

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

POWAY UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009040857

DECISION

The due process hearing in this matter convened on September 8, 9, 10 and 15, 2009, in San Diego, California, before Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH).

Brian Sciacca of Atkinson, Andelson, Loya, Rudd & Romo, Attorneys at Law, appeared on behalf of Poway Unified School District (Poway or District). On certain days, Attorney Geneva Englebrecht, also of Atkinson, Loya, Rudd & Roma, appeared with Mr. Sciacca on behalf of District. Emily Shieh (Ms. Shieh), District's Coordinator of Special Education, attended each day of the hearing on behalf of District.

Ellen Dowd, Attorney at Law, represented Student. Student's mother (Mother) attended each day of the due process hearing.

On April 23, 2009, the District filed with OAH its request for due process hearing in this matter. The parties requested a continuance of the due process hearing and on May 18, 2009, OAH issued an order granting their request.

At the due process hearing, oral and documentary evidence was received. At the close of hearing the matter was continued to October 6, 2009, for the submission of closing briefs. On that day, briefs were filed, the record was closed and the matter was submitted.

ISSUE

Whether the District made an offer of a free and appropriate public education (FAPE) in the least restrictive environment at the individual education program (IEP) meeting of February 13, 2009, and March 4, 2009 (hereafter the "February-March 2009 IEP team meeting.").¹

FACTUAL FINDINGS

1. Student is a 15 year-old boy who will turn 16 on February 25, 2010. Student's family has resided within the boundaries of the Poway Unified School District (District) since the 1997-1998 school year. Student currently resides with his parents, a caregiver and one of two adult siblings. At the time of the February-March 2009 IEP team meeting Student was in ninth grade. Student's school of residence is Rancho Bernardo High School (RBHS).

2. Student is eligible for special education as a pupil with multiple disabilities (MD). Student also meets the eligibility criteria as a pupil with autism and mental retardation. Student currently displays a significant below average cognitive ability and deficits in adaptive behavior. Developmentally Student functions between the age of two and three years. Except for a few utterances and the occasional word, Student is nonverbal. Student communicates through gestures, facial expression, vocalization and actions, and through the use of True Object Based Icons (TOBI). Student is dependent on one-on-one adult assistance to complete all daily routines, including toileting.

3. In 2002, when Student was in second grade, Mother withdrew Student from his District school placement to his home. Student was constantly getting sick at school.

¹ The issue has been modified to conform to the appropriate legal requirements including the requirement that the offer be in the least restrictive environment.

Mother considered Student a “bubble boy” due to immunological deficiencies and at risk from exposure to other pupils on a District campus. She informed District that Student had “leaky gut syndrome” a gastrointestinal condition related to immunological reaction to foods. Mother has elected not to vaccinate Student. He has not received standard vaccinations since 2003.

4. In 2003 District began providing Student with special education instruction and related services in his home. Student’s District funded special education program includes a 15 hour per week home program, one hour of speech and language therapy (LAS) a week (in two 30 minute sessions), 30 minutes per week of adaptive physical education (APE) and 30 minutes per month of occupational therapy (OT) consultation. The 15 hour home program is provided by ACES Inc., a nonpublic agency (ACES NPA), and focuses on behavioral, functional self-help, functional preacademic, prevocational and computer skills. The LAS, OT and APE services are provided by District providers. APE services address gross motor skills. OT consultation addresses Student’s toileting, feeding and drinking skills, fine motor skills, and developing verbal, visual and gestural prompts for communication. LAS services address Student’s communication development and his use of the TOBI, computer and prompts to communicate.

5. Since approximately 2003 Student’s educational placement and related services have been dictated by settlement agreements between District and Mother negotiated after they failed to reach consensus at Student’s annual IEP team meetings about Student’s placement. For several years District has offered Student placement in its critical skills special day class (SDC-critical skills), first at the middle school, and then at RBHS. At or after each IEP team meeting District and Parents agreed to goals and objectives proposed at the IEP team meeting and the goals were implemented in Student’s home program despite Parent’s disagreement regarding District’s offer of placement.

6. On September 21, 2006, and at a continued IEP meeting of October 11,

2006, District conducted a triennial IEP of Student. The assessments performed for this triennial review included formal standardized assessments. This was the last time formal standardized assessments were administered to Student.

7. The 2006 triennial psychoeducational assessment included the Developmental Assessment for Individuals with Severe Disabilities (DASH-2). DASH-2 measures and provides a baseline developmental age for skills in five areas of development, including, social-emotional, language, sensory-motor, activities of daily living, and basic academics. The assessment utilizes observations, interviews, and data review, and draws upon pupils' ability to perform certain tasks with a familiar tutor.

8. Student's development age was measured in all five areas. Student's social emotional developmental age of upwards of 12 months was derived from the best professional judgment of the examiners reviewing standardized age range scales against observations and interviews with Student's mother and the providers working with Student. Student's language developmental age was measured at 3 months. The language scale assesses language development in terms of an individual's ability to employ communicative behaviors and purposeful language. The school psychologist referred to a more in-depth study by the LAS therapist to determine his baseline levels.

9. The scale measuring activities of daily living provided information regarding self-sufficiency and personal independence. Student was measured to have a developmental age of one year in activities of daily living. His developmental age in this skill area was measured using five subscales of activities including feeding, dressing, toileting, home routines, and travel and safety. On the scale measuring basic academics, which includes the two subscales of preacademics and academics, Student's developmental age was measured to be below 27 months.

10. In addition to the DASH-2 other standardized tests were administered in preparation for the 2006 IEP team meeting. The autism rating scales (GARS-2) were

provided to Parent. Parent's report indicated that Student demonstrated autism-like behaviors. In addition the Bruininks-Oseretsky motor proficiency test, the sensory profile, and the functional communication profile were administered.

11. Parent provided District with a letter dated September 21, 2006, from Carl Hillier, OD, an optometrist (Dr. Hillier). The letter indicated that Student had a retinal detachment in his left eye and was susceptible to further injury and blindness if allowed to hit himself near the eyes. Dr. Hillier testified at the hearing as a percipient and expert witness. Student has been Dr. Hillier's patient since the age of four. Student saw Dr. Hillier prior to the 2006 triennial but has not seen him regularly since that time. Dr. Hillier saw him one month before the hearing. Dr. Hillier admitted that based upon accepted medical practices only an ophthalmologist was qualified to diagnose a retinal detachment. He referred Mother to an ophthalmologist for a diagnosis. He never consulted directly with the ophthalmologist before preparing the letter. Dr. Hillier prepared the letter in reliance upon Mother's representation to him that the ophthalmologist diagnosed Student with a retinal detachment. He did not recall whether Mother requested that he write the letter. He did not recall whether Student sustained a retinal tear. To his knowledge, Student received follow-up treatment from a pediatric ophthalmologist.

12. Parent signed a release so that the school nurse could contact Dr. Hillier. When the school nurse, Barbara Hockman (Ms. Hockman), contacted the doctor he informed her that Student did not have a retinal detachment, but a retinal tear.

13. As school nurse, Ms. Hockman is responsible for providing health assessments for Student's IEP team. Her health assessment consists of gathering medical reports and medical information for the IEP team. She also attends IEP team meetings for pupils with medical needs. Additionally, Ms. Hockman develops health plans for pupils and, where applicable, provides direct health services to pupils or trains and directs staff members in the provision of health services to pupils. Health plans are developed with

Parents to provide guidance to those providing instruction and services to the pupil. A health plan may include accommodations for a pupil's nutritional requirements. Ms. Hockman testified at the hearing. She is a qualified and experienced school nurse. She first met Student in 1997 and has been part of his IEP team since that time. She was careful to clearly define the limits of her responsibilities as a member of the IEP team and was candid about the extent of her recollection of events. With the exception of minor details, Ms. Hockman did demonstrate a clear recollection of her efforts to track pupil's health status. She was a credible witness and her testimony was given careful consideration in determining the propriety of District's offer with regard to Student's health needs.

14. Dr. Hillier also testified that he evaluated Student's vision and determined that he had severe nearsightedness or myopia. There was no evidence that his opinion about Student's extreme nearsightedness or myopia was ever communicated to the IEP team. Aside from needing glasses, neither Dr. Hillier, nor any other medical practitioner, advised Ms. Hockman that Student was visually impaired.²

15. Dr. Hillier's testimony, especially where it conflicted with Ms. Hockman and other witnesses, was not as credible and was not given the same weight. Dr. Hillier's willingness to write a letter stating a diagnosis for which he was not qualified to make

² Student claimed that District had notice that Student had a visual impairment because the 2006 IEP indicated that the team considered and rejected using Braille as part of Student's instruction. Although consideration and rejection of Student's use of Braille was included in the "special factors" section of the 2006 IEP next to a question reserved for blind or visually impaired pupils, Ms. Hockman did not have input into this section, and did not know why it was included. The IEP's consideration of Braille was directly responsive to Dr. Hillier's letter which referred to Student's risk of blindness.

without consulting Student's ophthalmologist negatively impacted his credibility. Further, Dr. Hillier's opinion that Student's visual impairment impacted his ability to access his education at the school site was discounted as he never observed Student during his home program or with his service providers. His demeanor during cross-examination further impacted his credibility. He became unduly defensive while being cross-examined about whether he received a call from the school nurse.

16. As she had since 2002, Mother insisted that Student's health would be at risk if he were educated at school. After contacting Student's doctors, Ms. Hockman was unable to substantiate Mother's claims. She was told by one doctor that although he had previously had immunological deficiencies that prevented him from going to school, he concluded from more recent tests that he no longer had deficiencies which would prevent him from attending school. Other medical practitioners she contacted informed her that they could not render an opinion about his health status as they had not examined him in a while.

17. By the time of the 2006 IEP team meeting, Student had been engaging in head hitting and other maladaptive behaviors. Layla Feldhaus (Ms. Feldhaus), Area Director for ACES NPA, developed a detailed behavior support plan (BSP) Student. A BSP has been in place for Student since that time.

18. Ms. Feldhaus testified at the hearing. Her testimony, when measured against District and Mother's conflicting perspectives of District's proposed educational placement, was given the greatest weight. Ms. Feldhaus has been with ACES NPA for 11 years. As Area Director, Ms. Feldhaus is responsible for supervising pupils contractually assigned to ACES NPA by District. Ms. Feldhaus is also Student's home supervisor. She is well qualified to manage and plan Student's functional education and behavior program. With a bachelors of science in experimental psychology, a master of arts in OT, board certification as a behaviorist, and continuing education in behavioral methodologies, she possesses a

wealth of knowledge in the range of behavior interventions and methodologies for special education pupils like Student.

19. Ms. Feldhaus has personally known Student since March 2007. In her supervisory role, she has developed his home program and managed ACES NPA staff assigned to work with him one-on-one in his home. Once a week she visits the home and speaks with Mother (when she is present) and ACES NPA staff, to get an update on Student's progress toward his goals. She also reviews Student's responses to the behavior interventions being administered. In her weekly meeting with the assigned ACES NPA staff she models intervention strategies and provides guidance. Although she is not in the home daily and can not observe every event, through her ongoing communication with staff, other service providers, and Mother, she possesses an in depth understanding of Student's unique needs, progress, and goals and objectives. Both District and Mother rely upon Ms. Feldhaus for the development of Student's core educational program, and his annual goals and objectives. She collaborates with Sue Buhler (Ms. Buhler), his District-assigned case manager, his speech and language pathologist (SLP) and his OT. She prepared his BSP and oversees its implementation. She prepares progress reports for the IEP team. ACES NPA has not been directly involved in the years-long disputes between Mother and District and Ms. Feldhaus. For all these reasons, Ms. Feldhaus was in the best position to provide an objective and credible perspective of District's offer.

20. Mother and District continued to disagree about Student's placement. At the 2006 triennial IEP team meeting, Student was offered the critical skills SDC at the middle school after consideration of a variety of placements from general education, nonpublic schools (NPS), to home instruction. At the October 10, 2007, IEP team meeting District again offered the critical skills SDC at the District's middle school. District's counsel explained the concept of least restrictive environment (LRE). District IEP team members

explained the various home programs available in the District, including home hospital, home school and independent study.

21. When Mother again insisted that Student's health status prevented him from attending school at the October 10, 2007 IEP team meeting, Ms. Hockman referred to the calls she made to Student's doctors in 2006 and explained that the District did not have any current information about Student's health status. The IEP team agreed to exchange the names of doctors to evaluate Student's health status no later than October 31, 2007, and to continue the IEP team meeting to a date after the agreed upon doctor's completion of his or her examination of Student. The IEP team also agreed to explore alternative placements for Student by October 31, 2007. At some point, Mother visited NPS sites but there is no evidence that she ever stated a preference for an NPS or proposed to the IEP team that Student's home placement be changed to an NPS or any other alternative site.

22. In an around late 2007, Mother brought Student to a physician at Long Beach Hospital and brought to his attention her concerns about Student's reactions to certain foods, his apparent build up of mucus in reaction to food and her suspicions that Student still had "leaky gut syndrome." The doctor never performed the required tests to confirm that Student had "leaky gut syndrome" as he suspected, and Mother did not provide District with medical documentation confirming Student's "leaky gut syndrome" condition.

23. The IEP team reconvened on February 13, 2008. An updated evaluation of Student was not performed as planned. Mother never submitted names of physicians to the District as agreed because she felt that the physicians proposed by the District were not qualified to evaluate Student. She represented that she would instead take Student to a new provider of her own choosing to conduct evaluations. Mother also shared her concerns about whether Student will get the assistance he needs in a school setting to clear his throat of an extreme build-up of mucus which occurs.

24. Instead of reviewing a medical evaluation by an agreed-upon physician at the February 2008 IEP team meeting, Mother presented the team with a letter from a doctor of osteopathy. The letter, dated the same day as the meeting, advised “to whom it may concern” that “[b]ecause of patient’s medical condition, current evaluation and therapeutic intervention for immune dysfunctions as well as other related medical issues, [Student] needs to remain at home.” The IEP team discussed the letter and went through the variety of home placements available for qualified special and general education pupils with medical needs, including home hospital instruction. There is no evidence that Mother submitted to District a written authorization from the osteopath or any other medical professional for home hospital instruction.³

25. District IEP team members offered placement in District’s middle school critical skills special day class with one-on-one support, a BSP, related services of APE, OT and, LAS, and a transition plan where ACES NPA would participate in transitioning Student from his home program to the school setting over a period of time.

26. On November 24, 2008, District and Parent entered into an “interim settlement agreement” (Agreement) to resolve a due process hearing request Mother filed with OAH against District. Mother consented to an independent health evaluation of Student based upon an evaluation plan dated July 29, 2008. The parties agreed that the

³ Home hospital instruction is authorized for special needs pupils as part of the continuum of options and to support special needs pupils with medical needs (Ed Code § 3051.4.) Home hospital instruction is also available to all pupils with temporary disabilities, defined as physical, mental or emotional disability incurred while a pupil is in school, after which the pupil can be expected to return to school without special intervention. (Ed. Code § 48206.3(b)(2).) A temporary disability does not include a disability for which a pupil is identified as an individual with exceptional needs. (Ibid.)

District “may assess the degree to which [Student] can be safely exposed to a typical school environment without detriment to his health.” Mother signed her consent to the evaluation plan. Mother and District also reached agreement on a physician, Dr. Seema Aceves, M.D., a specialist in allergies and immunological deficiencies at the Rady Children’s Hospital-San Diego. Mother agreed to present Student to Dr. Aceves for a health assessment, on or before January 6, 2009. In a separate consent form, Mother authorized Dr. Aceves to disclose information to the District.

27. The parties also agreed that an IEP team meeting would be held on or before February 24, 2009, to review the results of the assessment. The February 2009 IEP would become the new annual and triennial IEP review date for Student. Student’s triennial review was advanced by seven months from September 2009 to February 2009. No specific triennial assessments were prescribed by the Agreement.

28. On December 2, 2008, in anticipation of the February 2009 triennial review required by the Agreement, Ms. Buhler, prepared a triennial assessment plan for Student. Renee Tompkins (Ms. Tompkins), Student’s SLP, delivered the assessment plan to Mother.

29. Ms. Buhler collaborated with Martha Ingham, Ph.D. (Dr. Ingham), District’s certified school psychologist in the development of the triennial assessment plan.⁴ The plan focused on Student’s suspected disability of MD, autism and MR. The assessment plan covered academic achievement, processing and motor development, speech and language, intellectual development, social emotional/adaptive behavioral and a health history and physical assessment update. Most of Student’s triennial assessment consisted of observations by the various providers, school nurse, or case manager. A limited number

⁴ The terms “assessment” and “evaluation” are synonyms. Federal statutes and regulations generally use the term evaluation. California statutes and regulations generally use the term assessment. This decision will use the term “assessment.”

of standardized tests were included in the 2009 triennial assessment plan: the DASH-2; the Childhood Autism Rating Scale (AUT-R); the Adaptive Behavior Assessment Scales (ABAS); the functional communications profile, the Bruininks-Oseretsky Test of Motor Proficiency, the functional skills assessment and sensory profile.

30. Ms. Buhler has been Student's case manager since the ninth grade and as of the 2009-2010 school year was beginning her second year in that capacity. She is one of two teachers in SDC-critical skills at RBHS and is knowledgeable about the critical skills program. Ms. Buhler has been teaching SDC-critical skills at RBHS for eight years. She has 13 years of classroom experience and 19 years of experience as an APE specialist. Ms. Buhler possesses all necessary qualifications to teach severely handicapped special education pupils. She has not provided direct services to Student because Student remains at home. Ms. Buhler did have an opportunity to meet and observe Student prior to the triennial IEP. She first met Student in May 2008 to administer the annual state mandated test, the California Alternative Performance Assessment (CAPA). Ms. Buhler observed Student and his service providers on three different occasions at his home. October 31, 2008, December 19, 2008, and January 20, 2009. In one observation, she observed Student's lessons in toileting with ACES; and in other observation she observed his lessons with Ms. Tompkins using the TOBI, on his computer and in his swing. She also was able to observe Student's mobility and behaviors. He alternated his feet walking up stairs, but not downstairs, and could put his shirt on. He was reluctant to go back to work on his lessons after a break. In total, Ms. Buhler observed Student during his home instruction for 120 minutes prior to the February 2009 IEP team meeting.

31. Ms. Buhler is responsible for participating in the IEP team meetings and coordinating the necessary paperwork for Student's IEP and assessment, gathering the IEP team for meetings, conducting observations as part of Student's assessment, preparing IEP goals for Student, and preparing the draft IEP. Ms. Buhler has participated in hundreds of

IEP team meetings during her tenure at RBHS. Ms. Buhler testified at the hearing. This was her first time testifying in a due process hearing and although she was uncomfortable as a witness, she tried hard to answer to the best of her recollection. As indicated below, certain of her responses to cross-examination questions were troubling, her testimony about the critical skills class, when reviewed together with that of other witnesses and documentary evidence, was uncontradicted and proved to be reliable and credible.

32. On December 18, 2008, the OT prepared his assessment report based upon five hours of observations within a two month period. He addressed functional self-help skills and sensory processing/regulation, and reported on Student's present performance levels in each area. He noted his (unsuccessful) work with ACES NPA to introduce calming and replacement strategies for Student's extreme head hitting.

33. Student's OT services were provided on a consultation basis, meaning that the OT worked with ACES NPA and related service providers to incorporate OT within their instruction. Student's OT recommended a continuation of the same level of consultation service with an emphasis on "family follow through" of therapist recommended activities or adaptations.

34. The same day the OT prepared his assessment report, he sent the sensory profile home for Mother to complete. The OT's report was prepared the last day of his employment with the District and the last day before District's winter break. Mother did not submit the sensory profile to District.

35. On January 6, 2009, in compliance with the Agreement, Mother brought Student to Rady Children's Hospital-San Diego for his examination with Dr. Aceves. Dr. Aceves testified at the hearing. She possessed all the necessary qualifications to render an opinion regarding Student's possible allergies and related immunological deficiencies. Dr. Aceves holds a Ph.D. in biology in addition to an M.D. and she completed a post-residency fellowship in her area of specialty. Both parties had an opportunity to review her

qualifications before she was retained and agreed to retain her as an independent assessor. Both parties informed Dr. Aceves of their concerns about Student's educational placement. Mother shared that she was worried that Student would get sick if he returned to school and her preference for Student's home placement. District asked Dr. Aceves to render an opinion as to whether Student could attend school. Dr. Aceves was not pressured by either party to conform her medical opinion to their preferences, and she did not. During her testimony, Dr. Aceves did not stray from her area of expertise. Dr. Aceves relied upon Mother for Student's medical history. Based upon her retention as an agreed upon independent examiner, her reliance upon Mother for Student's health history, and her apparent objectivity at the hearing, her testimony was given great weight in determining whether District's IEP was appropriate in view of Student's medical needs.

36. Mother's concerns regarding Student were memorialized in Dr. Aceves report. Mother reported to Dr. Aceves that Student had a long history of problems swallowing certain foods. She also noted that Student occasionally had gagging and choking episodes, especially with wheat, dairy or egg products. She informed Dr. Aceves that she rotates Student's diet to prevent him from developing allergies. In addition to her concerns about his food, Mother indicated that she was concerned that Student suffers from airborne allergies. Mother also disclosed that two years prior to this exam an immunologist had diagnosed Student with an immunological deficiency, but that a repeat workup showed that these values had normalized. However, she followed the advice she received to home school Student to control his environment based upon his initial labs. Mother also informed Dr. Aceves that multiple physicians have examined Student to ascertain whether Student had ear infections which were causing him to swat at his ears and found that he did not. Student never had pneumonia or sinusitis although he does get viruses.

37. From her examination, Dr. Aceves concluded that Student probably suffered from airborne allergies in addition to food allergies. Student's lungs were clear but he suffered from post-nasal congestion. She also opined that the gagging and choking reported by Mother may not be secondary to a true food allergy, but could have other causes for which a gastroenterologist should be consulted. For example, Student may not be allergic but could be reacting to the texture of food.

38. Dr. Aceves tested Student for airborne and food allergies, and immune deficiencies. The lab tests confirmed Dr. Aceves' clinical impressions that Student suffered from allergies. Student's allergy tests revealed that he had certain airborne and food allergies. His x-rays revealed no evidence of sinusitis. Nothing in the lab tests or her examination indicated that he required extraordinary medical intervention. Dr. Aceves explained that when persons are sensitive to foods or airborne irritants like dust mites, grass, or cat hair, their body develops antibodies which cause allergic reactions. However, only certain allergic persons have clinically significant reactions to irritants. In contrast to Student's allergic response to irritants, a person with a clinical reaction could suffer from anaphylaxis, an immediate and deadly reaction to irritants. Student may have been sensitive as a result of airborne and food allergies but, according to Dr. Aceves, he did not have a clinical reaction to the consumption of food. Reviewing the immunological tests, Dr. Aceves also concluded that Student did not suffer from any immunological deficiencies.

39. Mother requested that Dr. Aceves prepare specific recommendations for Student. Dr. Aceves sent a letter to Mother. Dr. Aceves also provided Mother with her clinical report of January 6, 2009.

40. On January 14, 2009, Ms. Buhler notified mother that the IEP team meeting would be held on February 13, 2009 to develop or change an IEP, if appropriate, and conduct the triennial review. The notice indicated that all required members of the IEP team would be in attendance. The notice specifically referred to the following educators

and providers: District administrators, District general and special education teachers, the District nurse, all current special education and related service providers. Mother acknowledged her attendance on February 3, 2009.

41. On January 16, 2009, District contacted Dr. Aceves directly in writing. District asked for her "diagnostic impressions and assessment of the degree to which [Student] can be safely exposed to a typical school environment without detriment to his health." Dr. Aceves informed District that Student had significant grass allergies and allergies to other pollens, and reported that his immune levels have returned to normal. She noted that Student did not have sinusitis, but as a child with allergies was at a higher risk for sinusitis and ear infections.

42. Standardized tests were not administered before the February-March IEP 2009 IEP team meeting. On direct examination, Ms. Buhler testified that Mother never signed the assessment plan. Ms. Buhler was responsible for coordinating the assessments for the IEP team. Her usual practice was to notify the assessors upon receipt of the signed assessment plan. The assessors also kept in regular contact with her. The assessors were not responsible for securing Mother's consent. The assessors relied upon Ms. Buhler to secure Mother's consent and were confident from their historical dealings with her that they could rely upon her to notify them once Mother executed the assessment plan. Given that the bulk of the assessment plan consisted of record review and direct observations, for which Mother's consent was not required, the assessors were directed to proceed with their assessments without administering the small number standardized assessments identified in the assessment.

43. At the hearing, Student's counsel produced an assessment plan that Mother signed and dated January 17, 2009. An assessment plan with or without Mother's signature was not exchanged prior to the hearing and was not included District's records. Before being confronted with the signed assessment plan, Ms. Buhler testified that formal

assessments were not administered because Mother failed to execute the assessment plan. On cross-examination Ms. Buhler was questioned intensively about her assertion that Mother did not sign an assessment plan. After Ms. Buhler was confronted with the assessment plan and asked if she received it, she responded that she had seen the plan before the hearing. With the plan before her during cross-examination she appeared confused when the questions posed about the document assumed that she received the document on January 17, 2009. In fact, Ms. Buhler was never asked – on cross-examination or on re-direct - when she received the document. At one point in response to a different question about the assessment plan, she looked at the signature page and date of the signature and prefaced her remark with a reference to her receipt of the document on January 17, 2009. By the time that question was answered, however, it was clear from her demeanor and her close scrutiny of the signature page, that she was just reading the date from the document and was not responding based upon her recollection of events.

44. While Ms. Buhler's confused testimony about Mother's consent to the assessment plan negatively impacted her credibility on this point, Mother's testimony on this issue was also not reliable or credible. The plan was dated December 2, 2008. Ms. Tompkins personally delivered the plan to Mother. Yet Mother did not sign the plan for six weeks. Her reasoning for the delay was not consistent with the priority she otherwise gave to Student in general, and his medical assessment, in particular. At one point she stated that she was distracted by the holidays; at another point in her testimony she stated that she may have signed it in December. Finally, Mother insisted that she personally gave Ms. Buhler the signed evaluation form on January 20, 2009, when Ms. Buhler came to her home to observe Student. She remembered that date because it was her birthday. Mother's consent to the assessment plan was never discussed at the IEP team meeting. When asked during cross-examination why she didn't mention to the IEP team that she

consented to the assessment plan, Mother responded: "Why would I?" Given Mother's unsteady testimony about the triennial assessment plan and the apparent low priority she accorded to it, her recollection was not reliable or credible. Consequently, there is no reliable evidence as to when Ms. Buhler received notice of Mother's consent.

45. John Downing (Mr. Downing), Student's APE specialist, prepared an assessment report on January 28, 2009 based upon his direct observations of Student and review of previous records. Mr. Downing administered the 2006 triennial APE assessment of Student which included the Bruininks-Oseretsky motor proficiency test. As part of his 2009 triennial assessment, he reviewed previous reports but he did not administer standardized assessments. In his assessment report, Mr. Downing provided detailed observations of Student during his APE routine, his present levels and his goals. Student met his previous APE goals. Student still needed to work on upper extremity strength, core strength/balance, and eye-hand coordination. Student required work on mobility, stretching and simple ball tricks. Mr. Downing recommended three new APE gross motor goals.

46. As Student's APE specialist since March 2006, Mr. Downing developed a close and positive relationship with Student. He enjoyed working with Student, a "wonderful boy," who was always happy and engaged during APE. Student's daily contact with other individuals was largely limited to his service providers, caretakers and family. Student had little exposure to same-aged peers. From his long experience with Student, Mr. Downing believed that he would enjoy being with other pupils as he did recognize and enjoy seeing familiar people. Mr. Downing has developed and implemented Student's APE goals and objectives since 2006. As an APE specialist with the District for seven years, he possesses all the required qualifications and licenses to administer assessments, provide direct services and consultation, and develop IEP goals and objectives. It was clear from his testimony and his report that he was extremely familiar with Student's strengths and

deficits and was able to obtain accurate information about Student from his observations alone. Given his close relationship with Student, his professional qualifications, his clear and unequivocal responses to questions at the hearing, Mr. Downing's testimony was given great weight in determining whether District's offer was appropriate.

47. On February 5, 2009, Ms. Feldhaus prepared a behavioral and educational report to review Student's current educational and behavioral program, his performance and progress. Her report relied upon her review of the data book developed by ACES NPA, her interviews with his home tutors, and her observations of Student in his home program. Ms. Feldhaus summarized Student's conduct in his current program. For communication, Student continued to use the TOBI visual schedule and was developing his skills in choosing an item from a field of TOBIs. He was advancing his skills in using appropriate signals, like clapping or knocking, to communicate that he needs help, attention, to access a preferred item, to make a request for more, or to change an activity.

48. Ms. Feldhaus's report clearly identified Student's preferences. He responded well to familiar stimuli and individuals. Student preferred working on the computer which was outfitted with a touch screen, music and toys with a musical component, items he could manipulate which provided tactile, visual and auditory stimulation, and taking breaks on a suspended swing chair. He enjoyed hearing familiar individuals sing, and going on car rides with his family.

49. Student faced continued and ongoing behavioral challenges according to Ms. Feldhaus's report. He exhibited serious maladaptive behaviors in the form of hitting his head or chest with his open hand and biting his wrist. His head hitting behaviors continued to escalate after August 2008. His maladaptive behaviors occurred mostly when Student was frustrated. The source of his frustration was varied and included times when he was asked to complete a non-preferred task or transition from a non-preferred activity. The genesis of his frustration also included times where: he unsuccessfully attempted to

communicate his needs; changes were made to his routine; he was introduced to a new service provider; or environmental noises were present, such as the blender, vacuum cleaner, lawn mower or construction. Ms. Feldhaus noted that Student also engaged in head hitting without any noted stimuli. In addition to his self-injurious behaviors, Ms. Feldhaus observed that Student frequently engaged in stereotypical behavior such as hand wringing and putting his fingers in his mouth. To protect Student, Mother outfitted Student with a soft helmet, wrist bands and weights.

50. Ms. Feldhaus reported on 14 goals in place for Student. These goals focused on Student's behavior, adaptive and functional life skills and communication needs. Ms. Feldhaus reported that six goals had been met: tapping a communication device to indicate that he wants a break; participating in putting his arms through arm holes and pulling down his shirt with physical prompting; carrying an item for 10 feet with elbow prompting; scoop a serving of preferred food with elbow prompting using adaptive feeding equipment; using an adaptive switch to turn on and off a music player; using verbal and gestural cues to initiate three activities of daily living such as bending down to reach for a motivating object, or pushing the door open.

51. As of Ms. Feldhaus's February 3, 2009 report, Student made partial progress on seven goals. He increased but still did not fully tolerate tooth brushing with adult assistance. He could not be redirected fully to put his hands in his lap for three seconds without putting them back in his mouth without a wrist prompt. He made progress in participating in four different chores (trash, pick up toys, wipe table, sweep with push broom) by picking up toys independently on some occasions or with wrist or hand-over-hand prompting. He could push down his pants for toileting, but still required hand-over-hand assistance to pull up his pants. He could use and check his TOBI schedule and transition to the correct area given gestural prompts on one to three transitions a day, but not five times daily as planned. He further developed his fine motor activities and skills by

working on his goal of completing three purposeful fine motor activities and skills that require the use of two hands cooperatively. He independently pulled apart pop beads and a pull tube, but he could not unscrew the lid of a water bottle without hand over hand prompting, or unzip his backpack without wrist prompting. He made progress responding to one-step commands within 30 seconds, such as, pick up, stop, go get, by occasionally picking up items independently with prompts, but required more than light physical prompting to stop and go-get commands.

52. Of the 14 goals, Student made minimal progress on one goal, drinking from a water bottle. He did not want to drink from a water bottle with an adaptive strap during his teaching sessions.

53. Ms. Tompkins, Student's SLP, prepared a LAS progress report on February 9, 2009. Ms. Tompkins had been working with Student and observing him for approximately four months. She provided him with twice weekly direct services for thirty minutes a session as part of his home program. She is a qualified SLP. Her report consisted of observations of Student's present levels of performance and progress on his communication goals.

54. Ms. Tompkins worked with Student to develop functional communication skills. Student was mostly nonverbal. He responded with a few utterances, but due to his fine motor challenges, which impacted his ability to imitate consonant sounds, Ms. Tompkins worked with Student to develop his ability to communicate nonverbally. She worked with him to use clapping and knocking to make his needs known. She also worked with him utilizing a choice board with a TOBI visual schedule so that he could choose an item or activity from a narrow field of choices. Tompkins utilized verbal prompts to remind Student to indicate his choices. Ms. Tompkins also provided Student with hand over hand assistance to help Student use simple sign language. Tompkins developed Student's goals

and objectives in the area of communication with input from the Student's behaviorist, Ms. Feldhaus.

55. Ms. Tompkins did not receive notice that Mother authorized the administration of the functional communication profile. Ms. Tompkins testified that the functional communication profile, which consisted of observations and parent interviews, would not have added information that she did not already know from her observations of Student. She was satisfied that the goals and objectives developed for him were based upon an accurate assessment of Student's abilities at that time. In her work with Student in his home, Ms. Tompkins had the opportunity to closely observe him. She spoke regularly with Mother about Student. She knew of Mother's desire for Student to make progress in communicating his needs. She provided Mother her speech and language progress report prior to the IEP team meeting and kept her informed about Student's goals. Ms. Tompkins was clear about what she was in a position to know and observe, and what she was not, and had a clear recollection of her observations. Ms. Tompkins spoke positively of Student's progress on each previous goal. In response to questions from Student's counsel about Student's distractibility, Ms. Tompkins conceded that she didn't know how Student would react in a school setting, but she had worked in the SDC-critical skills class and never observed an unusually high noise level. She also noted that the home environment had its own distractions, such as lawn mowers and door bells that did not consistently affect Student's attention. Student could become inattentive and engage in maladaptive behaviors without any stimulus. Like Mr. Downing, Ms. Tompkins maintained that Student's would benefit from placement at the SDC-critical skills. Student would work on his communication skills in a setting where he would have an incentive to communicate with peers. Student often smiled as a greeting to her and appeared to enjoy seeing familiar people. Ms. Tompkins was a credible witness and her testimony was considered

carefully in determining whether District's offer was appropriate given Student's unique communication needs and challenges.

56. Dr. Ingham prepared District's psychological report for the triennial review on February 9, 2009. She had not received notice that Parent had authorized the administration of standardized tests prior to preparing her report. Ms. Ingham testified that she was in continual contact with Ms. Buhler and was never informed that Mother signed the assessment plan. She expressed surprise when it was suggested that Mother's authorization was withheld from her. Her psychological report was limited to her review of Student's records and Ms. Buhler's observations of Student on two occasions. Ms. Ingram did not provide direct services to Student or observe him.

57. Dr. Ingham summarized Student's health, developmental, and educational history, and his previous assessments. She reviewed his IEPs. Her report noted that his disability affected his involvement and progress in general education due to his significant below average cognitive ability and deficits in adaptive behaviors that adversely affected his educational performance. She noted his previous diagnoses by a variety of providers. She tracked his educational history from early childhood through 2009. She distilled the results of previous developmental and adaptive behavior assessments from May 1996 through 2006, noting that all the assessments reached the unitary conclusion that Student was cognitively and developmentally delayed. She confirmed that Parent completed autism rating scales (GARS) in 2004 and in 2006 which indicated, respectively, that Student was above average for likelihood of autism or very likely for autism.

58. Dr. Ingram has significant educational and professional qualifications. She has been a school psychologist with District since 1997 and in that capacity has conducted assessments, attended IEP team meetings and provided direct counseling and intervention services to pupils. She received special training or conducted training seminars in a wide variety of psychological and behavior issues, including violence and risk assessment,

autism spectrum disorders and interventions. Ms. Ingram also maintains a private practice. In addition to her clinical functions she is an adjunct professor. In that role she has guided doctoral students through the factual and theoretical foundations of cognitive assessments, pediatric psychology and developmental psychotherapy. Ms. Ingham responded to questions patiently and carefully. She remained unflustered and objective despite counsel for Student's unexpected interruption during her recitation of her professional qualifications. She had not personally observed Student or administered standardized assessments with him, so her opinion about Student's unique needs was limited. However, she demonstrated her expertise and her experience with addressing pupil's behavioral needs in the school environment. She participated in the February-March 2009 IEP. She was familiar with SDC-critical skills at RBHS. Ms. Ingham testified she has observed a good deal of growth and progress, what she referred to as "incidental learning," by pupils in their first year of transition to a more varied school environment from their home programs. She likened going to school to "putting your work hat on" where pupils learn to adjust their behaviors away from their home setting. Her testimony regarding placement and least restrictive environment was given considerable weight in determining whether District's met its burden of proof that its placement offer of RBHS constituted FAPE.

59. On February 10, 2009, Dr. Aceves informed the District that "Student is at no greater risk for infection than any other person with allergies according to his current testing."

60. Between February 10, 2009 and the IEP team meeting on February 13, 2009, District IEP team members met outside the presence of Mother to discuss District's offer of placement and services. District members decided to offer the critical skills SDC at RBHS⁵.

⁵On cross-examination, Student's counsel asked Ms. Buhler if the District met before the IEP team meeting to predetermine its offer. Ms. Buhler responded that it did, but

Prior to the February 13, 2009 IEP team meeting, Ms. Buhler also drafted goals and objectives with Ms. Feldhaus, with input from Ms. Tompkins and Mr. Downing. It was District's practice to meet before an IEP team meeting to discuss its offer of placement and services. It was also customary for the District to prepare a draft IEP document in advance of the meeting, as it had in this instance, which included basic information about the Student, his present levels of performance and goals and objectives. By design, the computerized IEP document does not permit District members to include an offer of placement in any IEP draft prepared outside the IEP team meeting. District's draft IEP did not include an offer of placement.

61. On February 13, 2009 Student's IEP team met to discuss the results of Dr. Aceves assessment and to conduct the annual and triennial review as required by the Agreement. The meeting began on February 13, 2009, but could not be completed at that time, and was continued and completed on March 4, 2009. Each meeting was scheduled for two hours. All required members of the IEP team were present. The following individuals attended the February-March 2009 IEP: Mother, Ms. Buhler, Ms. Shieh, District's Director of Special Education, Ms. Theresa Kurtz (Ms. Kurtz), Director of Special Education, Special Education Local Plan Area (SELPA), Peggy Brose, general education-physical education teacher, Ms. Hockman, Ms. Tompkins, Mr. Downing, Ms. Feldhaus accompanied by another individual from ACES NPA, Ms. Ingham, and OTs Terry Breslin (February 23) and Betsey Slavik (March 4).

qualified her response by explaining that it was typical for District IEP team members to meet beforehand to develop an offer. Ms. Buhler is not a lawyer, and her clarification of the term "predetermine" was consistent with her understanding of what occurred at the meeting.

63. The IEP team reviewed and discussed the previously described assessments and progress reports in the following order: Ms. Feldhaus's behavioral and educational report, Ms. Tompkins's speech and language progress report, John Downing's APE assessment report, Ms. Ingham's confidential psychological report, including Ms. Buhler's observations, Dr. Aceves's report, presented with Ms. Hockman's review of Student's health history, and the OT report.

64. Ms. Shieh asked Student's education and related service providers whether they required information from standardized assessments to complete their triennial review. Ms. Feldhaus, Ms. Tompkins and Ms. Ingham expressed their opinion that formal standardized assessments would not add to their or the IEP team's understanding of Student's present levels performance or contribute to the development of new goals and objectives or programming recommendations. Although the standardized test measures, such as DASH-2, would have provided a measure of Student's current developmental age and status, in several domains, the assessors and IEP team members were satisfied that they understood Student very well, understood his present performance level and could prepare appropriate goals and objectives. Witnesses consistently estimated Student's developmental age at two to three years old. Although Ms. Tompkins stated that she relied upon standardized tests to determine a pupil's developmental age, based upon her direct observation of Student as an SLP, she estimated that his LAS development was in the two years old range. Mother's experts also estimated Student's developmental age to be two to three years old.

65. Mother agreed that standardized assessments were unnecessary. After Ms. Feldhaus's presentation Mother agreed that standardized assessments were not needed. When asked a second time after Ms. Tompkins's presentation, Mother remarked that she agreed that Student's needs were well known by Student's providers and that formal standardized assessments were unnecessary.

66. Each service provider described Student's present level of performance and identified his progress on his goals and objectives.

67. Student's health and medical status was reviewed. Dr. Aceves had provided Mother, not District, with her report prior to the IEP team meeting. At Mother's request she also prepared a letter with recommendations which she also provided only to Mother. Mother provided Dr. Aceves's report to District in the meeting, and read portions of the letter Dr. Aceves prepared, but did not provide a copy of the letter to the IEP team. Ms. Hockman provided input about Student's health history and reviewed Dr. Aceves's report with the IEP team.

68. Mother agreed that Student no longer had an immune deficiency, but questioned Dr. Aceves's conclusion that Student was at no greater risk of infection than other pupils with allergies. Mother questioned Dr. Aceves's representation to the District. She maintained that Dr. Aceves in her separate and undisclosed letter to her suggested that Student was at risk due to his food allergies. Mother's representations to the IEP team were contradicted by Dr. Aceves's testimony at the hearing, set forth above.

69. The IEP team did not discuss, and Mother did not raise, any visual challenges Student might have which would require modification to his IEP goals and objectives or affect his placement decisions. The IEP team knew that Student removed his eyeglasses; however, they did not have any information that Student had visual problems which interfered with his access to his instruction, especially his one-on-one instruction. When Ms. Hockman had previously observed Student he did not appear to be tripping or holding on to walls. Ms. Buhler observed Student walking up the stairs unassisted. Ms. Tompkins observed Student during his preferred computer-based activity, and did not notice that he needed to sit unusually close to the screen to view it.

70. The IEP team reviewed proposed goals and objectives to address the following areas the IEP team agreed were Student's needs: gross motor skills; daily living

skills; functional academics; self advocacy; vocational skills; behavior/social emotional development; fine motor skills; communication development; and preacademic skills. Mother participated in the discussion of goals at both IEP team meetings. The IEP team discussed her concerns and developed additional goals to address her concerns. All the proposed goals were appropriate considering Student's present levels of performance. The goals as drafted could be implemented at a variety of educational placements. Mother agreed with the goals presented at the February and March IEP team meeting.

71. The IEP team reviewed recommendations for Student's continued LAS, APE and OT services. Mother did not express disagreement with the level of LAS and APE services proposed.

72. Mother did express disagreement with the OT's recommendation of one hour per month of consultation services only. Mother requested one hour per month of direct service per month instead to address Student's sensory needs.

73. The IEP team addressed Mother's request for direct OT services and the basis for District's offer of the consultation model. Ms. Slavik, co-owner and director of Kids Therapy, attended the IEP at District's request to review the previous OT's recommendations. Kids Therapy provides OT services for District. Ms. Slavik testified at the hearing as a percipient witness and District expert. Ms. Slavik possessed all the necessary qualifications and licenses to provide direct and consultative OT services. She had attended well over 100 IEPs, including IEPs concerning initial and triennial assessments. She responded to questions simply, clearly and without hesitation. Given her credentials, experience and demeanor, her testimony was carefully considered in determining whether District's offer was appropriate in view of Student's need for OT services.

74. Ms. Slavik reviewed Student's OT services with his OT service provider and relayed his opinion that services that focus on consultation with all Student's service

providers best supported Student. Student best learned through constant repetition of OT-related skills throughout his day. The IEP team recommended that the one hour of consultation per month continue with an additional four hours per year to address new concerns of Mother or the OT provider, or a change in OT providers.

75. Ms. Feldhaus revised Student's existing BSP to address Student's head hitting in particular. The BSP was based upon information obtained from data collected during the three hour daily home-based program, direct observation, and staff and parent interviews. The proposed BSP was consistent with the standards utilized in applied behavior analysis (ABA) and addressed Student's maladaptive and self-injurious behavior. Ms. Feldhaus's plan was developed as a uniform strategy of behavior interventions to be administered by everyone – educators, service providers, or family – in their interactions with Student. Key to the BSP were strategies to: (1) protect Student from his self-injurious habit of hitting his head (e.g., verbal command of no followed by immediately placing his helmet on his head, teaching him to tap on his leg instead), and (2) replace his maladaptive behaviors by teaching him other ways of communicating his needs (e.g., clapping or knocking to get listener's attention, tapping on leg instead of head, use of TOBI to make choices).

76. The BSP provided for ongoing evaluation and communication. Progress would be reported on regular intervals. Daily data sheets would be completed on Student's behavior; and communication would be maintained with Mother on a monthly and as needed basis through written notes, review of data and phone calls.

77. Mother voiced no objection to Ms. Feldhaus's proposed BSP. Mother's input was apparent in the BSP. Mother provided protective gear which was used during Student's instruction and was incorporated in the BSP. She provided a protective helmet for Student. The helmet was kept in place during Student's entire three hour instruction. She also provided gloves to Student to wear to prevent his biting behavior and wrist

weights to provide sensory input, slow down the time it takes for Student to hit his head, and to increase the response time for his service providers and family to intervene when he engages in head hitting.

78. At the February-March 2009 IEP District offered the following related services: APE services for 32, 30 minute sessions a year; OT consultation, one session per month for sixty minutes; additional OT consultation for four hours over the IEP year; and LAS for 60 sessions, 30 minutes a session.

79. The IEP team offered Student placement in SDC-critical skills at RBHS, a comprehensive general education campus. The IEP team discussed Student's placement on a general education campus, SDC-critical skills at RBHS and home placement. As Ms. Ingham indicated in her assessment, a general education placement would not meet Student's needs given his cognitive ability and maladaptive behaviors. At the February 13, 2009, IEP team meeting, the general education/physical education (PE) teacher provided information about mainstreaming opportunities within the PE program and her experiences with mainstreaming special needs pupils into PE. Under special factors in the IEP, it was noted that Student would participate in general education electives, school wide assemblies and grade level activities. Student would not participate in a general education class, but in the SDC-critical skills, he would have a program comprised of "functional academics (daily living, self-advocacy, vocational), OT, speech and APE." In the spare where the IEP team explains why Student would not participate in general education it stated that "[Student] requires one-to-one specialized instruction to make progress on his IEP goals."

80. District administrators, Ms. Kurtz and Ms. Shieh, testified that an NPS was discussed. Other witnesses, including Ms. Ingham and Ms. Feldhaus, don't recall a discussion of NPS. However, one District administrator, Ms. Kurtz was responsible for note taking and failed to include that discussion, and neither Ms. Shieh nor Ms. Kurtz

remembered any details of the discussion. Ms. Buhler was responsible for filling in the form at the front of the IEP indicating which options were discussed. She did not check the box for NPS. In view of Ms. Shieh and Ms. Kurtz' knowledge of the IEP process, their failure to document their discussion of another placement option, their vague proclamation that NPS placement was discussed was disregarded as not credible.

81. In addition to placement in SDC-critical skills at RBHS, District offered Student a full-time one-on-one special circumstances instructional assistance support (SCIA), trained by ACES NPA, a BSP and supplemental aids and equipment. To support Student in the SDC-critical skills program, District planned to provide Student with the following supplies and equipment: a TOBI visual schedule, access to a computer with touch screen, a CD player for his music, switching devices; classroom partitions or individual work area; kitchen supplies, including a microwave, blender, and refrigerator; supervised hand washing; quiet area for eating; adaptive feeding equipment (strap for water bottle/spoon), Big Mac switch; push broom; musical toys; high interest software; and splash guard.

82. The SDC-critical skills program is comprised of two classrooms, with a shared kitchen, bathroom and break area between the classrooms, which can also be used for individual instruction. Nineteen pupils rotate between two classrooms. In addition to the one-on-one aides assigned to many pupils, each special education teacher is assisted by two classroom aides. Ms. Buhler teaches five class periods for pupils who can participate in group instruction. Depending on their IEP, pupils under the direction of the teacher would receive one-on-one instruction. Partitions would be available for Student if he needed fewer visual or auditory distractions. Student would work one-on-one on his goals and objectives, just as he had with ACES NPA, and his other service providers. He would participate in general education activities with nondisabled peers when appropriate.

83. Unlike Student's current three hour core home program, the SDC-critical skills program is a full-day seven hour program, including lunches and breaks, and

excluding transportation. Ms. Feldhaus was of the opinion that Student could tolerate the full day program and would benefit from it. She conceded that he might protest and use maladaptive behaviors, such as head banging, but on balance she concluded that it was necessary for him to transition from his home program to the school setting. Ms. Feldhaus maintained that Student's behaviors would more appropriately be addressed in a setting away from his 24 hour caregiver. At the time of the IEP, ACES NPA had been addressing his same maladaptive behaviors over the course of several years. Ms. Feldhaus found the challenges of implementing his BSP and redirecting his behaviors were compounded by his home environment, particularly the availability of his 24/7 caregiver. While helpful when called upon to assist with Student's maladaptive behaviors, or the unsanitary aspects of toileting, sensing Student's discomfort and upset, the primary caregiver habitually intervened without being requested to do so by his ACES NPA behaviorist. Ms. Feldhaus was of the opinion that Student's maladaptive behaviors were reinforced and encouraged by the constant presence of his 24/7 caregiver because Student knew that she would respond and comfort him when he became agitated, and escalated his behaviors accordingly.

84. With the SDC-critical skills program District offered Student a twelve week transition to transfer Student's home program wholesale to the school site. Student would be introduced to his new educators, service providers and school-based one-on-one aide with the assistance of his familiar behaviorists from ACES NPA. ACES NPA would be responsible for training Student's one-on-one aide to work with Student. During the first three weeks of the transition period, Student's school day would be reduced to a three hour day. He would still receive instruction at home from ACES NPA as well as LAS, APE and OT, and then would be accompanied by ACES NPA to school on the school bus and at school. During weeks four through six of the transition period, Student would be instructed by ACES NPA and accompanied by ACES NPA to school, but he would spend

more time at school. LAS and APE would continue at home, but OT consultation would be transferred to school. During weeks seven through nine of the transition period, Student's instruction would occur exclusively at school with his one-on-one aide trained by ACES NPA, and ACES NPA would no longer be involved. Student would continue to receive LAS and APE at home. During weeks 10 through 12 of the transition period, all of Student's instruction and services would be transferred to SDC-critical skills and Student would attend school for the full day. Ms. Feldhaus endorsed the transition plan.

85. The IEP document did not include a health plan. Ms. Hockman would be responsible for preparing Student's health plan. It is her practice to prepare the plan with pupils' parents once there is an agreed upon placement. At the IEP team meeting Mother indicated that she did not agree with District's placement offer and would not place Student at SDC-critical skills at RBHS. For this reason, Ms. Hockman did not prepare a health plan for Student.

86. Mother made her preference for Student's placement at home clear, as she had done in previous IEPs. Mother insisted that Student's allergies presented problems for Student and that Dr. Aceves report did not provide a complete picture of Student's condition. She expressed her concern about his safety at school. In defense of her preference for home instruction, she asked Ms. Shieh whether the District would guarantee Student's safety at RBHS. Ms. Shieh candidly responded that accidents can happen District could never make such a guarantee.

87. At the hearing Mother repeated her position that home-based instruction was the only appropriate placement for Student. Mother emphasized that she had no problem with RBHS. She had two neurotypical children that successfully completed RBHS and she had participated actively as a parent in school activities. According to Mother, Student is very unique and can not be compared to other special needs children with MD and autism that can be accommodated on a comprehensive school campus. Contrary to

Dr. Aceves's opinion, Mother insisted that District's placement offer could not accommodate Student's "allergic reaction" to certain foods, including gluten, butter, wheat, dairy, and eggs. Mother insisted that Student continued to have "leaky gut syndrome" although she admitted that she has not yet subjected him to the invasive procedure required to confirm this diagnosis. Mother's fears for Student were compounded by his inability to express himself. She maintained that Student could only be safe if he was accompanied at all times by his caregiver or her, and she would only consider having him instructed in District's placement if they were at his side throughout the day. To illustrate Student's reliance upon his caregiver or Mother to be safe due to his reaction to foods, Mother described in graphic detail an incident where Student, accompanied by the caregiver and her, suddenly grabbed the caregiver's croissant. According to Mother, within "seconds" Student had an "allergic reaction" and began choking. She had to put two fingers down his throat to "open his airwaves" at which time she also pulled out ropes of mucus.

88. At the hearing Mother raised other concerns that she did not mention at the IEP team meeting, but which she maintained the IEP team ignored. In addition to her concerns about Student's food-related safety, she also insisted that District's proposed program could not incorporate the structure and environment at home which was necessary for Student to access his education and to progress. Mother maintained that Student progressed in his home environment because it was adapted to meet his severe behavioral and functional needs. Student spends a lot of time in the bathroom adapted for him listening to music and playing with the toilet switch. He wears Pampers. He has accidents and since he doesn't like to be soiled, he demands a shower. Student's educational program at home is limited to three hours a day and the discrete time provided for APE and LAS. Student naps immediately after his three hour instruction. He won't lie on a couch. He has to be locked in his bed. District does not have a bed

equipped for Student to take a nap, or a special inside swing. Finally, Mother maintained that Student would not benefit from exposure to same-aged peers as he has never showed any interest in them. Mother believed that Student would be unfairly ostracized. Although he didn't display an interest in same aged peers, Mother observed that he was aware of reactions from people when he traveled with his head gear, gloves and TOBI, and it made him upset. Mother's love and dedication to her child fueled her testimony. Her desire to keep him in the protective embrace of his caregiver and family is understandable. Her years-long advocacy on his behalf was motivated by her sincere and unshakeable belief that educating Student outside the home was harmful to his health, safety and personal dignity. Mother suggested at the hearing that she didn't fully participate at the IEP team meeting because she was intimidated by the large number of District personnel and service providers at the meeting. Her claim of intimidation is not supported by her familiarity with Student's service providers that work in her home, her history of advocacy on behalf of Student, her conduct at the IEP team meeting, or her demeanor at the hearing.

89. Mother's expert, Andrew Richard MacIntosh, M.D. (Dr. MacIntosh) agreed with Mother's position. Dr. MacIntosh is a behavioral and developmental pediatric neurologist. He is affiliated with Children's Hospital of Orange County, and Kaiser Permanente of Bellflower, California. For four years he was also affiliated with Fairview Developmental Center in Costa Mesa, California (Fairview). He relied principally upon his experience with the residential program at Fairview in reaching his opinion about Student's placement. Fairview is a unique hospital which operates like a residential program with a centralized medical office. Fairview houses upwards of 50 individuals with multiple handicaps that can't function outside an institutional setting. Like Student, the individuals have intellectual disabilities, and other disabilities, which in most cases, are compounded by significant behavioral problems. Dr. MacIntosh is in regular contact with adolescents

with multiple disabilities and has examined between 1000 to 3000 such patients throughout his career. In preparation for the hearing, Dr. MacIntosh reviewed Student's records and conducted observations. Dr. MacIntosh observed Student in his office for three-and-a-half hours and at his home for about fifteen minutes while he was in the care of his caregiver. He did not observe Student receiving instruction with ACES NPA, Ms. Tompkins or Mr. Downing. Dr. MacIntosh is not an educator and does not possess any educationally-related credentials.

90. While he preferred Student's home environment, his observations of District's SDC-critical skills were consistent with the representations of District personnel and Ms. Feldhaus. The facility was well kept and the classrooms were organized as typical classrooms. Dr. MacIntosh observed a group lesson in one classroom. The children, unaccompanied by one-on-one aides, were happy and laughing. One pupil was on a gurney behind a partition and out of view. Between the two classrooms, there was a hallway leading to a kitchen area which is accessible to pupils for life skills training. Through the connecting hall, there was another room with a conference table, which was available as a therapy or break room. In the other classroom every pupil had a one-on-one aide and all pupils were receiving individualized one-on-one instruction. He did not observe any pupil doing anything unsafe, and he observed only one pupil leaving his seat unassisted by a one-on-one aide to use the bathroom. Dr. MacIntosh described a large bathroom area which was relatively modern and wheelchair accessible. In the back of the bathroom there was a shower. As Ms. Buhler noted, the bathroom was also equipped with a change pad.

91. Dr. MacIntosh's home observations of Student were in lock step with Mother's testimony. Student was unlike any of the other special needs pupils Dr. MacIntosh observed in the SDC-critical skills. With a padded bed and 24 hour oversight, Dr. MacIntosh considered Student's home the only safe placement for Student. He

concluded that Student's cognitive deficits, sensory needs and behavioral issues, required him to be in a highly specialized and isolated home or residential placement. Dr. MacIntosh acknowledged that Student made progress in his home program, but doubted that he was capable of advancing much further and would reach a plateau as an adult. Despite Dr. MacIntosh's dour prediction about Student's outside potential, Dr. MacIntosh was in agreement with District witnesses and Student's service providers in two critical and related areas: communication and social skills. Dr. MacIntosh agreed that Student was capable of improving his communication skills and needed to progress socially. During his consultation with Mother, he advised her to "stretch him socially" in small steps, beginning with a "Mommy and Me" class.

92. Dr. MacIntosh's opinion that District's placement offer was inappropriate did not square with his classroom observations, and was undermined by his incredible testimony regarding Student's safety in the educational setting. Dr. MacIntosh maintained that Student would not be safe in District's placement. He testified that the classroom environment, especially, his proximity to other special needs pupils, was dangerous because Student may be harmed by sharp objects, including unpadded door hinges, and pens and scissors carried around by other pupils. When asked on cross-examination about Mother's testimony that she regularly takes him to a "big box" warehouse-style store where he would occasionally be exposed to neurotypical children running through the store, Dr. MacIntosh made the remarkable and unsubstantiated proclamation that as a rule neurotypical pupils were more predictable and less dangerous than special needs pupils. When confronted with the fact that Student would have a one-on-one aide throughout the school day, Dr. MacIntosh still insisted despite his observation of SDC-critical skills, that District could not provide the level of protection from harm that his caregiver or Mother could provide.

LEGAL CONCLUSIONS

1. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, the District has the burden of proof.

2. District contends that its February-March 2009 IEP offer of the SDC-critical skills at RBHS with related services and accommodations complied with the procedural requirements of the IDEA. District maintains that it also met its burden of proving that its offer in the February-March 2009 IEP was reasonably calculated to enable Student to receive educational benefits, and constituted a FAPE. Student maintains that District failed to meet its burden of proving that it complied with the procedural safeguards of the IDEA in two critical respects. First, Student contends that the IEP was predetermined at a meeting held without Mother and consequently Mother's procedural rights were violated. Student maintains that District demonstrated that its offer was predetermined by offering the same placement that it had offered previously, failing to consider a continuum of options at the IEP team meeting, and failing to acknowledge Student's unique needs other than his immune deficiencies or allergies. Second, Student contends that District failed to administer standardized assessments as required for its triennial review, and as a result the IEP team did not have adequate information to develop an appropriate offer of placement. In addition to its failure to satisfy the procedural requirements of the IDEA, Student also maintains that District failed to meet its burden of proving that its offer of the SDC-critical skills at RBHS was reasonably calculated to provide Student with an educational benefit in the least restrictive environment. Student contends that the placement and transition plan and the absence of a health plan ignored Student's unique needs. Student maintains that due to his health, cognitive and behavioral impairments he can only receive an educational benefit in his current home placement. As discussed below, based upon Legal Conclusions

one, and three through eighteen, and Factual Findings one through 92, District has met its burden of proving that its February-March 2009 IEP offer was an offer of FAPE in the least restrictive environment.

3. Under the Individuals with Disability Education Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006); 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(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) "Related services" are developmental, corrective and support services that are required to assist a special needs pupil to benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) "Related services" include transportation, developmental, corrective and supportive services as may be required to assist the pupil in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subds. (a) [In California, related services are called designated instruction and services].) Specially designed instruction also includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).)

4. 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]] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that

maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1034, 1037-1038 & fn. 10 (hereafter *Mercer Island*)).

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (hereafter *Gregory K.*) 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.*) Nor must an IEP 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.) 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 placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment⁶. (*Ibid.*)

6. To determine whether a pupil was denied a FAPE, an IEP must be examined in terms of what was objectively reasonable at the time it was developed, not in hindsight. (*Adams, supra*, at p. 1149; *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992 (*Roland*)).

7. A school district must also provide a special education program in the least restrictive environment. This means that the school districts must educate the special

⁶ The standard also requires that a school district's program comport with the IEP. This factor is not at issue in this case.

needs pupils with non-disabled peers “to the maximum extent appropriate;” and that special classes or special schooling occur only when the nature and severity of the pupil’s disabilities cannot be accommodated in the regular education environment with the use of supplementary aides and services. (20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. 300.114 (2006); Ed. Code, § 56342, subd. (d).) A placement must foster maximum interaction between disabled pupils and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The Ninth Circuit has created a four-part balancing test to determine whether special education pupils could be educated in a general education environment which considers the (1) educational and (2) non-academic benefits of full inclusion in the regular education environment, (3) the effect the pupil has on the teacher and other pupils in regular education, and the (4) costs of mainstreaming. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1401-1402 (hereafter *Rachel H*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (hereafter *Daniel RR*)]; 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 a self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive pupil with attention deficit hyperactivity disorder and Tourette’s Syndrome].) If it is determined that a child cannot be educated in the general education environment, then the LRE analysis requires determination of whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel RR, supra*, 874 F.2d at p. 1050.)

8. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (Ed. Code § 56360.) The continuum of program options

includes, but is not limited to: regular education programs; resource specialist programs; designated instruction and services, including, e.g., LAS, APE and OT; special classes such as special day classes; nonpublic schools and; instruction in the home, hospitals or other institutions. (Ed. Code § 56361.) There is no requirement that the IEP team discuss all continuum of placement options at the meeting.

9. In a District filed case, the District has the burden of proof to establish by a preponderance of evidence that it complied with the IDEA and companion state law. First, the District must prove that it has complied with the procedures set forth in special education law. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.) Second, the District must prove that the IEP developed through such procedures addressed the student's unique needs and was reasonably calculated to enable the special needs child to receive educational benefits. (*Id.* at p. 201; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031; *Mercer Island, supra*, at p. 1034.)

10. School districts are required to include certain individuals in the IEP team team: one or both of pupil's parents or their representative; a regular education teacher if a pupil 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 the available resources; a person who can interpret the instructional implication of assessment results; and other individuals, including the person with special needs, where appropriate. (34 C.F.R. § 300.321(a); Ed. Code §§ 5341,subd. (b).)

11. To comply with the procedural requirements of the IDEA and state law in the development of the pupil's IEP, school districts must include parents in the development of the IEP. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904].); 20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1), 56342.5 [parents must be part of any group that makes placement decisions].)

Parents must be given advance notification of the meeting, including the purpose, time, location and who will be in attendance, early enough to ensure an opportunity to attend. (34 C.F.R. § 300.322 (2006); Ed. Code § 56341.5.) Parents must be provided procedural safeguards. (Ed. Code § 56500.1.)

12. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with parents. (*Target Range, supra*, 960 F.3d. at p. 1485; *Fuhrmann supra*, 993 F.2d at p. 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her 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.) School districts can not predetermine a pupil's placement prior to the IEP team meeting and without parental involvement in developing the IEP. (*Target Range, supra*, 960 F.2d at p. 1481, 1484; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) A school district may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist.*, (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.*(9th Cir. 2003) 337 F.3d 1115, 1131.) School district staff may meet beforehand to prepare goals and objectives and can provide a written offer before parents have agreed to it. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262.) School districts do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*Mercer Island, supra*, 575 F.3d at p.1038 citing 34 C.F.R. § 300.501(b)(3) [an IEP meeting "does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed a later meeting"].)

13. Under special education law, a pupil must be reassessed at least every three years. (20 U.S.C. § 1414(a)(2)(B)(i)-(ii), 34 C.F.R. § 300.303(b) (2006).) As part of a reassessment, the IEP team is required to review existing assessment data, information provided by the parents, and observations, identify, with input from the parents, what additional data, if any, is needed to determine continued eligibility, present levels of performance and educational needs, and whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the annual goals and participate in the general curriculum. (34 C.F.R. § 300.305; Ed. Code § 56381.)

14. A special education settlement agreement is considered a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1977) 109 F. 3d 896, 898.) In California, contracts are interpreted based on principles set forth in the Civil Code. (Civ. Code § 1635.) Those statutory principles require a contract to be “interpreted...to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (Civ. Code § 1636.) If the contractual language is clear and explicit, the language governs its interpretation. (Civ. Code § 1638.) When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. (Civ. Code § 1639.)

15. An IEP is an educational package that must target all of a pupil’s unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term “unique educational needs” is to be broadly construed and includes the student’s academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

16. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305,

311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) The IEP must include a statement of the present performance of the pupil, a statement of measurable annual goals designed to meet the pupil's needs that result from the disability, a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2),(3) (2006); Ed. Code, § 56345, subds. (a)(2), (3).)

17. The IEP also must include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow the pupil to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).) Where a pupil's behavior impedes his or her 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. (Ed. Code, § 56341.1, subd. (b)(1).)

18. In determining the educational placement of a pupil with a disability a school district must ensure, among other things, that 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 attend if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or the

quality of services that he or she needs; and 5) 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; see also Ed Code § 56341(b).)

19. The weight of the evidence demonstrates that District met its burden of proving that it met the procedural requirements of the IDEA and state law. District provided Mother with notice of the IEP team and provided her with the required procedural safeguards. The IEP team included all required members, included individuals that had extensive experience with Student and were knowledgeable about his needs. The IEP document developed over the course of two meetings, addressed all the required elements of an appropriate IEP for Student, including a BSP, supplemental aids and equipment, and transition plan. The IEP document did not include a health plan, but based upon Ms. Hockman's custom and practice, the health plan would be in place once Mother agreed with the placement.

20. As part of its satisfaction of the procedural requirements of the IDEA and state law, District met its burden of proving that it conducted a meaningful IEP meeting with Mother. District did not predetermine its offer. District members did meet before the IEP team meeting without Mother. However, unlike the Districts in *Target Range* or *Deal*, Mother was a critical part of the development of the IEP. Since 2001 Mother has been engaged in an ongoing debate with District about the propriety of Student's home program versus a less restrictive school placement. For years Mother insisted that Student's allergies and immune deficiencies made it impossible for him to receive his special education and related services at a comprehensive campus. Since the 2006 IEP Mother resisted District's efforts to reach agreement on an updated medical evaluation. Finally, in late 2008, Mother entered into the Agreement with District authorizing Dr. Aceves's, a specialist in allergies and immunological deficiencies, to conduct an independent assessment. The terms of the Agreement provided that the assessment was

being done so that the District could determine whether Student could safely be exposed to a typical school environment. Based on the Agreement it was reasonable for the District members to meet in advance of the IEP team meeting to discuss the results of Dr. Aceves's assessment and its impact on Student's placement options. District's pre-meeting to discuss the results of Dr. Aceves's assessment and to determine whether a less restrictive offer was now appropriate, did not sabotage the procedural safeguards afforded to Mother under *Rowley*. In *Target Range* the school district presented a fully prepared and unalterable IEP to parents, excluded essential members of the IEP team from the deliberations, failed to discuss alternative options and failed to respond to parental concerns. In contrast, Student's IEP team included all essential participants, and the IEP team discussion was comprehensive. The IEP team members were knowledgeable about Student's previous triennial, his unique needs, his present level of performance and his goals. Significantly, as in the past, the draft goals and objectives developed prior to the IEP team meeting were not tied to a specific placement, but could be implemented in alternative placements. District IEP team members did not make a "take it or leave it" offer, but over the course of two meetings, considered Mother's input, including her separate discussions with Dr. Aceves, and respected her concerns and suggestions in the development of Student's goals and objectives, before it made its offer. District offered the same placement as it had before, but this fact is not dispositive, as the offer was appropriate. The record established that District spent considerable amount of time listening to, discussing and addressing Mother's concerns, as it had in previous IEPs. Mother's claim that she was too intimidated to interject herself into the IEP discussion is not supported by the record. On the contrary, the evidence overwhelmingly established that Mother participated actively in the IEP process.

21. District met its procedural obligation to have available a continuum of program options. District did have in place a continuum of program options from general

education to home schooling. District was not required to discuss every placement option at each IEP to demonstrate its compliance with its statutory duty to supply a continuum of placement options. Although the February-March IEP notes do not indicate a discussion of NPS, District and Mother discussed the home placement, District's critical skills SDC placement and general education opportunities. The overwhelming weight of the evidence demonstrates that Mother was acutely aware of District's placement options, but was convinced that home instruction was the only appropriate placement for her son.

22. The evidence showed that Student was properly assessed as part of Student's triennial review. Student's medical assessment was defined by Agreement and administered by an independent assessor. In all other areas, given the wealth of data available regarding Student, his service providers' expertise and extensive experience working directly with him, the IEP team members, including Mother, agreed that standardized assessments were not necessary. Despite the conflicting testimony regarding Mother's consent to the assessment plan, and when District was notified of her consent, Mother clearly made an informed decision to forego standardized assessments on the ground that Student's service providers could be relied upon to determine Student's performance level and unique needs. Mother's disinterest in standardized assessments was evidenced by her own failure to complete the standardized assessment the OT delivered to her on or after December 18, 2008, her delay in executing the assessment plan, and her comments at the IEP team meeting. Furthermore, the bulk of the information in the few standardized assessments that were initially proposed was derived from interviews and observations. Given the level of experience and close working relationship between Student and his service providers, there is no evidence that standardized assessments would have added any information that the IEP team members did not obtain from their own observations. The DASH-2 provided a standardized measure of Student's developmental age, but there was no evidence that administering

this assessment would result in any modifications to Student's program. Student's developmental status and challenges had not changed significantly over the years. Student's own experts agreed with Student's SLP that at the time of the February-March 2009 IEP Student demonstrated a developmental age of two or three years. In sum, District met its burden of showing that in its triennial review it obtained information necessary to understand Student's present levels of performance and related developmental needs, and to decide whether modifications or additions in the child's education program were needed.

23. District has met its burden of proving that its February-March 2009 IEP offer constituted a FAPE. Contrary to Student's assertion, the IEP team did not focus exclusively on Student's medical status or Dr. Aceves's report. The IEP team was acutely aware of Student's long-standing developmental and behavioral challenges. The IEP contained goals, provision for specialized academic instruction, LAS services, APE and OT services, and a BSP. The IEP also contained a transition plan that was endorsed by ACES NPA. Student's goals and objectives, placement offer and transition plan, were written with extensive knowledge of Student's needs known by the team members at the time. Mother was in agreement with the goals, and with the exception of OT, was in agreement with the services offered, and the BSP. Mother had no quarrel with Student's home program and it was this exact program that was being transferred wholesale to the SDC-critical skills class. Under the transition plan, ACES NPA and District staff would work with Student to accommodate his needs within the school environment. Student's maladaptive behaviors, especially his head hitting, have not improved at his home. His behaviorist, Ms. Feldhaus, is of the opinion that he needs to be away from his caregiver to progress. Likewise, his own experts believe that his communication skills can still progress, and that he needs to work on socialization. The school setting offers an environment that will expose him to more communication and social opportunities. His home program providers believe that

he would enjoy and benefit from the school environment. Mother does not trust anyone but his caregiver and herself to keep Student safe, but her distrust of school personnel was not supported by the record. Student would not have available all the comforts of home throughout his school day, but the IEP provides for aids and accommodations to assist him throughout his school day. There is no evidence that Student could not adjust to a full school day and new routine during the transition period, with the expertise of ACES NPA, a trained one-on-one aide and District's special education teachers.

24. District has met its burden of proving that its offer of FAPE was in the least restrictive environment. The IDEA requires that Student's placement maximize interaction between disabled pupils and their nondisabled peers to the extent practicable. The IEP team appropriately considered Student's unique needs, including his behavioral challenges, in its placement offer. SDC-critical skills class is located at RBHS, Student's school of residence, a comprehensive general education campus. The District program offers Student an opportunity to work on his behaviors away from his home setting in a protected school environment, to be exposed to peers, and when appropriate, to participate in general education activities. Mother's preference for keeping Student in the most restrictive environment, his home, is contrary to the goals of the IDEA and is not supported by the record. Student's home program unduly restricts his progress behaviorally and socially and limits his opportunities to develop his communication skills. Student's expert admits his communication skills can progress and that he needs social contact. At 15 years of age, Student's maladaptive behaviors persist within the isolation of his home where his contact and communication with people other than his caregiver, family and a small circle of educators, is severely restricted. District's offer of SDC-critical skills at RBHS was the least restrictive environment for Student at the time of the February-March 2009 IEP.

ORDER

District offered Student a FAPE in the IEP dated February 13, 2009 and March 4, 2009.

PREVAILING PARTY

The decision in a special education administrative due process hearing must indicate the extent to which each party prevailed on the issues heard and decided at the hearing. (Ed. Code, § 56507, subd. (d).) The District prevailed on the sole issue in this matter.

RIGHT TO APPEAL THIS DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

Dated: October 21, 2009

_____/s/_____
EILEEN M. COHN
Administrative Law Judge
Office of Administrative Hearings