistance of an interpreter, but did not observe

Student in the classroom. Ms. Moram attended the IEP team meeting. She remarked at the meeting that Student did not demonstrate growth over the previous six months. She recommended when he transitioned to kindergarten, the IEP team should expect he would be quiet. She agreed he should receive speech services to improve expressive and receptive language skills, but did not express an opinion at the IEP team meeting or in her report as to how much service he needed. She noted that Student's limited expressive production, difficulty understanding age-appropriate concepts, and limited communication intents significantly affected his ability to express himself, interact with adults and peers, and access and take part in the class curriculum.

53. The IEP team reviewed Student's progress toward his goals. Ms. Arellano opined at hearing that, at the time of the May 26, 2017 meeting, Student had made approximately 60 percent progress toward his speech goals.

54. Ms. Sullivan and Ms. Arellano opined at hearing that, based upon their knowledge and experience, five hours a week of individual speech therapy would cause Student to burn out. Student's needs required that he receive therapy the majority of time in small groups to enable him to practice his skills as he acquired English as a second language. Ms. Arellano also occasionally worked individually with Student toward his goals during therapy sessions.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it.

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

(20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) <sup>5</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each 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.

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<sup>5</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

§§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) In a recent unanimous decision, the United States Supreme Court declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test'..." (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.\_\_\_\_[137 S. Ct. 988, 1000-1001] (*Endrew*)). The Supreme Court in *Endrew* stated that school districts needed to "offer a cogent and responsive explanation for their decisions" and articulated FAPE as that which is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstance." *Id.*

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

due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).)

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student had the burden of proof on all issues.

#### PROCEDURAL VIOLATIONS GENERALLY

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

7. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) The hearing officer "shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed.

Code, § 56505, subd. (j).)

8. 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.) Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on parent's opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (*Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark Cnty. Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A procedural error results in the denial of educational opportunity where, absent the error, there is a "strong likelihood" that alternative educational possibilities for the student "would have been better considered." (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2003) 394 F.3d 634, 657 (*M.L.*). (Gould, J. concurring in part and concurring in the judgment).) Thus, an IEP team's failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error. (*Ibid.*)

9. Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Amanda J. v. Clark County Sch. Dist. supra*, 267 F.3d at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Ibid.*) A school district cannot independently develop an IEP without input or participation from the parents and other required members of the IEP team. (*Target Range, supra*, 960 F. 2nd at p. 1484.)

## ISSUE 1 - PROCEDURAL VIOLATIONS REGARDING TIMELINES

10. Student contends District denied him a FAPE by failing to meet all statutory deadlines related to assessments, requests for independent educational

evaluations, IEP team meetings, and the provision of services to Student. District contends it did not commit any procedural violations under the IDEA that resulted in a measurable impact upon Student or Parents. For the reasons set forth below, Student prevailed as to the timeline for assessment in attention and focus.

### Authority and Analysis

#### INITIAL ASSESSMENT TIMELINE

11. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A proposed assessment plan shall be developed within 15 calendar days of referral for assessment, not counting calendar days between the pupil’s regular school sessions or terms or calendar days of school vacation in excess of five schooldays, from the date of receipt of the referral, unless the parent or guardian agrees in writing to an extension, pursuant to subdivision (a) of Section 56321. The district shall attach a copy of the notice of parent’s rights to the assessment plan (Ed. Code §56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code §56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may begin immediately upon receipt of the consent. (Ed. Code, §56321, subd. (c).)

12. Student contends that the timeline for Student’s initial assessment began on August 19, 2016, when Father sent his initial email to District requesting evaluation of Student’s communication needs. District contends school started on August 24, 2016, and Ms. Sullivan timely sent Father an assessment plan within 15 calendar days after the start of school. Student did not meet his burden of proof.



13. Father's August 19, 2016 email to District expressed his concern about Student's speech and focus and attention. He asked for more information about how to have a team evaluate Student for special education eligibility and how he could engage in the IEP process. District sent Father an assessment plan on September 6, 2016.

14. District complied with Education Code section 56043(a) by timely sending Father an assessment plan for language and speech "within 15 calendar days" after school started on August 24, 2016. The statute is clear that the 15 day timeline is tolled between the regular school session, which ended on June 16, 2016, and the start of the next regular school session, which resumed on August 24, 2016. Father's argument that the tolling period did not apply to Student because he was not enrolled at District when Father made his initial request, was not supported by any legal authority. Additionally, Father's reliance on the fact that school administrative staff worked year-round was not relevant to this analysis. The statute does not distinguish between a school district which has year-round administrative staff, and a district that does not. The applicable timelines relate to when school is in session for the regular school year, or out of session for more than five school days. District's assessment plan for language and speech was timely.

#### TIMELINES REGARDING OTHER ASSESSMENTS

15. Student contends District failed to issue an assessment plan within 15 days after Father's request for an assessment in the area of attention and focus. Instead, District did not assess Student in the area of attention and focus until after the January 13, 2017 IEP team meeting. District did not specifically address Student's contention relating to the timing of the psychoeducational assessment in its closing argument, other than to argue it met all statutory timelines.

16. As discussed above, District was required by the IDEA to issue an assessment plan within 15 days after Father's initial request for an assessment in the area of attention and focus. District did not do so, resulting in a procedural violation.

Father's August 19, August 26, September 6 and September 7, 2016 emails put District on notice before Student was found eligible for special education that Father had concerns about Student's focus and attention and he requested input from a psychologist. Ms. Sullivan responded to Father's concerns by email on September 7, 2016, explaining the District first wanted to assess Student in language and speech, and referred Father to Student's pediatrician. Instead, she agreed to ask a school psychologist to attend the initial IEP team meeting, which did not happen, as discussed more fully below. District did not offer an assessment plan in response to Father's request at any time between August 19, 2016, and January 13, 2017.

17. Student proved that the five month delay in assessing Student in attention and focus seriously deprived Parents of the opportunity to participate in the development of Student's educational program between November 4, 2016, and January 13, 2017. District's failure to timely and appropriately respond to Father's August 19, 2016 request for an assessment in attention and focus constituted a serious procedural violation because it significantly impeded Parents' right to participate in the process of developing Student's educational program. If District had procedurally complied with the IDEA and assessed Student in attention and focus, the IEP team might have had the opportunity to consider eligibility under the category of other health impaired or specific learning disability at the initial IEP team meeting in November 2016. At that meeting, Parents would have had the opportunity to challenge an assessment finding that Student had no needs in the area of attention and focus. They could have requested an independent evaluation at that meeting in order to address their continued concerns, as they did in March 2017. District deprived Parents of the opportunity to participate meaningfully regarding their concerns of attention and focus at Student's November 4, 2016 IEP team meeting because Parents did not have the benefit of the information they would have obtained from the results of an assessment,

and which they did not obtain until after District administered a psychoeducational assessment to Student. However, Student did not prove that District's failure to timely issue an assessment plan and assess him in the area of attention and focus between August 19, 2016, and January 13, 2017, denied him a FAPE or deprived him of educational benefit under the standards articulated in *Endrew F., supra*, 137 S. Ct. at pp. 1000-1001.

18. Student, who was not enrolled as a preschool student until February 2017, did not show any signs of lack of attention or focus unrelated to his dual language status that impacted his ability to access his twice weekly language and speech services between November 4, 2016 and January 13, 2017. After District conducted its psychoeducational assessment in February and March 2017, District declined to find Student eligible under the categories of other health impaired or specific learning disability. Father requested and District agreed to fund an independent psychoeducational evaluation. The final results of that assessment were not available at the time of hearing and are not at issue here. Student offered no evidence proving he would have been found eligible in either eligibility category if he had been timely assessed between August 19, 2016, and February 2017. Credible evidence available to the IEP team in March 2017 established Student's challenges were directly related to his developmental delays in communication and his status as an English language learner. Student's teacher and speech therapists did not observe the focus and attention concerns at school that Father described in the home environment. On the contrary, they described Student as involved and compliant, but facing challenges because of his minimal knowledge of the English language. He made progress at school, despite those challenges. His academic assessment scores were within average to low average, which were not out of the ordinary. Ms. Sullivan's opinion that children who are learning English as a second language, and who have language deficits, often display attention

and focus challenges, was persuasive.

19. Parents' remedy for District's failure to timely assess Student in attention and focus after Father's initial request will be discussed below.

#### Issue 1(b) Timelines – Independent Educational Evaluations

20. Student did not offer any evidence supporting his assertion in his complaint that District failed to meet timelines associated with independent educational evaluations. He also did not address the issue in his closing argument. The evidence did not support a finding in Student's favor.

21. Father requested an independent speech evaluation at the January 13, 2017 IEP team meeting. District agreed to provide Father a list of independent assessors. Because of language issues, selecting an assessor took longer than Father liked. Father declined to provide District with the name of a preferred assessor, deferring to District. As such, given the complexity of Student's dual language learner status, District cannot be faulted for taking time to find an assessor who could assess Student in Arabic or in English with a suitable Arabic interpreter. The independent assessment was complete on the day Student filed his complaint, and District held an IEP team meeting within 30 days to discuss the assessment.

22. Student also requested an independent educational evaluation in the area of psychoeducation after the March 10, 2017 IEP team discussed Ms. Prado's assessment. Before the meeting ended, District agreed to provide Father with a list of assessors. District also responded in writing advising Father it agreed to fund the independent assessment. Student did not prove that District violated any timelines during the relevant period relating to the independent psychoeducational assessment.

#### Issue 1(c) - Timelines of IEP Team Meetings

23. Student contends the initial IEP team meeting was not timely, based on his

assertion that District should have issued the assessment plan before September 6, 2016. He also contends that because District stopped the March 10, 2017 IEP team meeting when Father protested Ms. Arellano's departure, the occupational therapy assessment was not considered within 60 days after Father signed the January 13, 2017 assessment plan.

#### AUTHORITY AND ANALYSIS

24. A school district must develop an IEP required as a result of an assessment no later than 60 calendar days from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code, §56043, subd. (f)(1).) 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.)

25. A meeting of an individualized education program team requested by a parent or guardian to review an individualized education program pursuant to subdivision (c) of Section 56343 shall be held within 30 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's or guardian's written request, pursuant to Section 56343.5.

26. Here, District timely held the initial IEP team meeting on November 4, 2016, which was within 60 days after Father signed the initial assessment plan on September 7, 2016. Father requested another IEP team meeting on December 14, 2016, in an email communication with Ms. Sullivan. District timely convened Student's first amendment IEP team meeting on January 13, 2017, which was well within 30 calendar days, in particular because District was on winter break from December 23 through January 6.

27. Father requested and signed an assessment plan for an occupational therapy assessment at the January 13, 2017 IEP team meeting. District also offered to conduct a social emotional assessment and a school-readiness assessment. District had 60 days to complete the assessments and convene an IEP team meeting to discuss them. District timely convened an IEP team meeting on March 10, 2017, to review the assessments.

28. Student did not prove that District's decision to terminate and reconvene the IEP team meeting after Father voiced his objection to Ms. Arellano's departure was a procedural violation that seriously impeded Student's right to a FAPE, deprived Parents of the ability to participate, or deprived Student of educational benefit. The March 10, 2017 IEP team meeting started within the 60-day period after Father signed the January 13, 2017 assessment plan. The occupational therapy and academic assessments, which were on the agenda, were pending discussion at the time Ms. Arellano departed the meeting. District cannot be faulted for stopping the meeting upon Father's objection to Ms. Arellano's departure, and reconvening the meeting two weeks later to address the outstanding reports when Ms. Arellano could be present, even though she was not personally involved in either of the outstanding assessments. The IEP team reconvened on March 28, 2017, and it considered all outstanding agenda items from the March 10 meeting, including the occupational therapy and academic assessments. The IEP team found that Student was not eligible for occupational therapy services, resulting in no harm to Student because of the delay. Father actively participated in the reconvened meeting and did not request an independent evaluation in occupational therapy. The revised IEP included a new goal relating to initiation of conversations. District agreed to allow Student to continue attending preschool at McKinley through the end of the school year to avoid disruption and because two independent evaluations were pending. No other changes were made to Student's placement or services and his

services were not disrupted during the two-week delay. Postponing the March 10, 2017 IEP team meeting for two weeks did not constitute a material procedural violation.

#### 1(d) –Timelines Relating to Services

29. Student did not meet his burden on this issue. With the exception of transportation, discussed under Issue 4, Student offered no evidence, argument or legal authority that supported a finding that District delayed providing Student with language and speech services, which was his only IEP service through the relevant time period.

30. District timely started speech therapy as soon as Student enrolled at McKinley in November 2016. Father complained that Ms. Kelly missed one session of therapy in late November or early December 2016. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker Sch. Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) Student did not prove that missing one session of speech therapy was a material failure to implement the IEP.

31. After Student transferred to Hoover and enrolled in the half-day preschool program, he attended school on almost all school days. Student offered no evidence that District failed to meet any statutory timelines relating to his IEP services.

#### ISSUE 2: APPROPRIATE PERSONNEL AT IEP TEAM MEETINGS

32. Student contends District failed to include a psychologist and a school site administrator at the November 4, 2016 initial IEP team meeting; a transitional general education kindergarten teacher at IEP team meetings; and attendance through the entire March 10, 2017 IEP team meeting by the treating speech therapist, Ms. Arellano. District contends all required District staff attended Student's IEP team meetings.

## Authority

33. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

34. 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].)

35. The Ninth Circuit has held that "the plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory – not discretionary." (*M.L.*, *supra*, 394 F.3d at p. 643.) In *M.L.*, the Ninth Circuit found that a general education teacher was required at the IEP team meeting for preschooler in an integrated general education



preschool classroom, even though information was available to the team about the teacher's opinions, and despite the recommendation of district team members for a special education classroom placement. (*Ibid.*) A regular education teacher, to the extent appropriate, must participate in the development, review and revision of the student's IEP, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the pupil, and the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the student. (20 U.S.C. § 1414(d)(3)(C); Ed. Code, § 56341(b)(2))

36. A general education teacher is necessary at the IEP team meeting of a preschool child to advise the team members, including the parents, on the availability, advisability, and supports necessary for a general education placement for the child. California does not mandate compulsory education for typically developing preschool children between the ages of three and six years. (Ed. Code, § 48200.) If, however, the preschool child requires special education and related services, school districts must offer appropriate services along the continuum of services. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56435.) If a school district does not operate regular preschool programs, the U.S. Office of Special Education Programs has long taken the position that the obligation to provide a special needs preschooler with placement with typical children can be satisfied by providing opportunities for participation in alternative programs, such as (i) preschool programs operated by public agencies, such as Head Start, (ii) private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children, and (iii) classes for preschool children with disabilities in regular schools. (*Letter to Nevelidine*, OSEP (May 28, 1993) 20 IDELR 181.)

37. The failure to include a regular education teacher on the IEP team deprives

the team of “important expertise regarding the general curriculum and the general education environment.” (*M.L.*, *supra*, 394 F.3d at p. 646; *see also*, *Target Range*, *supra*, 960 F.2d at p. 1485 [affirming trial court’s finding that school district deprived the student of FAPE by developing an IEP without the input and participation of student’s parents and a regular education teacher].) Without a general education teacher, a reviewing court has no means to determine whether an IEP team would have developed a different program after considering the views of a regular education teacher, and a failure to include at least one general education teacher is a structural defect in the constitution of the IEP team. (*M.L.*, *supra*, 394 F.3d at p. 646.)

#### Analysis

38. Student met his burden of proof that District procedurally violated the IDEA by failing to have a general education teacher present at the initial IEP team meeting on November 4, 2016, and a general education teacher at the January 13, 2017 IEP team meeting. At the time of the initial IEP team meeting, District and Parents did not know whether Student would be eligible for general or special education supports and services. District declined to offer Student any preschool placement, without the benefit of any input from a general education teacher. Yet, the IEP team later agreed that Student would benefit from exposure to other children to help him develop his English language. They placed him in the only preschool program available, a special education preschool program, at first for diagnostic purposes and later to continue his language development with other children.

39. However, the procedural violations were *de minimus*. Student did not prove that District deprived him of the opportunity for a FAPE, or that he lost any educational benefit from November 4, 2016, when he was found eligible for speech therapy, until February 7, 2017, when he transferred to Hoover and began attending a diagnostic special education preschool placement. Student’s known needs were

primarily language based, he received speech therapy twice a week at his home school during that time, and participated in group activities with his peers that helped him acquire social and language skills. Student offered no evidence that Student, who was four years and 10 months old at the initial IEP team meeting, had educational needs requiring placement in a general education preschool program.

40. Student also did not prove that absence of a general education teacher at the first two IEP team meetings seriously deprived Parents of the opportunity to participate. Father's testimony at hearing was focused on his request to have a transitional kindergarten teacher at IEP team meetings after the March 10, 2017 meeting. He had questions about kindergarten, which Student would start the following school year. He asked for year round school at the January 13, 2017 IEP team meeting. Student offered no evidence that supports a finding that Parents were deprived of the opportunity to participate in the November 4, 2016, and January 13, 2017 IEP team meetings because a general education teacher was not present.

41. Before the initial IEP team meeting, Father requested the attendance of the psychologist after Ms. Sullivan informally told him that District would not assess Student for attention and focus in the initial assessment. District was not required by the IDEA to include a psychologist at the initial meeting because it did not assess Student in the area of attention. District was also not required to agree to Father's request under these facts. However, the psychologist attended the January 13, 2017 IEP team meeting, and she offered to assess Student in response to Father's concerns about attention and focus. She also attended the March 10 and March 28, 2017 IEP team meetings and discussed her report. District did not procedurally violate the IDEA by not having a school psychologist at the November 4, 2016 initial IEP team meeting.

42. As for other required IEP team members, District was not required by the IDEA to have a school site administrator at Student's IEP team meetings. Ms. Sullivan

attended all of Student's IEP's as the administrative designee, as the law required. As a speech therapist and Student's case manager, she was knowledgeable about Student's needs, she had the authority to authorize the IEP team's offer of placement and services, and she timely communicated Father's requests for independent evaluations to Ms. Logan, and obtained District consent. Two District speech therapists, Ms. Kelly and Ms. Arellano, attended all of Student's IEP team meetings. They both had knowledge of Student's needs and present levels of performance. Psychologist Ms. Prado attended the January 13, 2017, and March 10 and 28, 2017 IEP team meetings. She assessed Student and was familiar with his needs. The occupational therapist attended the March 10, 2017 and March 28, 2017 IEP team meetings to discuss Student's present levels of performance and the occupational therapy assessment. Student's preschool special education teacher also attended both IEP team meetings in March 2017, after Student began attending preschool in February. The special education resource teacher attended all of the 2017 IEP team meetings to discuss Student's academic needs. All of the required District staff who attended the IEP team meetings were familiar with Student and his progress, and were available to and did answer Father's questions and addressed his concerns.

43. Although Ms. Arellano left the March 10, 2017 IEP team meeting after presenting her progress report, Ms. Kelly, who was also familiar with Student's communication needs, remained at the meeting. Father asked Ms. Arellano questions at that meeting, and again at the reconvened March 28, 2017 IEP team meeting, and she responded. Ms. Arellano's departure from the March 10, 2017 IEP team meeting was not a material procedural violation, because Ms. Kelly, a speech therapist with knowledge of Student's needs, was still present. Ms. Sullivan's decision to terminate the meeting was based on Father's protests, and was a reasonable decision. Terminating the meeting did not result in a violation of District's procedural obligations because Ms. Sullivan

postponed the remainder of the agenda to a date two weeks later when Ms. Arellano could be present as Father wanted. The IEP team met, Father actively participated, and the agenda was completed.

44. Although Father asked that a principal from Hoover attend the IEP team meetings, District was not obligated to invite a principal, because Ms. Sullivan attended as the administrative designee, which is what the IDEA required. Nevertheless, a school principal attended the March 28, 2017 IEP team meeting and Father asked questions and received answers.

45. In summary, Student did not meet his burden that District committed any material procedural violations relating to the attendance by District personnel at IEP team meetings during the relevant time period that resulted in impeding Student's right to a FAPE, seriously deprived Parents of the opportunity to participate at IEP team meetings, or deprived Student of an educational benefit.

### ISSUE 3: AMOUNT OF LANGUAGE AND SPEECH SERVICES

46. Student contends District denied him a FAPE by failing to offer or provide him with an appropriate amount of speech therapy. Specifically, Student argued that he required five, one-hour individual speech therapy sessions weekly to make progress in communication, based on the services he received at a private preschool in Egypt. District contends that it offered and provided appropriate speech therapy services. It argued that Father's request for five hours a week was excessive, and would likely cause Student to burn out.

#### Authority

47. Language and speech therapy services are included among the related services which "may be required to assist a child with a disability to benefit from special education." (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

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

49. Whether Student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.)

#### Analysis

50. Student did not prove he required more than two weekly 30-minute speech therapy sessions in a group setting. Student's only evidence in support of his claim was Father's testimony regarding the services Student received while in Egypt. However, his testimony was based upon hearsay and his own opinions, and therefore was not sufficient or persuasive. First, Father was not a speech therapist, and had no formal training in language and speech therapy or special education. His testimony regarding Student's progress in Egypt relied on 1) his conversations with Mother while Student was in Egypt, 2) a very short undated letter from Ms. Nasar, and 3) Father's own opinions and personal observations on Student's progress. Mother did not testify. Ms. Nasar's letter was uncorroborated hearsay and carried no weight as to the issue of Student's needs at the time the IEP team developed Student's IEP's. Student did not

offer evidence that the IEP team ever saw, knew about, or considered her letter and recommendations. Additionally, Ms. Nasar did not include with her letter any assessment reports or results, detailed progress reports, or provide any basis for her statement that Student required five hours a week of speech therapy to achieve “the desired result.” Father never met or talked to Ms. Nasar regarding the letter and had no personal knowledge of what services Student received at Daffodil.

51. On the other hand, both Ms. Arellano and Ms. Sullivan credibly testified regarding Student’s needs in the area of communication. Ms. Arellano was familiar with Student’s needs because she assessed him, delivered speech therapy to him, and attended his IEP team meetings. Ms. Sullivan attended all of his IEP team meetings, and was an experienced and knowledgeable speech therapist familiar with his needs. Student’s knowledge of English was minimal, he only communicated in Arabic at home, and he had challenges in communication because he was an English language learner. Their testimony established that the IEP team developed annual goals designed to meet Student’s known needs in articulation and sentence formation. He made progress toward and almost met his goals with two, 30-minute speech therapy sessions a week by May 2017. He required primarily group therapy to engage in peer interactions, he received some individual attention, and he benefitted from the therapy he received.

52. Ms. Sullivan and Ms. Arellano credibly testified Student would likely burn out from five hours of therapy every week, and he did not require that level of intensity to make progress at school. Student offered no credible evidence to refute their opinions.

#### ISSUE 4: TRANSPORTATION

53. Student contended he was entitled to transportation from home to school when he was attending Hoover during the diagnostic placement because family hardship prevented Parents from consistently transporting him to his placement. District

contended Student had no special needs that required it to provide transportation to Student. District also contended family hardship was not a basis for offering transportation under the IDEA.

#### Authority

54. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) transportation in and around school buildings; and (iii) specialized equipment (such as adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46576 (August 14, 2006).)

55. In California, related services are called “designated instruction and services.” (Ed. Code, § 56363, sub. (a).) Designated instruction and services includes transportation and developmental, corrective and other supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent Sch. Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664].) Designated instruction and services shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code, § 56363, subd. (a).)

56. The IDEA requires transportation of a disabled child only to address his educational needs, not to accommodate a parent’s convenience or preference. (*Fick v. Sioux Falls Sch. Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970.)

57. Although the Ninth Circuit has not specified criteria for determining whether a child needs transportation as a related service, other circuits have indicated some guidelines that are useful in evaluating this case. Relevant factors include, at least, (1) the child’s age; (2) the distance the child must travel; (3) the nature of the area through which the child must pass; (4) the child’s access to private assistance in making



the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit. (*Donald B. By and Through Christine B. v. Board of Sch. Com'rs of Mobile County, Ala.* (11th Cir. 1997) 117 F.3d 1371, 1375 (Donald B.)) The Eighth Circuit has considered requests for transportation for students with disabilities and concluded that "a school district may apply a facially neutral transportation policy to a disabled child when the request for deviation from the policy is not based on the child's educational needs, but on the parents' convenience or preference." (*Fick, supra*, 337 F.3d, at p. 970, citing *Timothy H. v. Cedar Rapids Cmty. Sch. Dist.* (8th Cir. 1999) 178 F.3d 968, 973; see also *Anchorage Sch. Dist. v. N.S. ex rel. R.P.* (D. Alaska, Nov. 8, 2007), No. 3:06-cv-264 JWS) 2007 WL 8058163, at \*10 [district responsible for pushing student's wheelchair from the curb to the front door of his home because door-to-door service was not "based on the guardians' mere convenience of [sic] preference" where "[b]oth guardians work full time . . . and are unavailable to push [the student] up the ramp at the end of his day."].)

#### Analysis

58. On February 7, 2017, District offered to place Student in a half-day diagnostic special education preschool program at Hoover, approximately two miles from his school of residence. District determined it required the placement to enable the assessors to observe Student in the classroom, and to begin to integrate him socially with his peers so he could acquire stronger English language skills. District offered Parents no alternatives. Father requested transportation to Hoover at and after the March 10, 2017 IEP team meeting. District deferred discussion on transportation to the March 28, 2017 IEP team meeting. The March 28, 2017 IEP team notes do not reflect that anyone responded to Father's renewed request for transportation, and the IEP team did not offer transportation. At hearing Ms. Sullivan testified that District's reason for not offering transportation was that District did not provide transportation to general

education preschool students, and family hardship was not a reason to offer transportation. District agreed to continue the placement at Hoover after the March 28, 2017 IEP team meeting because independent evaluations were ongoing, and District team members agreed he would benefit from exposure to English speaking children. District did not propose returning Student to his home school. Yet, District continued to decline to offer transportation.

59. Hoover had the only preschool special education program available to Student for a diagnostic placement. It was two miles from Student's school of residence. At Student's age, to assume he would not be capable of independently getting to school would not be unreasonable. Also, Father testified that although he usually took Student to school in the morning, because the program lasted only half a day, Mother, who did not drive, used a ride sharing service to travel to Hoover and ride home with Student.

60. District argued, relying on two previous OAH decisions, that Student's disability related needs did not justify compelling District to provide Student transportation. Administrative decisions are not binding precedent but can be instructive. In *Student v. Soquel Union Elementary School District* (2007) Cal.Offc.Admin.Hrngs. Case No. 2006120082, the hearing officer determined that a preschool child's disability of language and speech deficits and lack of hazard awareness were not sufficient to require the school transportation services consisting of half a mile to his school of residence. That case can be distinguished because District's placement offer was not at Student's school of residence and the distance at issue in this case is two miles, not one half of a mile.

61. In *San Bruno Park Unified School District v. Parent* (2016) Cal.Offc.Admin.Hrngs. Case No. 2015110053, the ALJ concluded that the child's age (five years old), and not the child's disability (autism/language and speech), was the factor

that made it unreasonable for the child to transport himself to school. Thus, the district in that case was not obligated to offer transportation. That case is also distinguishable because the child's placement offer was at his school of residence. The ALJ also noted that the mother in that case did not argue that she was unable or not capable of transporting the child to his school of residence. In contrast, Father told the IEP team at both IEP team meetings in March 2017 that Parents could not transport Student to and from Hoover. District offered no evidence that the IEP team considered and discussed Father's requests, or explained to him why it was not making the offer of transportation. In contrast to *San Bruno*, this case involves District's decision outside of an IEP team meeting to place Student at a school two miles from home and his school of residence.

62. District also argued, without relying on any legal authority, that, because District does not operate a general education preschool, and no school site exists within District that typical preschoolers attend, the "notion of assignment to home school does not apply to Burlingame until kindergarten." District's argument was not persuasive. District's policy or administrative regulation would not insulate District from the obligation to provide Student transportation as a related service if his unique needs necessitated the service to provide him with a FAPE. Any state or local law that exempts certain categories of students with disabilities from eligibility for transportation violates the fundamental premise of the IDEA; the needs of every student eligible for special education and related services must be considered on an individualized basis. Although state and local laws may expand the rights of students with disabilities beyond those provided under the IDEA, they may not reduce them. For example, a district may not refuse to provide transportation as a related service to a non-ambulatory disabled student on the grounds that state law generally does not require a district to provide transportation for any student living within two miles of the school. (*Letter to Smith*, (OSEP March 17, 1980) 211 IDELR 191 [211 LRP 7068].)

63. Student met his burden of proof that District denied him a FAPE by not offering him transportation from February 8, 2017, to April 28, 2017. District correctly argues that school districts must provide transportation to a disabled child to address his educational needs, and not to accommodate a parent's convenience or preference. However, here District offered Student a diagnostic educational placement at a school two miles from his home and school of residence. Student was unable to get to Hoover without the related service of transportation. Student's remedy will be discussed below.

## REMEDIES

1. Student prevailed on Issue 1(a) regarding timeliness of the assessment for focus and attention, and on Issue 4 regarding transportation. Student seeks compensatory education in the form of tutoring five hours a week during the regular and extended school year, reimbursement for transportation to and from Hoover, and annual independent educational evaluations in all areas of need.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*Sch. Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." The fashioning of equitable relief in IDEA cases requires a "fact specific" analysis. (*Puyallup, supra*, 31 F.3d. at p. 1497.)

3. When granting relief in IDEA cases, the decision maker "must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required." (*Florence Carter Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284].) Courts and ALJs "retain discretion to reduce the amount of a reimbursement award if the equities so warrant." (*Forest Grove Sch. Dist. v T.A.* (2009) 129 S.Ct. 2484, 2496.)

4. An independent educational evaluation at public expense may also be awarded as an equitable remedy if necessary to grant appropriate relief to a party. (*Los Angeles Unified Sch. Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.)

5. District's failure to timely assess Student in the area of attention and focus substantially deprived Parents, Student's teachers and District staff of the information necessary to consider whether Student had needs in the area of attention and focus requiring the IEP team to develop an appropriate educational program with appropriate supports and services. (See, *Timothy O. v Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1124-1125). Student did not prove that an appropriate compensatory remedy includes five hours a week of tutoring during regular and extended school year. Student offered no credible evidence that he required five hours a week of tutoring, or any other equitable compensatory remedy as a result of a denial of FAPE. Student's teacher and speech therapists reported he made educational progress toward his goals and accessed his education, to the extent possible while learning the English language.

6. An appropriate remedy for Parents would be a publicly funded independent psychoeducational evaluation. However, before the hearing in this case, District granted Parent's request for a publicly funded independent evaluation in the area of attention and focus at public expense, and the assessment was completed before this hearing. Student did not prove District should be ordered to provide independent evaluations in all areas of suspected need on an annual basis, as a remedy for the procedural violation of failing to assess when Parent requested. The IDEA provides for the remedy of independent educational evaluations under specific circumstances, none of which exist here aside from the one independent evaluation discussed above. Therefore, Parent is not entitled to any other compensatory remedy for this particular procedural violation.

7. Transportation expenses can be an item of reimbursement in IDEA cases.

(*Ojai Unified Sch. Dist. v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1479; *Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527; *Capistrano Unified Sch. Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 897.) As a remedy for Issue 4, Student is entitled to reimbursement for transportation expenses from February 8, 2017, through April 28, 2017. Student's request was supported by credible evidence in the form of service receipts from the ride sharing company, which correlated the number of trips with the number of school days during that time. Father credibly explained the details on the receipts, including the maps showing the starting and ending destinations.

## ORDER

1. District shall, within 30 school days of this Decision, reimburse Parents \$426.96 for the cost of transportation from February 8, 2017, through April 28, 2017.

2. All of Student's remaining requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on a portion of Issue 1(a), and on Issue 4. District prevailed on the remainder of Issue 1(a), Issues 1(b)-(d), Issue 2 and Issue 3.

## RIGHT TO APPEAL

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

DATED: November 13, 2017

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/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings