

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

PAJARO VALLEY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2013090347

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on September 11, 2013, naming Pajaro Valley Unified School District. Student's amended complaint was filed on March 14, 2014, Student's second amended complaint was deemed filed on May 5, 2014, and the matter continued for good cause to August 26, 2014.

Administrative Law Judge Joy Redmon heard this matter in Aptos, California, on August 26, 27, and 28, 2014.

Attorney Susan Foley represented Student. Also present on Student's behalf at various times throughout the hearing were Mother, Father, paternal Grandfather, maternal Grandmother, and legal assistant Linda Hughes.

Attorney Laurie Reynolds represented Pajaro Valley. Heather Gorman, program director, attended the hearing on Pajaro Valley's behalf. Ray Houser, director of the special education local plan area attended portions of the hearing.

At the conclusion of the hearing, the matter was continued until September 16, 2014, for the parties to submit written closing briefs. The briefs were timely received and the matter submitted for decision.

ISSUES¹

ISSUE 1. Did Pajaro Valley deny Student a free appropriate public education during the 2011-2012 school year by failing to offer appropriate:

- a. Push-in and pull-out resource specialist program services;
- b. Aide services; and a
- c. Behavior support plan?

ISSUE 2. Did Pajaro Valley deny Student a FAPE during the 2012-2013 school year by failing to offer appropriate:

- a. Push-in and pull-out resource specialist program services; and
- b. Aide services; and a
- c. Behavior support plan?

¹ At the outset of the hearing, the parties and ALJ reviewed the issues identified in the prehearing conference order. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student withdrew her issue regarding the appropriateness of Student's speech and language services during the 2011-2012 and 2012-2013 school years. After additional discussion on the record, Student limited Issue 3 to a denial of FAPE through May 26, 2014, specifically preserving her right to contest in the future the appropriateness of Pajaro Valley's IEP offer made on May 27, 2014. Accordingly, this decision does not address whether the May 27, 2014, IEP offered Student a FAPE.

ISSUE 3. Did Pajaro Valley deny Student a FAPE during the 2013-2014 school year up to May 26, 2014, by:

- a. Preventing Parent(s) from meaningfully participating in Student's educational decision-making process or denying Student an educational benefit when it:
 - i. Failed to hold an individualized education program team meeting in January 2014; and
 - ii. Failed to have required IEP team members at Student's March 25, 2014, IEP team meeting including her private school providers, a special education teacher, a general education teacher, a speech and language therapist, and an occupational therapist?
- b. Failing to offer Student placement in a non-public school that included:
 - i. A small campus;
 - ii. A low student-to-teacher ratio; and
 - iii. Specialized instruction for students with dyslexia?

SUMMARY OF DECISION

Pajaro Valley denied Student a FAPE by preventing Parents from meaningfully participating in Student's educational decision making process by holding Student's 2014 annual IEP team meeting late and failing to have a general education teacher present at Student's IEP team meeting.

Student did not prevail on the other issues raised in this case.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 10-year-old girl who lives within the boundaries of Pajaro Valley. Student was originally eligible for special education services due to a speech and language impairment when she was in preschool. In first grade, Student's primary

eligibility became a specific learning disability with a speech and language impairment as secondary. In second grade Student's IEP team determined she no longer had speech and language needs and her eligibility became a specific learning disability exclusively.

THE 2010-2011 SCHOOL YEAR, THROUGH THE EXTENDED SCHOOL YEAR 2011

2. Student attended Michael Pushnik's general education first grade class at Mar Vista Elementary School, received speech and language services, and began receiving resource specialist program services in January 2011.²

3. Mother, a credentialed school teacher, noticed that while in kindergarten, Student was not developing reading readiness skills at the same pace as her older siblings had or as her typically developing peers.

4. During first grade, Parents requested a comprehensive special education assessment because they were concerned about Student's reading progress. Additionally, Student frequently sucked her thumb in class and, according to Mother, wet her bed at night and began scratching and picking at her skin. Mother believed these behaviors were a manifestation of school-related anxiety. Student's IEP team met on January 19, 2011, after the assessments were complete. The academic assessments indicated that Student was performing in the average to just below average range in all academic areas but she was performing below her classroom teacher's expectation and her peers' performance. Assessment results revealed that Student had both visual and attention processing disorders. During that meeting it was determined that Student's

² The 2010-2011 school year is outside of the statute of limitations period for this case; however, this information is included because the operative IEP for the beginning of the 2011-2012 school year (at issue in this case) was drafted in January 2011 while Student was in the first grade.

primary disability was a specific learning disability with a secondary speech and language impairment.

5. To address her academic needs, Student's IEP contained five goals in the areas of decoding, reading comprehension, written language, and math calculation. To implement those goals, the IEP offered resource specialist program services in a small group, pull-out setting 65 minutes four times a week and 30 minutes one time per week to be taught by the resource teacher. Additionally, Student's IEP offered small group, push-in services 90 minutes per day, four times a week to be provided by either the resource specialist program assistant (resource aide) or resource teacher. Student's IEP also called for the following accommodations: dictate written work; directions read aloud; math manipulatives; preferential seating; shortened assignments; study buddy; visual models; small groups to re-teach when possible at her level; homework in reading only; dictated written work accepted as complete; and a private signal from the general education teacher (tongue click notice) to alert Student to stop sucking her thumb. Mother took the IEP document home to share with Father before consenting.

6. On January 21, 2011, an amendment IEP team meeting was held with Parents and the resource specialist teacher, Kerry Edelstein. At that meeting, Parents asked for an additional assessment and wording changes in the IEP to which Ms. Edelstein agreed. Parents consented to the IEP with the caveats regarding additional testing and word changes described above. Thereafter, the IEP was implemented.

7. Ms. Edelstein worked extensively with Student throughout the remainder of the 2010-2011 school year providing resource specialist program support in reading, writing, and math. They developed a positive student-teacher relationship. Student's processing disorders are severe which must be taken into consideration when determining her anticipated progress rate. By the end of Student's first grade year she had made academic progress in the areas addressed in her IEP. The progress was

demonstrated in both the resource specialist program and generalized to her first grade class as confirmed by Ms. Edelstein and Mr. Pushkin respectively. For example, at the time Student entered the resource specialist program in January 2011, she was reading only three out of 100 high frequency words and was just learning the alphabet's individual sounds. Student's IEP was successful in meeting her needs and providing educational benefit as demonstrated by the fact that after receiving resource services for just four months, Student could fluently read a first grade first month passage with 100 percent accuracy. With the combination of push-in and small group pull-out resource support services, Student was on track to meet her agreed upon goals.

8. Despite Student's progress, she continued to lag behind her typically developing peers. An amendment IEP team meeting was held on May 11, 2011, to discuss possibly retaining Student. Mr. Pushkin concluded that Student would benefit from repeating first grade to help reinforce her emerging reading skills and assist with social development. Ms. Edelstein was "on the fence" about retention, because Student was making progress. At the end of the IEP team amendment meeting, it was agreed that Student would repeat first grade. Parents also notified the IEP team that Student would undergo a neuropsychological assessment over the summer.

9. During the 2011 summer, Student underwent a neuropsychological assessment by Cheryl Bowers, Ph.D. While the assessment results were pending, Parents requested to meet with Student's IEP team to discuss the preliminary assessment results, promoting Student to second grade because they no longer wanted Student retained in first grade, a possible behavior intervention plan, and their request that Student be enrolled in the Lindamood-Bell reading program at Pajaro Valley's expense.

10. Student's IEP team rescinded the retention and Student started second grade at Mar Vista in mid-August, 2011. An IEP team amendment meeting was held on August 25, 2011. Parents provided a letter from Dr. Bowers that included summary

findings pending a complete assessment report. Dr. Bowers concluded that Student's general abilities index score fell within the superior range, but her broad reading skill fell within the extremely low range and therefore, Student "will absolutely require an individualized instruction that is intense in nature and that incorporates the sequential, simultaneous, and scaffolded multisensory process provided in an intensely repetition based approach." Dr. Bowers did not include a specific program recommendation in the initial letter.

11. Pajaro Valley did not agree to fund the Lindamood-Bell program. In response to Dr. Bower's summary of findings, however, Student's IEP was amended to increase pull-out resource specialist services by 45 minutes per day for additional small group instruction in the resource program and to decrease Student's more general push-in resource services by 45 minutes per day. The team discussed conducting a behavior assessment to determine if inattentive behaviors were affecting Student's reading progress. Parents took the draft IEP home to review but did not consent to the changes.

12. On August 29, 2011, Parents sent Pajaro Valley a letter indicating that Student would attend Lindamood-Bell five times a week until approximately 1:00 p.m. daily and their intent to seek reimbursement for these services. The following day, Mother revoked consent for Student to receive resource specialist services while Student was attending the Lindamood-Bell program on a temporary basis.

PAJARO VALLEY'S IEP OFFERS 2011-2012 SCHOOL YEAR REGARDING RESOURCE SERVICES, ONE-TO-ONE AIDE SERVICES, AND A BEHAVIOR SUPPORT PLAN.³

13. From approximately September 4, 2011, through December 2011 Parents removed Student for the majority of the school day and placed Student in an intensive one-to-one Lindamood-Bell reading program. Student attended Mar Vista for approximately the last 60-90 minutes of each school day. Student did not receive resource specialist program services during that time because Parents withdrew consent. Following winter break, Student returned to Mar Vista full time, but Parents requested that Student be placed back in first grade for the rest of the school year. Student's IEP team agreed and Student returned to Mr. Pushkin's first grade class for the remainder of the 2011-2012 school year. Student resumed receiving resource specialist program services.

The January 2011 and August 2011 IEP offer for the 2011-2012 school year

14. Student's visual and attention processing disorders caused her to have needs in all aspects of reading and writing including decoding, fluency, comprehension, word and letter formation, spelling, and written expression.

15. Dr. Bowers testified about Student's unique academic and behavioral needs during the 2011-2012 school year. She characterized Student as a child suffering from anxiety who required an intense one-to-one reading program to address her profound reading disability. She testified that in her August 24, 2011, letter she stated that Student required an intensive one-to-one reading program like Lindamood-Bell. She also explained that in her neuropsychological assessment report she listed a

³ Student's IEP also included speech and language goals and services and math goals. Student did not contest the appropriateness of those goals and services and as such they are not analyzed in this decision.

sequence of approaches that should be attempted in order starting with Lindamood-Bell, and if that was not effective then Chartwell (a nonpublic school specializing in Students with dyslexia), and finally a general education classroom with a full time one-to-one aide.

16. Despite Dr. Bower's testimony to the contrary, her August 24, 2011, letter never stated that Student required one-to-one reading instruction; rather, she said Student required "individualized instruction..." In her testimony, Dr. Bowers equated "individualized" with one-to-one. In the context of special education, however, individualized means tailored to the individual student's needs as opposed to one-to-one (e.g. Individualized Education Program). Additionally, Dr. Bowers did not attend the August 25, 2011, IEP team meeting, where her letter was discussed.

17. In Dr. Bower's assessment report she included a recommendation for one-to-one instruction amongst eighteen bulleted recommendations including that Student, "would be an excellent candidate to work as part of a small group in order for peers to share in explanations and team-teach each other." Nowhere does it indicate that her recommendations were to be considered in descending order as she testified at hearing. In fact, the first written recommendation equates two programs when it states,

"It is strongly recommended that she have an intensive and extensive total immersion program to address necessary goals for reading, spelling, and writing (e.g. Lindamood Bell program) *or* enrollment in a program designed for students with dyslexia such as the Chartwell School in Seaside coupled with supplemental intensive instruction." (emphasis added)

18. In the next bullet, Dr. Bowers indicates that if Student is to remain at her current school and, "...continues to have difficulties with attending or learning despite all

of the other interventions, it will be necessary to provide her with a 1:1 classroom aide.” The other recommendations cover a variety of topics including continued speech therapy, a particular handwriting program, extended school year services, and word recognition software.

19. Dr. Bowers is knowledgeable about dyslexia; however, her testimony was not consistent with the specific recommendations in her letter or report that were considered by Student’s IEP team, she did not observe Student at school prior to or while conducting Student’s initial assessment, she is not a special education teacher, and has never taught reading. After careful consideration, little weight was given to her testimony.

PAJARO VALLEY’S OFFER OF PUSH IN/ PULL OUT SERVICES

20. Pajaro Valley’s IEP offer at the beginning of the statutory period at issue in this case is contained in the January 19, 2011 IEP, as modified in the August 25, 2011, amendment discussed above. To address her academic needs, Student’s IEP contained five goals in the areas of decoding, reading comprehension, written language, and math calculation. To implement those goals, the IEP team offered the resource specialist program services in a small group, pull-out setting for 110 minutes four times a week and 75 minutes one time per week on the school’s regularly scheduled minimum day, that was to be taught by the resource teacher. Additionally, Student’s IEP team offered small group, push-in services for 45 minutes per day, four times a week, that was to be provided by either the resource aide or resource teacher. Student’s IEP also called for the following accommodations: dictate written work; directions read aloud; math manipulatives; preferential seating; shortened assignments; study buddy; visual models; small groups to re-teach when possible at her level; homework in reading only; dictated written work accepted as complete; and a private signal from the general education teacher (tongue click notice) to alert Student to stop sucking her thumb.

21. Pajaro Valley offered Student a mix of small group pull-out resource support, push-in resource support in her general education class, and several accommodations and modifications to the general education curriculum. The evidence established that Student made progress in reading and written language during the 2010-2011 school year while receiving just four months of resource support with a mix of small group and push in resource services. Student did not show that her needs changed such that she would not have continued to make progress in reading and writing had her parents allowed the services to continue and brought her to school for the full school day, especially given the increase in pull out services offered by Pajaro Valley for the 2011-2012 school year. To meet Student's needs, Ms. Edelstein had utilized components from multiple programs including Signs for Sounds, Explode the Code, and Read Naturally. Additionally, she incorporated a multisensory approach that included flash cards, rubber letters, and sand trays. She employed a strategic approach selecting components from each program that would be most effective for Student. These were appropriate strategies for Student.

22. Although Student's progress in the 2010-2011 school year was not as rapid as her typically developing peers, Ms. Edelstein credibly testified that it was consistent with the severity of Student's disability. Ms. Edelstein is a credentialed special education teacher with 16 years of experience as a resource teacher. During that time, she has taught reading and writing to numerous students with visual and attention processing disorders. She worked extensively with Student and had a keen understanding of Student's needs.

23. Ms. Edelstein credibly testified that the level of resource services was sufficient to meet Student's academic needs and implement her goals. The push-in aide support services were primarily provided by her instructional aide, Ms. Woodley. According to Ms. Edelstein, Ms. Woodley watched Ms. Edelstein deliver direct instruction

in small groups and utilized the same language and strategies when she provided push-in resource support. Ms. Woodley also attended trainings including in Read Naturally, deescalating misbehaviors, implementing behavior plans, and a three-day para-educator conference. Ms. Woodley assisted Student in her general education class and also worked with Student in a group of approximately two to three students total in the same class. Ms. Edelstein collaborated with Ms. Woodley and Mr. Pushnik regarding Student's push-in services. Student's resource support and aide services were designed to meet Student's unique academic needs.

24. The January and August 2011 IEP offer was reasonably calculated to confer educational benefit to Student in the area of reading and writing. The evidence did not support a finding that student needed a single program delivered one-to-one for up to four hours per day, as asserted by Student. A three to four hour per day intensive program that does not incorporate other students or other subjects would be detrimental to Student's overall learning because of the number of hours in a school day she would necessarily miss other subjects including science, social studies, math, and physical education. As noted, Ms. Edelstein's testimony demonstrated a deep understanding of Student's needs. That coupled with Student's slow but steady progress in reading and written language acquisition establish that Student did not require a single one-to-one intensive reading program such as Lindamood-Bell to meet her reading and written language needs. It is further determined that Student's January 19, 2011 IEP, as modified in the August 25, 2011 IEP, was designed to meet Student's unique needs and was reasonably calculated to provide her with educational benefit. Student did not meet her burden of proof to show that the push-in, pull out services did not offer Student a FAPE.

STUDENT'S NEED FOR AIDE SERVICES AND A BEHAVIOR PLAN

25. As noted above, Pajaro Valley's offer including push-in aide support met Student's needs. There was no credible evidence presented that Student required additional aide support or that an aide receive specialized training in working with children with dyslexia to meet Student's needs.

26. Student exhibited behaviors at school including thumb sucking, picking at her skin, chewing her hair, and hiding under her desk. The degree to which these behaviors occurred and their impact on her education was contested. Mother described Student as an anxious child whose behaviors were extreme for first grade. Mr. Pushnik and Ms. Edelstein credibly testified that with the exception of thumb sucking, Student's behaviors were within the normal range for a typical first grader and did not interfere with her ability to access her education. Mr. Pushnik is a credentialed teacher who has taught first grade for approximately 19 years. Mr. Pushnik explained that he was concerned about Student's thumb sucking in class, not because it impacted her education, but because it could lead to social stigma. He developed an auditory prompt or clicking sound as a signal for Student to remind her to take her thumb out of her mouth. The auditory prompt was an effective technique that reduced Student's thumb sucking at school. Student did not exhibit behaviors that interfered with her ability to access her education; however, to avoid attracting negative attention because she sucked her thumb in class, Student's IEP team decided to address it. Implementing Mr. Pushnik's clicking sound as an auditory prompt signaling Student to remove her thumb was an appropriate general education accommodation that was offered in Student's IEP.

27. It is determined that Student did not require one-to-one aide support or specific behavior goals or a behavior support plan to meet her needs and provide FAPE.

December 12, 2011, amendment IEP

28. An amendment IEP team meeting was held on December 12, 2011, before Student returned to Mar Vista full time after completing the Lindamood-Bell program. The purpose of the meeting was to plan for Student's return, discuss a draft behavior support plan, and make any necessary adjustments to her school program and placement for the spring.

29. At the meeting, Parents requested that when Student returned to Mar Vista full time she be placed in first grade for the school year rather than continuing with second grade. Parents also requested that Ms. Edelstein become familiar with the Lindamood-Bell program and incorporate its strategies into Student's resource services. The Mar Vista members of the IEP team agreed to both requests. Thereafter, Ms. Edelstein attended a 40 hour Lindamood-Bell training program to incorporate elements of the program along with the other strategies she was using with Student. Student's IEP team offered to adjust her resource services for one month while Student transitioned back to Mar Vista and until her next annual IEP team meeting that was due the following month. As noted previously, prior to attending the Lindamood-Bell program Student's resource services were delivered both in class via push-in and small group pull-out. The Lindamood-Bell program was delivered using a one-to-one model. At Parents' request, Ms. Edelstein had not worked with Student during that time she attended the Lindamood-Bell program. As a means of helping Student transition from an intensive one-to-one program back into the school setting and to determine if Student's needs changed prior to her annual IEP team meeting, Student's IEP team adjusted her program to include one-to-one resource services. The IEP amendment offered four 90-minute small group pull-out sessions, two 30-minute individual sessions both with the resource teacher, and four 30-minute push-in small group resource sessions per week by the aide or resource teacher. It is determined that the offered change to Student's

resource services was designed to meet her unique needs and was reasonably calculated to provide her with educational benefit.

30. The IEP team also discussed a draft behavior support plan. The target behaviors included transitioning to classwork after arriving, work refusal (saying "I can't do it"), putting her head on her desk or hiding under it, and thumb sucking. The replacement behavior was that Student would attempt to do her work and if she could not complete it then she would raise her hand and ask for help. The interventions identified to transition from the target to replacement behavior included verbal praise for work attempts, receiving a star on the board next to her name, and after five stars she could earn free time for a desired activity. According to Mother, she was concerned about having a star next to Student's name on the board. Ms. Edelstein explained that the Mar Vista members of the IEP team still did not believe Student's behaviors impacted her ability to access her education. After the draft plan was discussed during the IEP team meeting, according to the notes and Ms. Edelstein's testimony, the team agreed that the plan would be "tabled." It is determined that the draft behavior support plan was discussed by the IEP team but was not offered. It is also determined that Student's behavior needs had not changed from September until December 2011 requiring goals, services, or supports in addition to the accommodations contained in her IEP and that Student did not require a behavior support plan.

January 19, 2012, annual IEP

31. Student returned to Mar Vista full time following winter break and her annual IEP team meeting was held on January 19, 2012. By that time, Student was back in Mr. Pushkin's first grade class. Parents presented a letter from Lindamood-Bell that described Student's progress in that program. Ms. Edelstein also determined Student's then current academic levels. At that time, Student knew all letter sounds, digraphs, many long vowel patterns, r controlled vowel sounds, and some word endings. Her

decoding ability was still slow and she lacked automaticity or fluency with high frequency words. For example, on Lindamood-Bell's STAR WORDS list of 200 high frequency words, Student could decode many of them but was only able read 12-15 words automatically. Student could consistently spell consonant-vowel-consonant words and approximately 20 sight words. Student continued to struggle with written language including letter formation, capitalization, and spacing.

32. Student's IEP contained six new language arts goals specifically in the areas of decoding including reading fluency, sight words, long and short vowel combination words; spelling; and written expression including proper letter formation and spacing. Student's IEP also contained math goals not at issue in this case. The IEP contained accommodations including extra time for tests and assignments, preferential seating near the teacher and where she would be less distracted, shortened assignments, visual models, and additional "think" time to process verbal information and then provide an answer. To implement these goals, Student's IEP offered a combination of push-in, pull-out, and one-to-one resource support services. Specifically, four 90-minutes sessions of small group pull-out and two 30-minutes session of individual pull-out services weekly to be provided by the resource teacher, and four-45 minute weekly push-in sessions to be provided by either the resource aide or resource teacher. Parents also requested that Pajaro Valley integrate elements of Lindamood-Bell into Student's program. The Pajaro Valley members of Student's IEP team agreed and Student's IEP also offered specialized material from Lindamood-Bell including its Seeing Stars word list and visual spelling checklist both to be worked on four times per week for 20 minutes each while Student attended the resource pull-out services. Student did not show that she required one-to-one aide support throughout the school day in order to receive a FAPE. It is also determined that resource support included in the January 19,

2012, IEP were designed to meet Student's academic needs and were reasonably calculated to provide her educational benefit.

33. Student contends that she needed a behavior plan during this time period. Parents were concerned that Student exhibited anxiety at school and they were worried about her self-confidence. According to Mother, Student began excessively picking at the skin on her face, neck, and hands causing scabs and she began protesting going to school in the morning causing her to arrive late. Ms. Edelstein and Mr. Pushkin testified that they did not observe Student routinely picking at her skin. According to Ms. Edelstein, over the course of the entire time she worked with Student she saw a few scabs on her hands that looked like bug bites. She also saw Student scratch those scabs but did not observe her picking at her skin nor did she see scabs on Student's face or neck.

34. Regarding school avoidance, Ms. Edelstein testified that she spoke with Mother several times a week and Mother never mentioned that Student refused or was reluctant to come to school. Rather, Mother told Ms. Edelstein that it was difficult to get Student to school on time because she and her brother would argue or dawdle in the morning. On cross examination, Mother acknowledged that Student and Brother "made each other late." This is also consistent with other action taken by Student's family. Student initially attended the Lindamood-Bell program in Santa Cruz for four hours per day in the morning before returning to Mar Vista. During the fall, the Santa Cruz center closes down and Student received services at the Lindamood-Bell center in Monterey. Mother testified that Student's program was then shortened from four to three hours due to Student's tolerance. Even if true, rather than starting at the earlier time so that Student could attend two and a half hours at Mar Vista in the afternoon, Student's family elected to have her start the Lindamood-Bell program an hour later in the morning. In light of the forgoing, it is determined that Student's late arrival at school

was caused by factors other than anxiety. Student did not have behavior needs requiring a behavior support plan to meet her unique behavior needs.

35. It is determined that during the 2011-2012 school year, the amendments and IEP's discussed above were designed to meet Student's unique needs and reasonably calculated to provide her educational benefit. At no time during that year did Student require one-to-one instruction, one-to-one aide support, or a positive behavior support plan.

PAJARO VALLEY'S IEP OFFERS 2012-2013 SCHOOL YEAR REGARDING RESOURCE SERVICES, ONE-TO-ONE AIDE SERVICES, AND A BEHAVIOR SUPPORT PLAN

36. During the 2012-2013 school year, Student attended Risa Schwartz' general education second grade class at Mar Vista and received resource specialist program services throughout the school year. Student's IEP team discontinued speech and language services in September 2012 as Student no longer exhibited a need in this area.

37. At the beginning of the 2012-2013 school year, Student was enrolled in second grade and her operative IEP was from January 19, 2012. It was asserted that the resource services provided to Student by the beginning of second grade were not appropriate because Student's reading skills had regressed rather than improved. This assertion was based on a Lindamood-Bell assessment conducted in July 2012. Little weight, however, is given to this assessment. Taylor Bonetti was Student's primary Lindamood-Bell tutor. Ms. Bonetti explained that students who complete the Lindamood-Bell program are invited back the following summer for a "school year check-up." According to Ms. Bonetti, Student had many reading skills but the summer check-up showed she dropped in some measures. The Lindamood-Bell assessment is a combination of individual subtests from other comprehensive psychological and educational assessments. Most of the subtests are outdated and have been replaced by

current versions. Additionally, the individuals who administer the Lindamood-Bell assessment are not required to hold any credentials. Ms. Bonetti, for example, is not a licensed psychologist or credentialed teacher but has a high school diploma and is currently working to complete an undergraduate degree in interior design. More importantly, she explained that when a child has had a break from the Lindamood-Bell program, as Student did, it is *typical* to see their scores dip. It is determined that Student's scores on the Lindamood-Bell assessment do not establish that she regressed in her reading skills. Student did not show that there was a change in her needs in her second grade year that would have made the IEP unable to continue to provide FAPE. It is determined that Student's IEP continued to meet her unique needs and provide her educational benefit throughout the time it was operative.

38. Student continued to receive a combination of push-in and pull-out resource services provided by Ms. Edelstein and supported by her aide Ms. Woodley. Student made progress during second grade. By December 2012, Student improved in reading from 14 words per minute on a first grade passage to 24 words per minute on a second grade passage. Additionally, utilizing the Lindamood-Bell reading list, Student improved from reading 12 to 80 sight words. Student either met or made progress on each of her IEP goals. Student did continue to struggle with automaticity in her reading which was addressed by her fluency and sight word goals.

39. Mother also testified that Student continued to have school anxiety that manifested in hair chewing, thumb sucking, picking at her skin, and refusing to come to school. This was disputed by Student's teachers. According to Ms. Edelstein and Ms. Schwartz, Student no longer sucked her thumb frequently in class, did not pick at her skin, or frequently chew her hair. It is determined that despite these occasional behaviors, they were not to a degree that interfered with Student's ability to access her education. Attendance, however, was an issue during second grade. Student had more

than 70 unexcused tardies that year. Mother testified that this was because Student refused to go to school in the morning. This contention was not supported by the evidence. As noted previously, the prior year Parents elected to have Student start the Lindamood-Bell program late at the expense of missing an additional hour of instruction at school. Additionally, the reasons noted on Student's attendance record for the tardies included "overslept," "brother is a slug bug," and "family sick." Nowhere does it mention that Student refused to come to school. Moreover, Ms. Edelstein testified that she spoke with Mother weekly and at no time did Mother mention Student's reluctance to come to school. For these reasons, it is determined that Student did not have school refusal or anxiety to a degree that caused her to be tardy for school or interfere with her ability to access her education.

40. Student's annual IEP team meeting was held on January 17, and February 1, 2013. Student's IEP contained decoding goals targeting improved sight word recognition and reading fluency. It also contained a spelling goal, written language goal focusing on both spelling and correct punctuation, and a math calculation goal. To implement these goals, the IEP offered four 60-minute small group pull-out sessions with the resource teacher per week, one 30-minute individual pull-out session with the resource teacher per week, and four 30-minute push-in sessions per week provided by either the resource teacher or her aide. Ms. Edelstein recommended the reduction in resource service support because of the progress Student made up to that point. The IEP also called for the following accommodations: extra time for assignments and tests, preferential seating where she will be less distracted and be easily accessed by the teacher, shortened assignments, visual models, extra time to think and answer, quiet work space, parentally shortened homework assignments, paraphrased instructions, single tasks given at a time, pair verbal instructions with visual cues, personal list of commonly misspelled words, permission for adults to spell unknown words, alphabet

line on her desk, separate test location, permission to chew gum in resource room, model/teach naming feelings if Student shows anxiety, and ability to say, "I'm ok right now. I will come check in. Can I work by myself?" Parents consented to the IEP on February 28, 2013.

41. It is determined that Student did not have a need for one-to-one aide services or a behavior support plan. It is further determined that the IEP consented to on February 28, 2013, met Student's unique needs and was reasonably calculated to provide her educational benefit. Student's IEP was implemented for the rest of second grade. According to Ms. Schwartz and Ms. Edelstein, Student continued to make academic progress throughout second grade. On the California STAR tests, Student scored in the advanced range for math and below basic in reading with a score of 282, just 17 points under the cut off for basic. These scores were consistent with Student's report card. Additionally, this progress was also consistent in light of Student's visual and attention processing disorders. It is determined that Student's IEP continued to be appropriate throughout the 2012-2013 school year.

PAJARO VALLEY'S IEP OFFERS 2013-2014 SCHOOL YEAR

42. Student began the school year in August 2013 at Mar Vista in Colleen Riggins' third grade general education class with resource specialist program services. Despite Student's academic growth, Parents continued to be concerned that Student's progress, in particular in reading and writing, should be more rapid. In August 2013, Parents sent Pajaro Valley a letter indicating their dissatisfaction with Student's program, requesting reimbursement for Lindamood-Bell services, and prospective placement at Chartwell School or private Lindamood-Bell services. An IEP team meeting was held on September 6, 2013, to discuss the concerns. During the meeting, Parents expressed that Student was coming home from school upset and struggling with her homework. Student's IEP team discussed ways to modify Student's homework and they decided she

would not use the class spelling list. The IEP team discussed additional ideas about increasing resource time, considering a special day class, and possibly Student transferring to her neighborhood school for a different resource program. The options remained open for further discussion and no placement changes were offered at that time.

43. The following week, Parents filed the instant request for a due process hearing. Shortly thereafter, Parents won money in a raffle and decided to place Student at Chartwell. On November 5, 2013, Pajaro Valley confirmed receiving notice of Student's unilateral placement and also sent Parents an assessment plan in preparation for Student's triennial IEP team meeting due the following January. Student has attended Chartwell continuously since November 2013. Student has made academic progress at Chartwell.

44. As noted above, Student started third grade in Colleen Riggins' third grade general education class with continued resource support provide by Ms. Edelstein who was assisted by Ms. Woodley. Ms. Riggins is a credentialed teacher with more than 15 years' experience. She was a credible witness who was knowledgeable about Student's academic strengths and areas of concern. According to Ms. Riggins, at the beginning of third grade, Student exhibited the most significant growth in writing, in particular through Writer's Workshop where Student drafted, edited, and produced a book. Ms. Edelstein credibly testified that Student continued to progress in all academic areas at the beginning of third grade. Student enjoyed her time in the resource program and specifically working with Ms. Edelstein. Student asserted during the hearing that during the 2013-2014 school year Student required a nonpublic school with a small campus, a low student-to-teacher ratio, and specialized instruction for students with dyslexia. Other than the assertion, no credible evidence was presented to support these contentions. Moreover, Student had made progress in the Mar Vista program during the

prior years and during the beginning of the 2013-2014 school year with the combination of supports and services provided under her IEP. It is determined that Student did not require a nonpublic school with a small campus, low student-to-teacher ratio outside of the resource support provided, and specialized academic instruction for students with dyslexia to meet her unique needs and provide educational benefit.

45. Pajaro Valley did not receive a signed assessment plan back from Parents. Student's annual and triennial IEP team meetings were due in January 2014. Pajaro Valley did not send a meeting notice to Parents until March 12, 2014, nearly two months after the IEP team meetings were due. Mother was not available on the scheduled date and the meeting was moved to March 25, 2014.

46. Prior to the March 25 meeting, Chartwell forwarded information to Pajaro Valley regarding Student's progress and present academic levels. The Pajaro Valley members of the IEP team were present at the scheduled meeting's start time; however, Parents were not present. Parents were called and Father arrived at the meeting approximately 45 minutes later. By that time, Ms. Riggins had left the meeting. No representatives from Chartwell were present at the meeting.

47. Student asserted that a special education teacher, a speech and language therapist, and an occupational therapist were also not present at the IEP team meeting. Ms. Edelstein, Student's former resource teacher was present at the meeting. Additionally, Student did not present any evidence that she had continued speech and language needs or any occupational therapy needs requiring a therapist in either of those specialties to attend her IEP team meeting.

48. During the meeting, Father signed the triennial assessment plan. Pajaro Valley made what it deemed a transition plan for re-entry IEP offer that it intended to be in place for the first four-weeks after Student transitioned back to Mar Vista. After that, another IEP team meeting would be held to finalize Student's annual IEP and

incorporate findings from her triennial assessments. The IEP offer included goals based on Student's academic performance before leaving Mar Vista and the information from Chartwell. The proposed goals were in the area of decoding focusing on fluency and increased sight words, spelling, and written language. To implement those goals, the IEP offered four 75-minute small group pull-out sessions per week taught by the resource teacher and four 45-minute push-in services for the first four-weeks Student returned to Mar Vista provided by the resource teacher or aide. The IEP also included the same accommodations that had been provided in the prior IEP with an intent to redraft necessary accommodations after Student's transition back to Mar Vista. Parents did not consent to the IEP. As discussed below, the failure to have a general education teacher at the IEP team meeting was a procedural violation that resulted in a denial of FAPE to Student. Therefore, the substantive offer of that IEP team meeting need not be analyzed in this decision.

49. Student's next IEP team meeting was held on May 27, 2014, to discuss the completed assessments. That IEP is not at issue in this case.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

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

⁴ Unless otherwise indicated, the legal citations in the introduction and in the sections that follow are incorporated by reference into the analysis of each issue decided below.

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to a parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

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

burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Here, Student has the burden of proof.

PROCEDURAL COMPLIANCE

5. Under the IDEA, in cases alleging a procedural violation, an ALJ may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or deprived the Student educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) California has enacted a similar statute that prohibits an ALJ from basing a decision solely on non-substantive procedural errors, unless the ALJ finds that those errors resulted in a loss of educational opportunity to the pupil or interfered with the parent or guardian's right to participate in the process of formulating the IEP. (Ed. Code, § 56505 subd. (j).)

6. Procedural inadequacies that result in a loss of educational opportunity or seriously infringe on parents' opportunity to participate in the IEP formulation process clearly result in a denial of FAPE. (*Shapiro v. Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078; see also *Amanda J. v. Clark County School Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].)

Issue 1: Denial of FAPE for the 2011-2012 school year regarding resource specialist program services, aide services, and a behavior support plan.

7. 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).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and that the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

8. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. §1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. §1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

9. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining her annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subs. (a)(4), (6)(A).)

10. During the 2011-2012 school year, Student had two agreed-upon and implemented IEP's (January 19, 2011, as amended on August 25, 2011, and again on December 12, 2011; and a new annual IEP on January 19, 2012). The aforementioned IEP's were designed to specifically address Student's areas of need and each offered a combination of resource services that included small group instruction, individual instruction, and push-in support in Student's general education classroom. This

approach was proven successful the prior year where Student made academic progress. The IEP's specifically contained Student's present levels of performance in reading and written language. They contained measurable goals designed to meet her unique reading, spelling, and written language needs and also accommodations to be provided to help Student access the general education curriculum. After returning to Mar Vista full time, Student's IEP was amended to incorporate elements of the Lindamood-Bell program. Pajaro Valley even sent Student's resource teacher to a week-long Lindamood-Bell training program to help support Student utilize components of this parentally-preferred program. The placements offered in the consecutive IEP's called for general education with push-in, pull-out, and individual resource support (December 12, 2011, and January 19, 2012). These placement offers were appropriate for Student based upon her profound reading disability and attentional issues.

11. Additionally, Student's IEP called for numerous accommodations that provided her support including addressing thumb sucking. Thumb sucking was the one behavior that Student frequently exhibited in class, and while it did not rise to the level of interfering with her ability to access her education, Student's IEP provided an appropriate accommodation to reduce the behavior. Student's IEP team appropriately discussed Student's behaviors during the January 2012 IEP team meetings and determined as a group that she did not need goals or a behavior support plan to address behaviors. To the extent that Student had behavioral needs, those needs were consistent with her same age peers and did not rise to the level of interfering with her education. Student did not meet her burden to establish that she required specific behavior goals or a behavior support plan during the 2011-2012 school year.

12. Student argued that she required one-to-one reading instruction such as the Lindamood-Bell program or other specialized instruction for Student's with dyslexia. This contention was not supported by the evidence because she did make academic

progress while receiving a combination of general education and resource support during the 2010-2011 school year before attending the Lindamood-Bell program and again during the spring of 2012 after returning to Mar Vista full time. Student repeatedly cited the alleged progress she made at Lindamood-Bell and later at Chartwell as evidence that Pajaro Valley's program did not offer her FAPE. Even if the Lindamood-Bell or Chartwell program were *more* appropriate, that comparison is not relevant under the law. The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Rowley, supra*, 458 U.S. at 197, 200; *Gregory K. v. Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.) As long as the school district's offer was reasonably calculated to provide educational benefit, it constitutes an offer of a FAPE. (*Rowley, supra*, 458 U.S. at 200.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F.2d at 1314.)

13. It is determined that the IEP's offered during the 2011-2012 school year were designed to meet student's unique needs and were reasonably calculated to provide educational benefit. She did not meet her burden to establish that her resource services were not appropriate, that she needed a one-to-one aide, or that she required a behavior support plan. Moreover, the evidence establishes that in light of Student's disability, she received educational benefit in language arts, specifically in reading, spelling, and writing. Under the IDEA, "meaningful educational benefit" must be gauged in relation to the potential of the child at issue. (*Deal v. Hamilton Cnty. Bd. Of Educ.*, 392 F.#d 840, 861-62 (6th Cir. 2004).) In light of the forgoing, it is determined that Pajaro Valley did not deny Student a FAPE for the 2011-2012 school year.

Issue 2: Denial of FAPE for the 2012-2013 school year regarding resource specialist program services, aide services, and a behavior support plan.

14. During the 2012-2013 school year, Student's prior IEP was amended on September 1, 2012, to eliminate speech and language (not contested herein) and IEP team meetings were held on January 17, and February 1, 2013, to finalize Student's IEP for the school year. Parents consented to the IEP on February 28, 2013, and it was implemented. The IEP analyzed in Issue 1 continued to provide Student a FAPE throughout the time it was operable. The January 2013 IEP contained Student's present levels of performance in reading and written language. It contained measurable goals designed to meet her unique reading, spelling, and written language needs and also accommodations to be provided to help Student access the general education curriculum. The placements offered in the IEP called for general education with push-in, pull-out, and individual resource support. A range of program recommendations were discussed. Ms. Edelstein had a keen understanding of Student's academic and social needs. She designed a reading program that was tailored specifically for Student and incorporated elements of different reading curriculums, including the parentally-preferred Lindamood-Bell program. These placement offers continued to be appropriate for Student. Student's IEP also called for numerous accommodations designed specifically for Student to provided her additional support in her general education class.

15. It is determined that the IEP's offered during the 2012-2013 school year were designed to meet student's unique needs and were reasonably calculated to provide educational benefit. Student did not meet her burden to establish that her resource services were not appropriate, that she needed one-to-one aide services, or that she required a behavior support plan. Moreover, the evidence establishes that Student actually received educational benefit in language arts, specifically in reading,

spelling, and writing during the 2012-2013 school year. Accordingly, it is determined that Pajaro Valley did not deny Student a FAPE for the 2012-2013 school year.

Issue 3: Procedural and Substantive Denial of FAPE for the 2013-2014 school year

BEGINNING OF SCHOOL THROUGH JANUARY 16, 2014

16. Student's IEP consented to in February 2013 was in effect at the beginning of the 2013-2014 school year. An IEP team meeting was convened on September 6, 2013, in response to a letter Parents sent expressing concern with Pajaro Valley's program, seeking reimbursement for Lindamood-Bell services, and prospective placement at Chartwell or continued Lindamood-Bell services to be provided by Pajaro Valley. The IEP team discussed alternatives to Student's program and offered to modify Student's homework assignments and remove the class spelling list. Parents did not consent to the proposed changes and filed a request for a due process hearing. The following month Parents sent notice of unilateral placement. Student began attending Chartwell in November 2013.

17. Student argued that during the 2013-2014 school year she required placement at a nonpublic school, a small campus, a low student-to-teacher ratio and specialized instruction for students with dyslexia. Student did not meet her burden to establish that she required the forgoing to meet her unique needs. The operable IEP at the beginning of the 2013-2014 school year was the one analyzed in Issue 2 above. A proposed amendment to further modify homework and eliminate the class spelling list was offered in September 2013. The IEP and proposed amendment were designed to meet Student's unique needs and provide her educational benefit. Additionally, Student made academic progress during the 2013-2014 school year up until the time she left Mar Vista. In particular, Ms. Riggins persuasively testified that in addition to reading, she saw Student's writing and self-editing ability improve to the extent that Student was

able to write, edit, and publish a book similar to that of her typically developing peers. No persuasive evidence was presented establishing that Student required a nonpublic school, a small campus, a low student-to-teacher ratio beyond what was provided through resource support, and specialized instruction for students with dyslexia to meet her needs. It is determined that Pajaro Valley did not deny Student a FAPE for the 2013-2014 school year from the beginning of the school year through January 16, 2014, when her next annual IEP team meeting was due.

JANUARY 17, THROUGH MARCH 25, 2014

18. An IEP must be reviewed at least annually to determine whether the annual goals are being met, and at that time, the school district must revise the IEP as appropriate to address any lack of expected progress, new assessments, information provided by the parents, the child's anticipated needs, or any other matter. (34 C.F.R. § 300.324(b)(1) (2006); Ed. Code, § 56343, subd. (d).) Pajaro Valley sent parents an assessment plan on November 5, 2014. Parents had not returned the plan; however, Pajaro Valley took no steps to inquire about the assessment plan nor did it schedule a timely IEP team meeting. The failure to hold an IEP team meeting until March 25, 2014, constitutes a procedural violation of the IDEA.

19. Pajaro Valley correctly argues that not all procedural violations constitute a denial of FAPE. (*L.M. v. Capistrano Unified Sch. Dist.* (9th Cir. 2009) 556 F.3d 900, 909, (*Capistrano*) [citations omitted].) A child is denied a FAPE only when the procedural violation impedes the child's right to a FAPE, infringes on the parents' opportunity to participate in the decision-making process regarding FAPE, or causes a deprivation of educational benefit. (*Id.*; 20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subds. (f)(2) and (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, *superseded by statute on other grounds by the IDEA Amendments of 1997* § 614(d)(1)(B).) A parent has meaningfully participated in developing an IEP when he is

informed of his child's problems, attends the IEP team meeting, expresses his disagreement regarding the IEP team's conclusion, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

20. In this case there was no explanation provided excusing Pajaro Valley from conducting a timely IEP team meeting. Failing to hold an IEP team meeting until March 25, 2014, constitutes a procedural violation of the IDEA that resulted in a denial of FAPE because it deprived Parents the opportunity to meaningfully participate in the decision-making process because there was no process in which to participate. Had a timely IEP team meeting been held, it is possible that Student would have returned to Mar Vista for the second semester of third grade. By the end of March it is far less likely that Parents would have been willing to return Student for approximately 10 weeks remaining in the school year.

MARCH 25, 2014, THROUGH MAY 26, 2014

21. An IEP team meeting was held on March 25, 2014. It had been scheduled to start at 2:15 p.m. and all Pajaro Valley members of Student's IEP team were present. Parents were called and ultimately Father arrived. By that time, Ms. Riggins, Student's former general education teacher had left. Father did not excuse the general education teacher from participating. Additionally, no general education teacher from Chartwell was present at the meeting, as this teacher may have fulfilled the requirement.

22. Special education law requires certain individuals to attend IEP team meetings. In particular, the IEP team must include: (a) the parents of the child with a disability; (b) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (c) not less than one special education teacher, or where appropriate, not less than one special education provider of the child; (d) a representative of the school district who is knowledgeable about the

availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (e) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above; (f) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (g) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

23. Student asserted that no special education teacher, speech and language therapist, and occupational therapist attended the March 25, 2014, IEP team meeting. Ms. Edelstein, Student's former resource teacher, did attend the meeting. Moreover, Student did not establish that she had speech and language or occupational therapy needs requiring their attendance at the meeting. No procedural violation of the IDEA occurred in this regard.

24. It is undisputed that no general education teacher attended the March 25, 2014, IEP team meeting. This is a procedural violation of the IDEA. Pajaro Valley argues that the failure constitutes a "harmless error" and did not rise to the level of a denial of FAPE. Pajaro Valley cites six cases where the failure to have the general education teacher or representative from the private school attend an IEP team meeting was insufficient to establish a denial of FAPE. None of those cases, however, are directly on point or persuasive. Pajaro Valley argued that Heather Gorman, its district-level program director, is a former third grade teacher who could have addressed any general education questions. Ms. Gorman had not taught at Mar Vista. Moreover, it was not her intent at the IEP team meeting to serve in that capacity because Ms. Riggins, Student's most recent general education teacher, actually did attend but left before Father arrived at the meeting. Accordingly, the failure to have a general education teacher present to

discuss the impact and appropriateness of changes to Student's general education placement is more than harmless error. It is a procedural violation that constitutes a denial of FAPE because it infringed on Father's right to meaningfully participate. This is particularly true because a change in Student's general education services was proposed during the meeting. Specifically, the IEP contained an offer reducing Student's resource services to four 75-minute pull-out sessions per week and four 45-minute push in sessions for the four week transition. It eliminated individual resource services altogether and increased the amount of time in general education from 73 percent to 83 percent.

25. Assessments were conducted following the March meeting and Student's IEP team convened again for an IEP team meeting on May 27, 2014. The appropriateness of that IEP is not at issue in this case. In light of the procedural denial of FAPE from January 17, through May 26, 2014, and the fact that a new offer was made during the May meeting that is not at issue herein, the substantive appropriateness of the March offer is rendered moot.

REMEDIES

1. ALJ's have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*).)

2. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with

educational benefit. (*C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.) However the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14. [114 S.Ct. 361, 126 L.Ed.2d 284.]

3. It was determined herein that Pajaro Valley denied Student a FAPE from January 17, 2014, through May 26, 2014. During that time, Student was attending school at Chartwell, a school specializing in educating students with language processing disorders. Chartwell did meet Student's unique needs and provided her educational benefit. It is determined that Pajaro Valley will reimburse Student for four and one-half month's tuition at Chartwell and mileage for one round trip per day for the days that Student actually attended from January 17, 2014, through May 26, 2014, at Pajaro Valley's mileage rate that was in effect at that time.

ORDER

1. Parents shall submit proof of Student's attendance at Chartwell from January 17, 2014, through May 26, 2014. Within 30 days of receiving that documentation, Pajaro Valley will pay mileage for one round trip per day that Student attended Chartwell at Pajaro Valley's mileage rate that was in effect at that time.

2. Within 30 days of the date of this decision, Pajaro Valley shall reimburse Student for four and one-half month's tuition at Chartwell based upon Chartwell's 2013-2014 tuition rate.

3. All of Student's other claims for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Pajaro Valley prevailed on Issues 1 and 2. Pajaro Valley prevailed on Issue 3 from the

start of the 2013 school year through January 16, 2014, and Student prevailed on Issue 3 from January 17, through May 26, 2014.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

DATE: October 28, 2014

/s/

JOY REDMON

Administrative Law Judge

Office of Administrative Hearings