

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021010075

CUCUCAMONGA SCHOOL DISTRICT

v.

PARENT ON BEHALF OF STUDENT.

DECISION

March 30, 2021

On January 5, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Cucamonga School District, naming Student as respondent. On January 29, 2021, the hearing was continued to February 3, 2021. Administrative Law Judge Christine Arden heard this matter on February 3, 2021, and February 4, 2021.

Attorneys Jonathon Read and Madisyn L. Ukrainetz represented Cucamonga School District. Ms. Lorena Arias-Aguilar, Cucamonga School District's Director of Special Education, attended all hearing days on Cucamonga School District's behalf.

Dr. Royal Lord, Program Manager for the West End Special Education Local Plan Area Administrators, referred to as the West End SELPA, attended the hearing on February 4, 2021, also appeared on behalf of Cucamonga School District. No one appeared on behalf of Student.

The matter was continued to March 15, 2021, to allow time for the parties to submit written closing briefs. OAH served the parties with written notice of the filing deadline for written closing briefs on February 5, 2021. The record was closed, and the matter was submitted on March 15, 2021.

ISSUE

1. Did Cucamonga School District offer Student a free appropriate public education, referred to as a FAPE, in the individualized education program, called an IEP, developed October 20, 2020, such that it may implement it without Parent's consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to

meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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, assessment, 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, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Since Cucamonga was the petitioner in this case it had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and in third grade at the time of hearing. Student resided within Cucamonga School District's geographic boundaries at all relevant times. He was eligible for special education under the autism category.

ISSUE 1: DID CUCAMONGA SCHOOL DISTRICT OFFER STUDENT A FAPE IN THE INDIVIDUALIZED EDUCATION PROGRAM DEVELOPED OCTOBER 20, 2020, SUCH THAT IT MAY IMPLEMENT IT WITHOUT PARENT'S CONSENT?

Cucamonga contends the individualized education program developed on October 20, 2020, offered Student a FAPE. Cucamonga contends its multidisciplinary assessment of Student provided the IEP team with sufficient information about Student to determine his present levels of performance and identify his needs. Cucamonga further contends the information available to the IEP team showed that, due to Student's autism, he had severe deficits in the areas of attention, behavior, communication, social skills, and adaptive and daily living skills, and sensory processing. Cucamonga further contends Student required specialized academic instruction provided in a small classroom with embedded supports in behavior, attention, communication and social skills. Cucamonga further contends the autism program administered by the San Bernardino County Superintendent of Schools on a comprehensive public school campus, which provided specialized academic instruction and services to autistic students with moderate to severe disabilities, referred to as the County Autism Program, was the least restrictive placement in which Student could obtain educational benefit. Cucamonga further contends Student was offered appropriate related services consisting of speech and language therapy, occupational therapy, consultation between Student's service providers and his teacher, and transportation to and from school. Cucamonga contends it complied with procedural requirements in drafting the October 20, 2020 IEP, and that the IEP was reasonably calculated to ensure Student made appropriate educational progress in light of his circumstances.

Although no one appeared at the hearing on Student's behalf, the evidence presented indicates Parent believed the October 20, 2020 IEP offer was not appropriate because placement in the County Autism Program was not the least restrictive environment in which Student could access his education. Parent informed Cucamonga the County Autism Program did not offer Student sufficient inclusion with typically developing peers, and Student could make appropriate educational progress in a mild-to-moderate special day class on a comprehensive school campus with the support of a full-time one-to-one aide.

A FAPE means special education and related services available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an individualized education program, referred to as an IEP, for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

When a school district seeks to demonstrate it offered a FAPE, the legal analysis has two prongs. First, it must be determined whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp 206-207.) Second, the

district must show that the IEP developed through those procedures was designed to meet the child's unique needs and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Since Cucamonga seeks an Order that it offered Student a FAPE it must prove both procedural and substantive compliance with the IDEA and California law.

A determination regarding whether or not a child received a FAPE must be based on substantive grounds. (20 U.S.C., § 1415(f)(3)(E); Ed. Code, § 56505(f).) A procedural violation amounts to a substantive denial of a FAPE only if it either impedes the student's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or causes the student to be deprived of educational benefit. (*Ibid.*) Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 67 F.3d 877, 892.)

A school district's determinations regarding special education are based on what was objectively reasonable for it to conclude given the information the district had at the time. A district cannot be judged exclusively in hindsight but instead, an IEP must take into account what was, and what was not, objectively reasonable at the time the IEP was drafted. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).) In this case, the IEP team relied upon information from Cucamonga's multidisciplinary assessments, educational records from Student's two previous school years, and Mother.

Student first enrolled in Cucamonga on August 7, 2020, the first day of the 2020-2021 school year. Mother first contacted Cucamonga in June 2020, and provided it with Student's IEP dated May 16, 2019, from Clark County School District in Las Vegas,

Nevada, referred to in this Decision as the Nevada 2019 IEP. Even though Cucamonga requested Student's most recent annual IEP and progress reports from the 2019-2020 school year, Mother did not provide them. Cucamonga later learned Student's then most recent IEP was developed by the Charlotte-Mecklenburg Schools in North Carolina, referred to in this Decision as the North Carolina District, on November 20, 2019.

On August 7, 2020, based on the Nevada 2019 IEP, Cucamonga offered Student an interim IEP, referred to as the Interim IEP. Cucamonga intended the Interim IEP to be temporary, pending action taken at an IEP team meeting held after 30 days. The Interim IEP offered Student a placement in the County Autism Program, as well as related services in language and speech therapy for two hours a month, and occupational therapy for one hour a month, and transportation between home and school. The Interim IEP offered Student 78 percent of his school day outside of general education, and 22 percent of his school day in general education. This program was comparable to the one offered in the Nevada 2019 IEP.

The 2020-2021 school year began during the COVID-19 pandemic, and Cucamonga was then only providing remote instruction or independent study to its students. The Interim IEP provided it would begin when all students returned to in-person instruction. Cucamonga provided only remote instruction and independent study through the date of the hearing.

The Interim IEP was modified on August 26, 2020, due to Cucamonga's then inability to provide in-person instruction because of COVID-19 restrictions. At the start of the 2020-2021 school year Cucamonga offered all its students two options for school attendance. Students could elect to attend school either remotely through virtual

distance learning, or through independent study. Student chose the independent study option, which required him to complete work packets on his own and turn them in bi-weekly to his supervising teacher, Marysol Ulloa. Until the schools were opened for in-person instruction, Student would receive a 20 minute per week consultation with both the speech language pathologist and the occupational therapist, who would also provide him with the related services described in the Interim IEP. Mother consented to the August 26, 2020 IEP Amendment, along with a contract agreeing to the terms of the independent study program.

In August 2020, Cucamonga believed the last school Student attended was in the Clark County School District in Nevada, referred to as the Nevada District. Mother provided Cucamonga only with the Nevada 2019 IEP, to which Mother had not consented. The Nevada 2019 IEP stated Student's specially designed instruction would be delivered in a self-contained classroom for 78 percent of his school day, and general education for 22 percent of his school day. The Nevada 2019 IEP offered Student related services in speech and language for two hours per month, occupational therapy for one hour per month, and transportation to and from school.

Mother told Cucamonga Student had not been assessed for three years, and needed a reevaluation because his present levels of performance were out of date. On August 25, 2020, Mother gave Cucamonga her written consent to the Nevada 2019 IEP with the exception of the placement.

THE SEPTEMBER 1, 2020 IEP

Cucamonga held an IEP team meeting on September 1, 2020, 24 days after the school year began, to discuss Student's interim educational program. Based on

information from Mother, Cucamonga believed at that time Student had not had an IEP team meeting since May 2019 in the Nevada District. Mother and all required district team members attended. Mother was provided with procedural safeguards. Student's present levels of performance were reviewed and new goals proposed and accepted by Mother. The team offered Student, once in-person instruction started, a program consisting of a self-contained classroom in the County Autism Program, and related services in language and speech therapy for two hours a month, and occupational therapy for one hour a month and transportation between school and home. Mother consented to the September 1, 2020 IEP, with the exception of the offer of FAPE. Until in-person instruction resumed in Cucamonga, Student continued to participate in the independent study program under the Interim IEP, as modified by the August 26, 2020 IEP Amendment.

PROCEDURAL COMPLIANCE

INFORMATION AVAILABLE TO THE IEP TEAM

In developing a child's IEP, the IEP team must consider the child's strengths, the parent's concerns for their child's education, the results of the most recent evaluation of the child, and the academic, developmental and functional needs of the child. (34 C.F.R. § 300.324(a)(i)-(iv).)

Cucamonga conducted a comprehensive assessment of Student from August 31, 2020, through October 2, 2020. The testimony and professional credentials of each of Cucamonga's assessors established each of them as competent and well-qualified to conduct the assessments and interpret the assessment results. While assessing Student, Cucamonga learned Student had attended school the North Carolina District for the

2019-2020 school year. Cucamonga received Student's educational records from the North Carolina District on October 19, 2020, and the assessors took the information in those records into account when they presented their assessment report to the IEP team on October 20, 2020.

Student's educational records included a November 14, 2018 Multidisciplinary Assessment Report from the Nevada District. Student's educational records from the North Carolina District included an October 15, 2019 Speech and Language Report; a November 13 and 18, 2019 Occupational Therapy Evaluation; a November 20, 2019 Eligibility Determination; a November 20, 2019 IEP; a November 20, 2019 Psychological Report; and an end of year feedback report. In addition, Student's special education teacher from the North Carolina District informed Cucamonga via email that Student's placement there was in a program on an alternative curriculum for students with moderate-to-severe disabilities.

Since student is African-American Cucamonga was precluded by law from giving him an intelligence test. (*Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969, 980-981.) The tools selected and administered to evaluate Student by Cucamonga were not discriminatory on a racial or cultural basis. Those assessment tools were all in a language and form most likely to yield accurate information regarding Student's knowledge and what he could do academically, developmentally and functionally.

Ulloa, a special education teacher, assessed Student over six sessions because his attention was very limited, he eloped frequently, and needed many breaks. Under most circumstances Ulloa only needed two sessions to conduct an academic assessment, but Student's eloping behaviors made it necessary to have four more sessions than usually

necessary. Student's scores on the academic assessment fell in the well below average range in attention, academics and adaptive behavior.

Student had great difficulty understanding the verbal instructions and short passages involved in the assessments. During the speech and language assessment, Student's frequent echolalic language caused him to repeat the final words spoken by assessor Kathleen Coles, speech and language pathologist, when she asked Student a question. Student had difficulty pointing to the correct response during the receptive language questions. Coles concluded Student's fluency was appropriate, but he had significant deficits in receptive, expressive and pragmatic/social language.

Rebecca Lysak, occupational therapist, concluded Student should continue to receive occupational therapy at school to support his fine motor skills, handwriting, and sensory processing needs. After conducting the health assessment, school nurse, Vicki Whistler determined Student's only special medical problem was his diagnosis of autism spectrum disorder. Whistler concluded Student was in overall good health.

The results of Cucamonga's assessments of Student were consistent with the results of the assessments conducted by the Nevada District and the North Carolina District. Due to his attention, behavior, comprehension and communication deficits, Student was not able to participate in many standardized tests. Cucamonga's assessments of Student were documented in the 46-page Triennial Multidisciplinary Report dated October 20, 2020, called the October 2020 Assessment Report. On October 16, 2020, Cucamonga emailed Mother a copy of a draft of the October 2020 Assessment Report. Cucamonga requested Mother review the report before the upcoming IEP team meeting and identified Cucamonga staff to contact if she had any

questions. Cucamonga informed Mother the IEP team would review the report at the upcoming meeting on October 20, 2020.

The October 2020 Assessment Report described in detail the assessments conducted in the areas of pre-academics, academic functioning, functional skills, communication development, speech and language, social-emotional, behavior, attention, adaptive and daily living skills, occupational therapy, sensory processing, processing abilities, and health. The assessment results provided the IEP team with accurate and sufficiently comprehensive information on Student's functional, developmental, and academic performance to identify all of Student's present levels of performance and special education and related service needs.

The 2020 Assessment Report explained the effect that Student's cognitive, behavioral, physical and developmental factors had on his ability to access and obtain benefit from his education. The assessors concluded Student should remain eligible for special education under the autism category. The assessors recommended Student be placed in a highly structured setting with predictable routines. He should be allowed to engage in play based social learning situations with adult support. Student needed consistency across environments, short tasks, as well as frequent breaks and rewards. He had significant deficits in social skills and communication. The assessors also recommended a behavior intervention plan.

Mother expressed no disagreement with the assessment results or the report. The 2020 Assessment Report presented a detailed accurate picture of Student, described his present levels of performance, and identified his educational needs, based on the valid, reliable assessments conducted by the qualified Cucamonga assessors.

THE OCTOBER 2020 IEP TEAM MEETING

An IEP required as a result of an assessment must be developed within a total time not to exceed 60 days from the date of receipt of the parent's written consent for assessment, unless the parent agrees to an extension in writing. (Ed. Code, § 56344, subd. (a).) Here, the IEP team met timely on October 20, 2020, to review the assessments of Student and develop his triennial IEP. Cucamonga gave Mother proper notice of the October 20, 2020 IEP team meeting on October 5, 2020.

The Ninth Circuit has emphasized that parental participation safeguards are among the most important procedural safeguards in the IDEA, and procedural violations that interfere with parental participation in the IEP formulation process "undermine the very essence of the IDEA." (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

The IEP team must include one or both of the parents or a representative chosen by the parents. It must include not less than one regular education teacher of the child if the child is participating in general education (20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.344(a)(2)), and not less than one special education teacher, or where appropriate, one special education provider to the student. It must include a representative of the school district who is:

- qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of the student;
- knowledgeable about the general education curriculum; and
- knowledgeable about the availability of school district resources.

The team must include an individual who can interpret the instructional implications of assessment results. At the discretion of the parent, guardian or school district, other individuals may be included 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).)

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.* (9th Cir. 1996) 82 F.3d 1493, 1499, abrogated in part on other grounds by *Schaffer ex rel. Schaffer v. Weast* (2005) 546 U.S. 49, 56-58.) 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).)

The Ninth Circuit has expressly held that the IDEA reference to a regular education teacher of the child at IEP team meetings does not require the presence of the student's current general education teacher on the IEP team. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 939). However, the teacher chosen as an IEP team member should be knowledgeable about the child and implementation of the IEP developed. (*Id.*)

Student's IEP team met on October 20, 2020, to review Cucamonga's multidisciplinary assessment of Student and develop his triennial IEP. Mother attended the meeting, as did Sharon Neault, the Ombudsperson from the West End SELPA. Neault's job was to act as a liaison between Mother and Cucamonga. General education teacher Tryna Walker, and credentialed mild-to-moderate special education teacher, Ulloa, who was also Student's supervising independent study teacher, also attended. All of the Cucamonga assessors who had assessed Student were present to explain their assessment results, including speech language pathologist Coles, occupational therapist

Lysak, school psychologist Porto, and Ulloa. The principal of Cucamonga Elementary School and Cucamonga's Director of Special Education, Arias-Aguilar, both of whom were knowledgeable about the district's resources, also attended. Melissa Jacobo, a San Bernardino County Office of Education moderate-to-severe special day class teacher was also present.

All legally required personnel were present at the meeting. Arias-Aguilar provided Mother with a copy of the procedural safeguards, and explained them to Mother.

LEGAL REQUIREMENTS FOR THE IEP DOCUMENT

In developing a child's IEP, the IEP Team must consider the:

- strengths of the child;
- concerns of the parents for enhancing the education of their child;
- results of the most recent evaluation of the child; and
- academic, developmental, and functional needs of the child. 34 C.F.R.

§ 300.324(a)(1)(i-iv).

When developing an IEP for a child whose 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. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The IEP team must also consider the child's communication needs, and whether the child needs assistive technology devices and services. 34 C.F.R. § 300.324(a)(2)(iv) and (v).

An annual IEP must contain a statement of the child's present levels of academic achievement and functional performance, including the manner in which the child's

disability affects involvement and progress in the general education curriculum. (34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1)(a).)

School districts must develop measurable, annual goals, including academic and functional goals, designed to (1) meet the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum; and (2) meet each of the student's other educational needs that result from the disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345(a)(2).) The goals must describe how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided. (20 U.S.C., § 1414(d)(1)(A)(i)(III)).

Goals provide a mechanism for determining whether the anticipated outcomes for the child are being met, and are used to determine the placement and services are appropriate to the child's special learning needs. (*Letter to Hayden* (U. S. Office of Special Education Programs(OSEP) 1994) 22 IDELR 501; see also *Letter to Smith* (OSEP 1995) 23 IDELR 344; *Letter to Butler* (U.S. Office of Special Education and Rehabilitation Services 1988) 213 IDELR 118; *Notice of Interpretation*, Appendix A to 34 C.F.R. part 300, Question 4 (1999). The development of goals is a procedural requirement. (See *Rodrigues v. Fort Lee Bd. of Ed.* (3rd Cir. 2011) 458 Fed. Appx. 124, 127.)

An IEP must contain a statement of the special education, related services, supplementary aids and services, and program modifications or supports to be provided to the student. It must also specify the frequency, duration, and location of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300.320(a)(4) & (a)(7); Ed. Code, § 56345(a)(4) & (a)(7).) It must contain an explanation of the extent to which the

student will not participate with nondisabled children in the regular class. (20 U.S.C. 1414(d)(1)(A); 34 C.F.R. §300.320(a)(5); Ed. Code, §56345, subd. (a)(5).)

An IEP must also contain a statement of appropriate accommodations necessary to measure the student's academic achievement and functional performance on State and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(6); Ed. Code, § 56345, subd. (a)(6).) An IEP must state whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3).)

An IEP must document its rationale for placement in other than the pupil's school and classroom they would otherwise attend if not disabled. (34 C.F.R. § 300.116; 71 Fed. Reg. 46, 588 (August 14, 2006); Cal. Code Regs., tit. 5, § 3042.) The IEP must indicate why the student's disability prevents their needs from being met in a less restrictive environment even with the use of supplementary aides and services. (*Ibid.*) The IDEA does not confer on the student an absolute right to placement in his neighborhood school, but that the IEP explain why the neighborhood school may not be properly suited to address the student's educational needs.

The IEP is not required to include information under one component of a student's IEP that is already contained under another component of the IEP. (Ed. Code, § 56345, subd. (h).) An IEP need not include additional information not expressly required by statute. (Ed. Code § 56345, subd. (i).)

An IEP is not required to include the particular instructional methodologies that will be utilized in instruction. (34 C.F.R. § 300.320(d)(1); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating

children with autism. (See *Adams, supra* 195 F.3d at 1149; *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84 (*T.B.*)). Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.) A parent's disagreement with a school district's educational methodology is insufficient to establish an IDEA violation. (*Carlson v. San Diego Unified School Dist.* (9th Cir. 2010, unpublished) 380 Fed.Appx 595; see also, *Lachman v. Illinois State Board. of Education* (7th Cir. 1988) 852 F.2d 290, cert. denied at 488 U.S. 925 [holding that parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education of a student with a disability].)

The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*)). A formal written offer is, therefore, more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*) The formal IEP offer may be clarified by a prior written notice letter. (See 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. § 300.503; *Union, supra*, at 15 F.3d p. 1526 [permitting a prior written notice letter to clarify placement offer].)

Procedural violations that do not result in a loss of educational opportunity or which do not constitute a significant infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992), *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B).) A due process hearing decision cannot be based solely upon a non-substantive procedural error unless it is also found that the error resulted in the loss of educational opportunity

to the pupil or interfered with the opportunity of the parent to participate in the formulation process of the IEP. (Ed. Code § 56505(j).)

THE TEAM IDENTIFIED STUDENT'S PRESENT LEVELS AND AREAS OF NEED

After agreeing Student continued to be eligible for special education under the autism category, the IEP team updated Student's present levels of academic achievement and functional performance. The team relied mainly on Cucamonga's assessment results, but also took into consideration Student's educational records from his past two school years.

Student's assessors reported Student's strengths were his rote memory skills and physical health. He had challenges in the areas of behavior, attention, expressive and receptive communication, social skills and sensory perception. Academically, Student was in either the very low or low range in all subject areas. Developmentally, Student was significantly delayed. On a functional level Student needed to develop his self-help and adaptive skills.

During the team's discussion of Student's present levels of performance and areas of need, Mother was concerned that, even though Student was usually even-tempered at home, he became aggressive and threw himself on the floor when frustrated. Mother was also concerned Student had difficulty focusing on tasks and was often easily distracted. Her concerns were consistent with the reports of the assessors that Student had a low frustration tolerance, and difficulty focusing on nonpreferred tasks. In general, academic tasks were nonpreferred for Student.

The IEP team established Student's present levels of performance in academics. His skills in math concepts and applications, written expression, math computation, oral

expression and listening comprehension were in the very low range. As an example, while general education third graders were working on math computations in the 1000s, Student was working on 20s. He could add within 20, but not yet able to subtract. Student's reading comprehension, silent reading fluency and letter and word recognition skills were in the low range. Third graders on the general education curriculum were required to identify details in stories. In contrast, Student could read words, but was not able to answer reading comprehension questions. Student's academic present levels of performance and needs established by the IEP team were supported by the results of the academic assessment conducted by Ulloa.

School psychologist Porto estimated from his assessment results that Student's overall cognitive capacity was in the well below average range. This was consistent with cognitive assessments performed by the prior two school districts, and further demonstrated Student's need for academic support at his individual instructional level, rather than grade level.

The IEP team established Student's present developmental levels, which were delayed in the areas of communication and fine motor skills. Speech language pathologist Coles presented the results of Student's speech and language assessment. Because his articulation skills were age appropriate, his verbal fluency was not an area of concern. However, Student's receptive language skills were varied. He could understand words, phrases and single step verbal commands in the form of direct requests, but he had difficulty understanding sentences and multi-step directions. He often required physical prompting to establish eye contact before he could attend to a verbal communication directed at him.

Student's expressive language was very limited. He spoke in separate words or phrases, and did not use sentences often. He could assign labels to items in pictures, but they were often inaccurate. Student's pragmatic, or social, language was limited to greetings, and verbal requests with prompting. He did not voluntarily use language to request things, gain attention, participate with others, or ask about things. Student could respond to a "what" question, but did not respond to questions that could be answered with either "yes" or "no." He did not engage in verbal or nonverbal turn-taking. Student's present levels of performance and needs in communication were documented by the IEP team, and supported by the results of the speech and language assessment conducted by Coles.

Occupational therapist Lysak presented the results of the occupational therapy assessment. In the area of fine motor development, Student had age appropriate muscle tone, strength and range of motion. It was hard for Student to sit in a chair for even a short time due to his serious attention deficit. He frequently got up from his seat and eloped during writing tasks. He needed almost constant verbal and tactile prompts to keep engaged. Even though his pencil grasp was immature, he demonstrated skill in visual motor integration when writing. He could copy sentences from a model, but his script was very large for his age. He could copy complex shapes and manipulate small items appropriately. He had knowledge of shapes and images and was able to complete fine motor precision tasks quickly. He was often fidgety and distracted and struggled with impulsivity. Student had sensory processing difficulties and demonstrated sensory seeking behavior. Student's inability to sustain attention on writing tasks significantly impacted his ability to participate and progress in grade level curriculum. Student's present levels of performance and needs in fine motor

development were documented in the IEP by the IEP team, and were supported by the results of the occupational therapy assessment conducted by Lysak.

School psychologist Porto presented the team with the results of the psychoeducational assessment in the areas of social emotional functioning and behavior. Student was friendly, and able to greet peers and adults. When excited he hummed, flapped his hands, jumped up and down and smiled. He seemed to enjoy interactions with others, although he would not initiate interactions himself.

Regarding attention, Student was easily distracted when presented with a non-preferred task. He could work on a task for about 5 minutes, but needed adult prompting every 15 or 20 seconds. In comparison, students in Ulloa's mild-to-moderate special day class remained on a task and without prompts for 20 minutes. Third graders in general education classes worked independently on a task for approximately one hour.

Because Student's inattention and elopement behaviors occurred every 20 seconds or less, his behavior significantly impeded his learning. He had difficulty staying seated and completing an academic task. When objecting to a nonpreferred task Student often whined, flopped to the floor, rolled around on the ground, and threw items. For most of the school day he was off task and wandered around the room, slid on the carpet, flapped his hands, took off his shoes and socks, rolled on the ground, hit and kicked others and yelled, instead of doing classwork.

Student's social-emotional and behavioral present levels of performance were documented by the IEP team. They were supported by the results of the social-emotional and behavioral components of the psychoeducational assessment conducted by Porto.

STUDENT'S ADAPTIVE DAILY LIVING SKILLS

The IEP team determined Student was able to dress himself and use the restroom without adult assistance. He could also feed himself. He did not not clean up after himself when directed to do so. Cucamonga's assessment of Student's functional skills supported the present levels and needs in adaptive living skills established by the IEP team.

Student had an autism diagnosis, and was in good general health. He did not routinely take medicine. His attention span was short. He passed the vision assessment, but refused to participate in the hearing assessment. The IEP team documented Student's functional skills, supported by the assessments of Porto and the school nurse. It determined that nothing about Student's health would affect his educational performance.

The IEP team considered Student's strengths, Parent's concerns, the results of the assessments by Cucamonga and the prior school districts, and Student's academic, developmental and functional needs. It accurately documented in the October 2020 IEP Student's present levels of academic achievement and functional performance, including how Student's disability affected his involvement in the general education curriculum.

STUDENT'S GOALS

The IEP team determined that to receive educational benefit Student required annual goals in the following areas of need: math; reading comprehension; self-help; vocational-attending/staying on task; behavior-asking for a break; expression; expression attributes; fine motor; writing; and receptive language. In preparation for the IEP meeting, special education teacher Ulloa drafted proposed goals for discussion in

the areas of math, reading comprehension, self-help, vocational-attention, writing and behavior-requesting a break. Speech language pathologist Coles drafted goals in expression and in receptive language. Occupational therapist Lysak drafted a fine motor goal.

The IEP team identified Student's educational needs resulting from his disability, and developed a total of 10 annual measurable goals to meet each of those needs. The team determined Student's short-term progress on the goals would be checked three times over the following year, and Student would be evaluated for progress on goals by September 1, 2021. Mother agreed with the team's identification of Student's needs, and approved all the goals.

At hearing, Porto, Ulloa, Coles and Lysak each knowledgeably and credibly opined that the 10 goals addressed Student's areas of need, and reasonably calculated the progress Student could be expected to make in the following 12 months. The goals in the October 20, 2020 IEP met Student's needs resulting from his disability, particularly his academic deficits, communication deficits, inability to focus on nonpreferred tasks, and maladaptive behaviors. The goals were developed to enable Student to be involved in and progress in the general education curriculum, albeit at his pace and instructional level, and to meet each of his educational needs. The goals were measurable and could be achieved by Student within a year. Therefore, the annual goals offered in the October 20, 2020 IEP met both procedural and substantive requisites and were appropriate.

In measuring performance and progress, the IEP team decided and documented that Student would be given alternate assessments, rather than standardized statewide assessments. Student's needs resulting from his disability prevented Student from

participating in regular assessments to measure his performance. Additionally, Student would have the accommodations of simplified test directions, and speech to text assistance during testing.

At the October 20, 2020 meeting, the IEP team identified the supplementary aids, program modifications and supports, collectively referred to as accommodations, which Student needed. The team recognized Student should be supported by a communication device, seat cushion, pressure items and a pressure vest. These are identified on the Special Factors page of the October 20, 2020 IEP. The IEP specified the start date, end date, and frequency of program accommodations and personnel supports.

The team also recognized Student's behavior impeded his and others' learning. The team identified additional supports to address Student's behaviors. These included a five-spot token board, adult reminders and prompting, calming body visuals, visual schedules, frequent movement breaks, and a behavior intervention plan.

In preparation for the IEP meeting Porto and Ullua, in consultation with Coles and Lysak, drafted a proposed behavior intervention plan that was discussed at the October 20, 2020 IEP meeting. The team worked from that draft to develop a behavior intervention plan focused on replacing Student's primary problem behavior of eloping when presented with a nonpreferred task. Because Student did not like academic tasks, school generally consisted of nonpreferred activities for him, which he was not able to tolerate for longer than 15 to 20 seconds. The desired replacement behavior was for Student to ask for a break, either verbally or nonverbally by showing a break card, instead of eloping. The team identified nine supports to be applied to modify Student's

behavior, as well as multiple strategies to be used by staff when Student eloped. The team approved the behavior intervention plan in the October 20, 2020 IEP.

Porto and Ulloa persuasively testified that the accommodations and behavior intervention plan would provide positive reinforcement for good behavior, and provide Student with strategies to address his frustration, inattention and elopement. Accordingly, the accommodations, supplementary aides and supports identified on the Special Factors page of the October 20, 2020 IEP, and the behavior intervention plan developed at that meeting, appropriately addressed Student's behavior needs.

OFFER OF A FAPE – STATEMENT OF PLACEMENT AND RELATED SERVICES

The continuum of program options for placement includes, but is not limited to:

- regular education;
- resource specialist programs;
- designated instruction and services;
- special classes;
- nonpublic, nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication instruction in the home or instructions in hospitals or institutions.

(Ed. Code, § 56361.)

After considering the continuum of placement options, which Arias-Aguilar described to Mother, the IEP team determined the County Autism Program was the

appropriate least restrictive placement for Student. Porto explained very convincingly at hearing that the district members of the IEP team correctly determined it would be inappropriate to place Student in a mild-to-moderate special day class with a one-to-one aide for a few reasons. First, Student would not be able to access the curriculum in a mild-to-moderate class, which would frustrate him. Second, the team recognized Student needed to develop independence skills because he was currently very prompt dependent. A one-to-one aide would only further encourage Student's prompt dependence and undermine the development of independence skills. Porto noted Student needed the structure and routine provided in the County Autism Program, as well as the evidence-based practices it employed, to improve his behavior. Student needed to improve his communication skills and decrease the frequency of his elopement behaviors before he would be able to focus his attention long enough to access the academic curriculum.

Arias-Aguilar stressed at hearing that Student's behavior needs impacted him to a moderate-to-severe degree. These behaviors needed to be addressed before he could attend to academic tasks. Arias-Aguilar convincingly opined Student needed placement in an intensive program with a small student-to-teacher ratio, taught by a teacher credentialed to teach moderate-to-severe level students. Arias-Aguilar further convincingly opined that the County Autism Program is the least restrictive environment in which Student could make progress in all his areas of need simultaneously.

Ulloa also opined Student would be more appropriately served in a moderate-to-severe program, rather than a mild-to-moderate program. At the time of hearing, Ulloa taught a mild-to-moderate class, in addition to supervising students on the independent study option. She explained that, in the mild-to-moderate special day class, students were working in the general education curriculum with modifications.

They were working towards general education standards with accommodations and supports. In contrast, students in moderate-to-severe classes, such as the County Autism Program, worked on functional goals and skills. Examples of these functional skills included self-help skills, extending the amount of time students could remain seated, attending to nonpreferred tasks, and asking for help when needed. Additionally, the students in the moderate-to-severe class required more adult intervention. Ulloa noted Student needed to develop his functional skills and needed more adult intervention than a mild-to-moderate class would provide.

In determining whether an IEP offers a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) 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.)

As stated earlier, when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Endrew F., supra*, 137 S.Ct. at pp. 1000-1001, citing *Rowley, supra*, 458 U.S. at p. 204.) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

The school district must ensure that the program is designed following a number of general procedural requirements so that the student is placed in the least restrictive environment:

- the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(34 C.F.R. § 300.116.)

Substantively, to provide the least restrictive environment, school districts must first ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers. Secondly, the school district must ensure that special classes or separate schooling occur only if the nature or severity of the child's 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).)

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

1. the educational benefits of placement full-time in a regular class;
2. the non-academic benefits of such placement;
3. the effect the student has on the teacher and children in the regular class; and
4. the costs of mainstreaming the student.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of general education was the least restrictive environment for an aggressive and disruptive student with ADHD and Tourette's Syndrome].)

If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) 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.)

Applying the first of the *Rachel H.* factors to the facts in this case, due to his unique needs Student would not receive educational benefits from full-time placement in either a regular education class, or a mild-to-moderate special day class. Student had severe attention deficits, behavior challenges, and was academically well below grade level. Student's attention span was 15 to 20 seconds, a fraction of the attention span of his neurotypical peers. This was also much less than the 20-minute attention span of students in a mild-to moderate special day class. Additionally, Student was unable to follow multi-step directions. Each of these significantly interfered with his ability to learn at the pace and whole-class instruction format of general education classes.

Student was not able to access the curriculum in a class less restrictive than a moderate-to-severe special day class due to his severe behavioral deficits. He could not access the general education curriculum, even if it was modified. The curriculum in a mild-to-moderate special day class would likely frustrate Student because his present levels of academic performance were in the very low range and his ability to attend to academic tasks was very low.

Considering the second *Rachel H.* factor, the non-academic benefits of a regular class, there also appeared to be little non-academic benefit for Student in either a regular class or a mild-to-moderate special day class. Although Student was passively friendly, he did not initiate interactions with his peers. Student had receptive, expressive and pragmatic language deficits and could not engage in reciprocal conversation, which severely impacted his ability to communicate with his peers. These deficits not only interfered with his academic learning, but minimized any non-academic benefit he could receive from being in either a general education classroom or a mild-to-moderate special day class.

Considering the third *Rachel H.* factor, Student's effect on the teacher and other children, it is probable Student would have had a negative effect on both his teacher and classmates in a regular classroom. He exhibited very distracting behaviors, including eloping, becoming aggressive, falling to the floor, and throwing objects. These behaviors would disturb other students in both a general education classroom and in a mild-to-moderate special day class. Student's behaviors would interrupt the teacher and interfere with instruction. Also, it is likely that a teacher in either a regular class or a mild-to-moderate special day class would not have the time to give Student the almost constant prompting he required.

There was no evidence that cost was a factor in the IEP team's decision that Student could not have been satisfactorily educated in either a regular classroom or a mild-to-moderate special day class. Student needed a very small class with a low adult to student ratio, which was not be available in either a regular class or a mild-to-moderate special day class. In conclusion, each of the four *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

Once it has been determined that education in the regular classroom cannot be achieved satisfactorily, the inquiry turns to whether the child has been mainstreamed to the maximum extent appropriate. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) Here, the evidence demonstrated that the October 20, 2020 offer of placement in the County Autism Program, which also provided mainstreaming opportunities with typical students in extracurricular and nonacademic activities for 22 percent of the school day, was the least restrictive environment in which Student could obtain educational benefit. The evidence established Student had been placed in, and received educational benefit from placement in a program for students with moderate-to-severe disabilities in the North Carolina District in the previous school year. The County Autism Program

provided specialized academic instruction at Student's own pace, embedded language and behavioral supports, evidence-based strategies specifically designed to support autistic children, frequent breaks, and sensory equipment. These are precisely the types of supports Student needed in order to progress in all his goals.

A regular education class and a mild-to-moderate special day class offered Student no academic or other benefits, and would likely only frustrate him and trigger maladaptive behaviors. The weight of the evidence established that the placement offered in the October 20, 2020 IEP, the County Autism Program for 78 percent of the school day, was the least restrictive environment in which Student could be satisfactorily educated, along with the offered related services and accommodations.

The IEP's team's rationale for offering Student placement in a school and classroom other than the one he would have attended if he was not disabled, was addressed in the October 20, 2020 IEP. The IEP also addressed why Student's neighborhood school was not suited to address his educational needs. The IEP further explained why Student's disability prevented his needs from being met in a less restrictive environment than the County Autism Program, even with the use of supplementary aides and services. The IEP also explained the resources available to Student in the County Autism Program, which Cucamonga had authority to offer to Student.

At the October 20, 2020 IEP team meeting, Parent said she would consider placement in the County Autism Program. Later, Parent did not consent to the placement. Cucamonga offered to convene further IEP team meetings to discuss Parent's concerns about the placement. However, Parent did not want to participate in further meetings.

The October 20, 2020 IEP placement offer complied with all procedural requirements. The placement decision was made during the IEP team meeting by a group of knowledgeable team members after consideration of a continuum of placement options, which were explained to Parent at the IEP meeting. The team discussed whether Student could be satisfactorily educated in a regular education environment, and when it determined that he could not, they discussed mainstreaming Student to the maximum extent appropriate. The team took Parent's concerns into account, and explained why Student was not offered placement in a local Cucamonga school. The IEP documented the placement, the percentage of time in and outside of general education, and the reason Student did not attend his home school. Cucamonga sustained its burden of proof establishing that the October 20, 2020 IEP made an appropriate offer of special education placement in the least restrictive environment for Student.

The team considered placement for Student in a mild-to-moderate special day class, as well as a moderate-to-severe special day class, and the County Autism Program, which was comparable to a moderate-to-severe special day class, but embedded with specific supports designed for students on the autism diagnostic spectrum. Jacobo, the County moderate-to-severe special day class teacher, described all three of those special day classes to Parent at the October 20, 2020 IEP meeting. After discussion, the district team members determined the County Autism Program was the appropriate placement and least restrictive environment for Student.

The district members of the IEP team offered Student placement in the County Autism Program for 1410 minutes a week, which equaled 78 percent of Student's time at school. The other 315 minutes per week, which equaled 22 percent of Student's time at school, Student would be in the general education setting for extracurricular and

non-academic activities. The placement offered was clearly identified in the October 20, 2020 IEP. The written offer of a FAPE in the October 20, 2020 IEP satisfied the procedural requirement that a formal IEP offer must be clear. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) There was no ambiguity regarding the nature of, and details regarding, the placement offered. The written offer of placement was sufficiently clear.

The County Autism Program was staffed by people trained to work with children like Student. The staff of the County Autism Program was expert in teaching techniques, as well as in behavioral strategies, designed to support autistic students. The adult to student ratio in the program was approximately one adult to every two or three students. The class size was 10 or 11 students. The teacher was a credentialed moderate-to severe special day class teacher with extensive training on teaching students with autism. The teacher was assisted by at least two instructional aides.

The County Autism Program was grounded in evidence-based practices, including applied behavior analysis strategies, specifically tailored to support autistic students. Some examples of the supports included in the program were a picture exchange communication system, which encouraged fluent communication and independence, and sensory breaks. There were sensory items and equipment used in the classroom. These specialized supports were embedded in the County Autism Program throughout the school day. The supports in that program were appropriate to address Student's identified unique needs.

Parent did not agree to the offered placement at the meeting, but said she would consider it and let Cucamonga know her decision later. Cucamonga learned later that Parent would not consent to the October 20, 2020 IEP because she wanted Student

placed in a mild-to-moderate special day class with a full-time aide, rather than in the County Autism Program. Parent hoped an aide would enable Student to benefit and make progress in a general education classroom. Parent did not disagree with any other elements in the IEP.

Cucamonga sent Parent a prior written notice on November 16, 2020, to further explain its decision to offer placement in the County Autism Program. The letter stated Student's annual goals demonstrated he needed a more intensive and modified instruction than a mild-to-moderate special day class with aide support could provide. The prior written notice further informed Mother that an aide was not a certificated teacher who could provide individualized and direct instruction in the classroom, and Student lacked the academic and attention skills to benefit from fast-paced whole class instruction. The notice also explained an aide is not qualified to provide supplementary support to students with significant behavioral needs. Student needed to be in a classroom with a teacher and staff trained in behavior intervention, such as the County Autism Program. Moreover, an aide was not intended to supplant a whole program or curriculum.

Cucamonga's prior written notice clarified the reasons why a mild-to-moderate class with the support of an aide was not an appropriate placement for Student. Parent rejected Cucamonga's offer to reconvene the IEP team to further discuss Student's placement.

The October 20, 2020 IEP explained the team's rationale in offering Student placement in the County Autism program and why he could not be educated in a regular classroom. It also explained why Student's disability prevented his needs from being met in a less restrictive environment than the County Autism Program.

Cucamonga's placement offer of the County Autism Program included in the October 20, 2020 IEP met all procedural and substantive requisites.

RELATED SERVICES

A child eligible for special education must be provided access to related services reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra*, 580 U.S. ____ [137 S.Ct. at p. 1000].) The IEP document must specify the frequency, duration, and location of the related services offered. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300.320(a)(4) & (a)(7); Ed. Code, § 56345(a)(4) & (a)(7).)

Related services offered in the October 20, 2020 IEP were:

- consultation services between Student's special education teacher, occupational therapist, and speech language pathologist for 30 minutes per month;
- speech and language therapy for 120 minutes per month in a group setting through the San Bernardino County Office of Education;
- occupational therapy for 60 minutes per month in a group setting through the San Bernardino County Office of Education and;
- transportation to and from school.

Student had significant delays in expressive and receptive communication. Coles opined competently that the offer of 120 minutes per month of speech and language therapy services in a group setting was appropriate to address Student's needs in the areas of expression, expression attributes, and receptive language. Coles testified the offered consultation service was appropriate and necessary to ensure Student's program was appropriately individualized. The consultation service would permit the

professionals working with Student to address any needs that had not been specifically addressed in the accommodation portion of the IEP. The consultation services would allow the teacher and speech language pathologist to be in constant communication to help support one another so that Student could succeed. This combination of speech therapy services would provide Student with all the supports he needed to reach his communication, and academic goals. Coles persuasively opined that the offered speech and language therapy services of two hours per month, plus 30 minutes per month consultation with Student's teacher, met Student's communication needs.

Student's communication delays were best addressed in group speech and language therapy. The 120 minutes a month of group speech and language therapy, along with 30 minutes a month of consultation between the speech language pathologist and Student's teacher were appropriate to address Student's communication needs. In addition, speech and language development was embedded in the County Autism Program. The nature, frequency, duration, and location of the speech and language therapy services offered Student were clearly identified in the October 20, 2020 IEP and supported by the results of the speech and language assessment conducted by Coles. The speech and language services offered in the IEP were reasonably calculated to enable Student to make appropriate progress in communication in light of his circumstances.

Student had difficulty holding a pencil and writing. He needed occupational therapy services to address these deficits. Lysak explained Student had foundational skills in fine motor and visual motor abilities, but he needed access to the supports offered in the County Autism Program so that he could be successful. Lysak persuasively opined that the offered occupational therapy services of one hour per

month, plus 30 minutes per month consultation with Student's teacher, were appropriate to meet Student's fine motor needs.

The 60 minutes a month of occupational therapy services, along with another 30 minutes a month of consultation between the occupational therapist and Student's teacher, offered Student appropriate occupational therapy services to address his fine motor needs. The occupational therapy services offered in the October 20, 2020 IEP were supported by the occupational therapy assessment conducted by Lysak. The occupational therapy services offered in the IEP were reasonably calculated to enable Student to make appropriate progress with his fine motor skills in light of his circumstances.

The IEP appropriately specified the frequency, duration, and location of the related services offered. Mother did not object to Cucamonga's offer of related services, and there was no evidence that the related services offered were not appropriate for Student. Therefore, the related services offered in the October 20, 2020 IEP were both procedurally and substantively appropriate.

EXTENDED SCHOOL YEAR

Each public agency must ensure extended school year services are available as necessary to provide a FAPE to a child. (34 C.F.R. § 300.106(a).) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 34 Code of Federal Regulations part 300.320 through part 300.324, that extended school year services are necessary for the provision of a FAPE.

The results of the assessments established Student needed to continue receiving specialized academic instruction and related services during the summer recess between

regular school years to receive a FAPE. Student would regress in his learned skills if he missed specialized academic instruction and related services for that period of time. Therefore, the IEP team offered Student an extended school year program consistent with the specialized academic instruction and related services provided to him during the regular school year. The extended school year offered Student in the October 20, 2020 IEP was reasonably calculated to enable Student to avoid losing skills he had already mastered, and to continue to make appropriate progress in light of his circumstances in academics, behavior, communication, and fine motor skills over the summer break.

PARENTAL PARTICIPATION

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 a FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when the parent 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*, 993 F.2d 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].)

A school district's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) Predetermination occurs when an educational agency has made its determination prior to the IEP meeting,

including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed. Appx. 342, 344; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child’s programming in advance of an IEP team meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688 at p. 693, fn. 3.)

Parent was afforded an opportunity to participate in the October 20, 2020 IEP meeting. Parent had an opportunity to participate in discussions regarding the assessments, identification of Student’s present levels of performance and needs, accommodations and supports, placement, and related services. The evidence presented established Parent participated in the October 20, 2020. She was also offered, but rejected, the opportunity to participate in further IEP team meetings to address her disagreement with the placement offered. There was no evidence that the IEP team predetermined any elements of the October 20, 2020 IEP.

In summary, Cucamonga complied with procedural requirements in conducting the October 20, 2020 IEP team meeting, developing the components of Student’s educational program, and documenting its offer in the October 20, 2020 IEP. Substantively, the October 20, 2020 IEP offered Student appropriate goals, accommodations, behavior intervention plan, related services, and an appropriate placement. The County Autism Program would provide Student with supports he needed, which would promote his independent functioning in the least restrictive environment. The specialized academic instruction and related services offered in the October 20, 2020 IEP were individually tailored to provide him educational benefit and

appropriate progress on his goals in light of his circumstances. The County Autism Program was well suited to meet Student's unique needs.

In summary, the October 20, 2020 IEP offered Student placement in the least restrictive environment, as well as specialized individualized academic instruction and related services, with supplementary supports, reasonably calculated to enable Student to make progress in light of his circumstances. Accordingly, the October 20, 2020 IEP offered Student a FAPE.

CONCLUSIONS AND PREVAILING PARTY

As required by 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.

The IEP developed at the October 20, 2020 IEP team meeting offered Student a FAPE in the least restrictive environment. Cucamonga School District prevailed on the sole issue presented.

ORDER

1. Cucamonga School District's October 20, 2020 IEP offered Student a FAPE in the least restrictive environment.
2. Cucamonga School District may implement the October 20, 2020 IEP without parental consent if Student is enrolled in the Cucamonga School District and requests special education and related services.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Christine M. Arden

Administrative Law Judge

Office of Administrative Hearings