

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019090224

ALTA LOMA ELEMENTARY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

MARCH 6, 2020

On September 6, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Alta Loma Elementary School District, naming Parent on behalf of Student. On September 19, 2019, OAH continued the due process hearing. Administrative Law Judge Alexa Hohensee heard this matter in Rancho Cucamonga, California on January 15, 16, 21, 22, 23 and 24, 2020.

Jonathan Read and Natalie Garnica, attorneys at law, represented Alta Loma. Beth Freer, Alta Loma's director of special education, and Dr. Royal Lord, program manager for the West End Special Education Local Plan Area, attended all hearing days

on Alta Loma's behalf. Maureen Graves and John Nolte, attorneys at law, represented Student. Student's mother, called Parent in this Decision, attended all hearing days on Student's behalf.

At the parties' request the matter was continued to February 10, 2020 for written closing briefs. The record was closed, and the matter was submitted on February 10, 2020.

ISSUE

1. Did the individualized education program, called an IEP, developed at the May 1 and May 16, 2019 IEP team meetings, offer Student a free appropriate public education, called a FAPE, in the least restrictive environment?

JURISDICTION

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

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Alta Loma had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was seven years old and in first grade at the time of hearing. Student resided within Alta Loma's geographic boundaries at all relevant times. Student was eligible for special education under the category of autism, with a secondary eligibility of speech or language impairment.

ISSUE 1: DID THE IEP DEVELOPED AT THE MAY 1, AND MAY 16, 2019 IEP TEAM MEETINGS OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

Alta Loma contends that the IEP developed over two days, called the May 1, 2019 IEP in this Decision, offered Student a FAPE in the least restrictive environment. Alta Loma asserts that the information available to the IEP team showed that Student's autism resulted in severe processing, academic, attention, communication, and social skills deficits that required specialized academic instruction in a special classroom with

language, behavior and social skills supports. Alta Loma offered Student placement in a program administered by the San Bernardino County Superintendent of Schools to provide specialized instruction and services to students with autism, called the County autism program. The County autism program classroom offered was housed on a comprehensive public school campus, and Alta Loma offered Student 25 percent of his school day in general education with typically developing peers. Alta Loma contends that it's placement offer was appropriate, and that the May 1, 2019 IEP offered Student related services and supports reasonably calculated to ensure that Student made appropriate educational progress in light of his circumstances.

Student contends that he should have been placed in a general education classroom the entire school day because he did not engage in disruptive behaviors and was making academic progress in a private school general education classroom where he was parentally-placed. He asserts that with an aide and more one-on-one instruction from his teacher, his educational needs could be met in a general education classroom, where he would have typically developing peers as language and social skills models.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make

progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*).

When a school district seeks to demonstrate that it offered a FAPE, the legal analysis has two prongs. First, it must be determined whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp 206-207.) Second, the district must show that the IEP developed through those procedures was designed to meet the child's unique needs and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*)).

On the first day of the hearing in this matter, the parties stipulated on the record that Student did not contend that District had made any procedural or substantive errors under the IDEA as to physical therapy, adapted physical education, or occupational therapy relating to the May 1, 2019 IEP. Accordingly, although this is a district-filed case and Alta Loma must prove procedural and substantive compliance with the IDEA and California law, those areas are not addressed in this Decision to the same depth as disputed areas.

PROCEDURAL COMPLIANCE

ASSESSMENT

The IEP process must include a comprehensive assessment of the Student in all areas of suspected disability. (34 C.F.R. § 300.303(b)(1); Ed. Code, § 56381(a)(2).) The results of the assessments must be documented in writing and shared with the parents. (Ed. Code, §§ 56327, 56329.)

If an assessment is conducted to develop an IEP, the parent of the student must be given a written proposed assessment plan. (Ed. Code, § 56321(a).) Notice of a proposed assessment consists of the proposed assessment plan and a copy of parental rights and procedural safeguards under the IDEA and companion State law. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a).)

Here, Parents contractually consented to comprehensive assessments of Student in a March 1, 2018 settlement agreement between Parents and Alta Loma in another due process matter. The purpose of the assessments was to develop an IEP for Student for the 2019-2020 school year. Accordingly, the usual steps a school district must take to give notice to parents and obtain consent to an assessment did not apply here. (See *Elk Grove Unified School District v. E.G.* (E.D. Cal., Sept. 12, 2019, No. 2:15-cv-02312-TLN-KJN) 2019 WL 4318572.)

IDENTIFICATION OF AREAS OF NEED

Alta Loma contends that it completed a comprehensive assessment of Student's needs in all areas of suspected disability, which gathered relevant functional, developmental, and academic information for the IEP team. That information was documented in the May 1, 2019 IEP as Student's present levels of performance. Student

contends that Alta Loma's assessors gave up too readily on standardized assessments, used assessors insufficiently familiar with one of the test instruments administered, and were overly negative in the information considered from past educational records.

Evaluations identify students who need specialized instruction and related services because of an IDEA-eligible disability, and help IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) California law refers to an evaluation as an "assessment." (Ed. Code, § 56381.)

A local educational agency must assess a special education student in all areas of suspected disability, including if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social/emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

Assessments must be conducted by persons competent to perform them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.)

A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). The assessments used must be: selected and administered so as not to be discriminatory on a racial or cultural basis; provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; used for purposes for which the assessments are valid and reliable; administered by trained and knowledgeable personnel; and administered in accordance with any instructions provided by the producer of such

assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii)).

Alta Loma conducted its assessments of Student in March and April 2019. Alta Loma comprehensively assessed Student in all areas of suspected disability.

School psychologist Catherine Geerken, speech and language pathologist Christine Openshaw, credentialed special education teacher Jemma Rogers, occupational therapist Elizabeth Ragaza, adapted physical education teacher Jenna Escareno, and school nurse Erin Stevens were competent and well-qualified to conduct the assessments. They gathered information with a variety of assessment tools and strategies to obtain relevant functional, developmental, and academic information. They gathered important information from Parent, Student's private school kindergarten teacher Jerry Pate, Student's private behavior aides and behavior program supervisor, Student's private speech pathologist and his private reading instructor. The multidisciplinary evaluation report included detailed summaries of past assessment results, current progress reports, and comments from Student's private providers, and the district assessors considered this information in forming their opinions and making recommendations. The district assessors also conducted multiple observations of

Student at school, on different days and at different times, during formal testing, and during speech and reading instruction sessions.

Several school assessors were unable to administer standardized test instruments because Student was inattentive and did not interact or respond to directions. This difficulty had been experienced by previous independent assessors, who either could not administer standardized instruments, administered assessment tools outside of test protocols which invalidated the test, or reported incomplete results. Ms. Geerken, Ms. Openshaw and Ms. Rogers chose to administer the Psychoeducational Profile Third Edition, called the PEP-3, a play-based observational assessment. They persuasively explained why they chose the PEP-3 and other assessment tools, and why these tools were appropriate to elicit the information on Student's abilities and performance required by the IEP team.

The assessment tools were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in a language and form most likely to yield accurate information on what Student knew and could do academically, developmentally and functionally. The assessors used technically sound testing instruments that demonstrated the effect that cognitive, behavioral, physical, and developmental factors had on Student's functioning. All assessment tools were used for their intended purpose, valid and reliable, and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessment.

Student's expert psychologist, Dr. Catherine Bailey, was critical of the PEP-3, which she opined elicited such a broad category of emerging skills as to provide little guidance to an IEP team. However, she had done no testing of Student herself, and

could not point to information reasonably necessary to educational planning that was not gathered by the school district assessors with the PEP-3 or additional tests, checklists and rating scales. Student's board certified behavior analyst, called a BCBA, Lilly Flores-Fiumara, was critical of the opinions drawn from the PEP-3. She acknowledged that the PEP-3 was designed with more flexibility than most standardized assessments in providing opportunities to demonstrate skills, but thought that if Student could not demonstrate a skill, the assessors should have tried harder to build rapport or used behavioral interventions, such as a token economy, to see if Student would perform. Ms. Flores-Fiumara was not a licensed psychologist or trained in administration of the PEP-3, and did not conduct an assessment of Student. She had no knowledge of the efforts taken by the district assessors to build rapport, and her opinion that Student would have performed better if the assessors had deviated from the test protocols by use of a token economy was speculative. Both of these witnesses were vague about what information they contended would have been elicited by variance from the test measures administered, other than to refer to Parent's statements of what Student could do, which statements were gathered, considered and well-represented in the assessment report. Although both witnesses had a professional demeanor and readily responded to questions asked, their vague and speculative opinions critical of the assessments chosen by Alta Loma and the results obtained were unpersuasive, especially as they had not assessed Student and obtained contrary results.

Alta Loma's assessments resulted in a 59-page multidisciplinary team evaluation report, dated May 1, 2019, that provided the IEP team with accurate and sufficiently comprehensive information on Student's functional, developmental, and academic performance to identify all of Student's special education and related service needs. The test instruments were technically sound, and demonstrated the effect that cognitive,

behavior, physical and developmental factors had on Student's functioning. Parent interpreted the information gathered by Alta Loma's assessments differently, but did not show that further assessment was needed to inform the IEP team on Student's educational needs. Student did not show that Alta Loma failed to consider pertinent data necessary to identify Student's unique educational needs.

HEALTH AND DEVELOPMENT

Health examinations must be performed by a credentialed school nurse or physician. (Ed. Code, § 56324, subd. (b)).

Registered and school nurse Erin Stevens assessed Student's health and development. A review of records and Parent interview did not reveal any significant health concerns, and Student passed his vision and hearing screenings. Ms. Stevens's portion of the resulting multidisciplinary report informed the IEP team that, developmentally, Student had been diagnosed with autism and delayed communication skills before beginning preschool, and continued to have difficulty interacting with his environment and other people.

COGNITIVE AND ACADEMIC FUNCTIONING

Psychological assessments of pupils must be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).) School psychologist Catherine Geerken assessed Student's cognitive functioning. Ms. Geerken was a licensed psychologist and a credentialed school psychologist. Ms. Geerken had conducted assessments of students with disabilities for over 13 years as a school

psychologist, and was trained and prepared to assess cultural and ethnic factors appropriate to Student.

Ms. Geerken gathered information from Parent through several questionnaires, and received a significant amount of parental input. Ms. Geerken reviewed Student's preschool assessments, in which he had presented with borderline cognitive ability, and extremely low expressive and receptive language development, adaptive skills and social-emotional functioning. Student had also demonstrated significant autistic behaviors, including lack of social interaction, restricted interests and repetitive behaviors. She reviewed a 2017 independent psychoeducational assessment, in which Student was unable to complete full standardized tests due to lack of attention and interaction with the assessor, but scored in the average intelligence range on two nonverbal intelligence subtests.

All prior assessments reported that Student had difficulty tolerating academic tasks, but strong rote skills. Rote skills are overly learned memorization skills, such as decoding, applying phonics rules, and basic math facts, such as counting by 5's or 10's. Student memorized "sight" words, or words that could not be sounded out phonetically.

Ms. Geerken observed Student at his private school three times, at a session with his private speech pathologist, and at a session with his reading instructor at Lindamood Bell. Ms. Geerken interviewed Student's kindergarten teacher Mr. Pate, the behavior aides that accompanied Student at school, and Student's private service providers. Student's behavior aides were funded by Student's insurance and by Parents.

Ms. Geerken was assisted by credentialed special education teacher Jemma Rogers, who conducted the academic portion of the assessment. Ms. Rogers reviewed Student's past assessments and records, and observed Student at his private school and

during testing. Ms. Rogers was credentialed to teach students with mild to moderate disabilities, and was a resource specialist who taught grade-level academics to elementary school students. Both Ms. Geerken and Ms. Rogers were very well qualified to conduct their assessment of Student.

During observations at school, Student did not interact with his peers or his teacher. Most of Student's instruction came from his one-on-one behavior aides. Student was very dependent on the aides, who frequently and repeatedly prompted him, and rewarded him every few minutes for good behavior with tokens or candies.

At speech sessions, Student sat beside his aide and worked on reading skills, rather than language skills, from the Lindamood Bell reading curriculum. The private speech pathologist used a behavior reinforcement system different from, and in addition to, that of the aide. During observation of a reading instruction session at Lindamood Bell, Student sat beside his aide and worked on language skills, such as building multi-word sentences. Student tended to repeat one-word responses despite the instructor prompting for a full sentence.

After her school observations and review of Mr. Pate's responses to multiple questionnaires, Ms. Geerken believed that Mr. Pate's grades and impressions of Student's abilities were skewed and did not take into account the assistance of the one-on-one aides. She was correct. At hearing, Mr. Pate testified unequivocally that he did not know what academic tasks Student could perform independently, and that Student's good grades reflected the combined work of Student and his aides. Mr. Pate explained that he accurately informed the assessors of academic concepts that had been introduced, but responded to questions about Student's abilities taking into account assistance from the aides. Mr. Pate was very thoughtful, and testified candidly and

convincingly that he had little personal knowledge of Student's academic skills in May 2019.

Parent enrolled Student at the private school as a kindergartener, although Student had already completed kindergarten at Alta Loma. By the time of the May 2019 assessment, near the end of Student's second year of kindergarten, Student could sound out some consonant-vowel-consonant words and read memorized words, but Student generally did not comprehend what he read. He also demonstrated the rote ability to recognize and spell the weekly spelling words, and to memorize such things as bible verses and the names of presidents.

Private one-on-one aide, David Paniagua, was persuasive in demonstrating that Student's apparent academic abilities were skewed by aide assistance. Mr. Paniagua explained that if Student wrote an incorrect answer on a class assignment, he would tell Student "try again" as many times as necessary until Student erased each wrong response and wrote a correct response. For example, in a math lesson on greater-or-lesser-than numbers, the worksheet would have two columns of side-by-side numbers with an empty circle between each pair, and the students would be required to draw arrow marks in each circle pointing to the number less than the other. With Mr. Paniagua's assistance, Student could readily fix an incorrect answer by erasing an arrow pointed the wrong way and drawing an arrow facing the other way when told to "try again." Although Mr. Pate would assign that paper a good grade because of the final work product, Mr. Pate was unable to gauge whether Student understood the concept of "more" versus "less" independent of the aide. Student also did not write independently, and had to be prompted by his aides. Aides provided Student with hand-over-hand assistance in writing numbers during school observations.

When Ms. Geerken and Ms. Rogers attempted to administer standardized test measures to Student, it quickly became apparent that Student's autism interfered with his ability to interact with the assessors, understand instructions, or perform requested tasks. This was consistent with Student's history of being unable to complete standardized assessments beyond a few disparate subtests. Ms. Geerken determined that she would use the PEP-3, which was a play-based and observation checklist assessment tool specifically designed to assist educators in identifying developmental delays and planning educational programs for children with autism. It helped evaluate what tasks a child with autism could or could not do, and identified emerging skills to target in educational programming. The PEP-3 gave a developmental age on each subtest based on typically developing children, and a percentile rank compared to other children with autism. It included a variety of components to test areas in addition to cognition, such as communication skills, motor abilities, and maladaptive behaviors. The PEP-3 was administered collaboratively with, and incorporated into the assessments of, other Alta Loma assessors. Ms. Geerken also used other normed assessment tools, such as rating scales.

Dr. Bailey and Ms. Flores-Fiumara opined that Alta Loma assessors should have chosen other standardized tests or tried harder. This was unpersuasive. Dr. Bailey, a psychologist, had not herself assessed Student, as Parent had hired her as an educational consultant to observe Student at school, read the evidence submitted by Alta Loma, and testify. Dr. Bailey had no personal knowledge regarding Student's ability to understand and comply with standardized test instructions, or the assessors' attempts to elicit compliance. Dr. Bailey opined that Student was "testable" because he had earned scores on standardized reading tests administered by Lindamood Bell in December 2018. However, Lindamood Bell only reported scores and gave no

information on how long it took to administer these tests, or whether test protocols were followed. Further, Student did not establish that Lindamood Bell tests were conducted following the test protocols. (See *Student v. Eureka City Unified School Dist.* (2010) OAH Case Number 2010070151, p. 12 [describing problems with the efficacy of Lindamood Bell assessments.]) Student received “0” and “1” raw scores on nine of 12 reading tests administered by Lindamood Bell, suggesting that he could not complete them, and he scored at the first percentile or below on all but two tests. These results were consistent with Student’s history of being unable to complete all but a few subtests of standardized testing. Dr. Bailey’s opinion that this report indicated that Student could perform on standardized tests, or that the Lindamood Bell report demonstrated academic growth, was unpersuasive.

Ms. Flores-Fiumara also had not assessed Student, and her opinion that Student would have performed satisfactorily if motivated with rewards, as he was by his behavior program aides, may have violated test protocols and was unpersuasive. The opinions of Dr. Bailey and Ms. Flores-Fiumara regarding how district assessments were chosen or completed lacked foundation and were speculative.

Alta Loma’s assessors were qualified to administer the PEP-3. Even though this was the first time any of them had administered the PEP-3, they were familiar with the PEP-3 and experienced assessors. Ms. Geerken had chosen other standardized measures in assessments of other students because she had been able to elicit sufficient responses from them. Ms. Geerken testified convincingly that she and other district assessors made multiple attempts to administer other standardized tests to Student, but Student could not follow the directions of almost all of them, including the standardized cognitive instruments Ms. Geerken attempted. Alta Loma assessors persuasively opined that the PEP-3 was designed to, and did, provide significant and useful information to

the IEP team on Student's abilities and current skill levels. The 59-page multidisciplinary report contained information from many sources including the PEP-3 and multiple Parent-completed rating scales and questionnaires.

Student's experts opined that Student's abilities and skills had grown over the past year, and they recommended that Student remain in a general education classroom to continue that growth trajectory. However, those opinions were based solely on Parent's report, observations of work completed with aide assistance, and Mr. Pate's inaccurate report cards. The results of Alta Loma's assessments were consistent with prior assessments, in which Student scored with severe cognitive, academic, communication and adaptive skill deficits. Dr. Bailey and Ms. Flores-Fiumara did little more than repeat what had been reported by Parent, and even their observations were based on assumptions from Parent reports. The opinions of Dr. Bailey and Ms. Flores-Fiumara were unreliable because they had limited personal knowledge, and did not verify reported results with their own testing. Their opinions on Student's cognitive abilities, academic skills, and functional performance, and on Student's educational needs, or educational program components reasonably calculated to meet those needs, were given less weight than those of the Alta Loma experts who observed Student and conducted their own assessments.

Student's behavior program supervisor, Christopher Wong, Mr. Paniagua, Dr. Bailey and Ms. Flores-Fiumara did not persuasively demonstrate that Student had advanced skills beyond rote memory. For example, Ms. Flores-Fiumara reported that Student read words from materials he had not seen before simply because the materials were unused when Parent gave them to her. Ms. Flores-Fiumara's conclusion was flawed and unpersuasive because Student could have practiced on one set of materials, with Parent purchasing a new identical set for Ms. Flores-Fiumara.

On Ms. Geerken's administration of the PEP-3, Student had a verbal cognitive age of 36 months. He could orient to sound, do simple puzzles, match pictures, name shapes and simple objects, rote count, match colors and repeat 3 to 4 word sentences. Emerging skills included interest in picture books, following two-step directions, understanding simple commands, and differentiating between personal pronouns. He had difficulty reading numbers, words, sentences and passages from an unfamiliar picture book, sorting cards without a demonstration, requesting food or drink, producing a two-word phrase or stopping an activity when requested. Compared to other children with autism, Student's overall percentile score of 31 indicated a moderate degree of atypical cognitive development.

Ms. Rogers was unable to administer a standardized test of academic achievement, but measured Student's academic skills using responses from Mr. Pate and Parent to academic performance questions on an adaptive behavior scale. Mr. Pate reported that Student could read his name, and could sometimes write his first and last name, name the days of the week in order, and tell time. Student could not read and obey common signs, answer simple story questions, use a calendar, read and follow classroom assignment instructions, read the lunch menu, measure with a ruler, correctly produce an amount of money, follow the classroom schedule, write emails or find information on the internet. Parent gave responses consistent with those of Mr. Pate. Student had an age equivalent in academic functioning of a five to six-year-old, although he was almost seven years old, and had repeated kindergarten. Ms. Rogers concluded in the multidisciplinary report that Student's academic skills were below grade level, that he needed maximum verbal and visual support to participate in classroom activities, and needed an adult in close proximity to give frequent prompts.

LANGUAGE AND COMMUNICATION DEVELOPMENT

Ms. Openshaw assessed Student's communication abilities. Ms. Openshaw had been a licensed speech language pathologist for over 20 years, and conducted assessments of children in both medical and school settings. Communication was an area of suspected disability because Student had autism, and language deficits are a characteristic of that disability. She reviewed previous assessments that reported atypical communication development, with too little speech to obtain language samples, no social use of language, and rote repetition of what was heard, called echolalia. Prior assessments reported that Student could repeat words with prompting, but he did not generally initiate verbal or nonverbal communication.

A previous district speech assessor was not able to obtain scores on formal speech and language testing, and a 2017 independent language assessor had been unable to administer standardized test measures. Ms. Openshaw was unable to administer standardized tests after multiple attempts, and collaborated with Ms. Geerken and Ms. Rogers in administering the PEP-3, which had speech and language components.

Ms. Openshaw interviewed Parent and reviewed Student's educational records. She observed Student at his private school, where she observed that Student's one-on-one aide prompted him to pay attention and complete lessons, and often gave Student hand-over-hand assistance with writing. Mr. Pate reported on a concurrently given adaptive behavior assessment rating scale, that Student could nod or shake his head to yes and no questions, sometimes said "hello" or "goodbye," and sometimes followed directions. Mr. Pate indicated that Student did not use sentences with a noun

and a verb, listen closely for five minutes, use irregular plural nouns, pay attention during classroom discussions, or answer complex questions.

Ms. Openshaw observed Student during a private speech session, in which the speech pathologist was working with the Lindamood Bell reading curriculum.

Ms. Openshaw opined that the Lindamood Bell curriculum was not an effective method for targeting Student's speech and language needs. The private speech pathologist prompted Student to use three to five word complete sentences, but Student gave two-word responses. Ms. Openshaw interviewed the private speech pathologist, whose information was consistent with Mr. Pate's responses. The private speech pathologist told Ms. Openshaw that Student struggled with apraxia, needed maximum prompting, and would not work without an incentive.

Ms. Openshaw also observed Student during a Lindamood Bell reading lesson, where the instructor was working on Student's speech goals. Student was giving one-word responses.

The PEP-3 measured Student's ability to express himself by speaking or gesturing. Student could name basic colors, shapes and objects, and use descriptive words like "big." Student spontaneously commented on some test materials, such as a bubble blower, and used one 5-word sentence "Can I have blue car please." He showed emerging skills in the use of plural nouns, but had difficulty with representational play, spontaneous communication, maintaining eye contact, verbal turn taking, and requesting or sharing information. Receptively, Student comprehended the names of colors and common objects, understood some adjectives such as "big," identified letters, and could follow one-step directions. Emerging skills included following two-step directions and understanding personal pronouns. He had difficulty following two-step

directions and responding to gestures. Student's oral-motor skills were adequate for speech production, and his speech was generally intelligible. Student was not able to speak without repetition or babbling, and frequently exhibited echolalia. Ms. Openshaw could not get a full language sample of 50 utterances due to Student's limited verbal output, and Student's average length of utterance was two to three words.

The PEP-3 reflected a moderate degree of atypical language development for a student with autism. Student was 80 months of age, but his receptive and expressive language were at the developmental age of 25 months, and sentence construction was at less than a developmental age of 40 months. Ms. Openshaw concluded in the multidisciplinary report that Student had needs in the areas of receptive, expressive and pragmatic, also known as social, language.

SOCIAL AND EMOTIONAL FUNCTIONING AND BEHAVIOR

A person recognized by the National Behavior Analyst Certification Board as a board certified behavior analyst, or BCBA, may, but is not required to, conduct behavior assessments and provide behavior intervention services for individuals with exceptional needs. (Ed. Code, § 56525, subds. (a) and (b).)

Student had historically presented with aggressive behaviors, and was receiving behavior intervention services at school and at home. Inappropriate interactions with others is a characteristic of autism, as is atypical behavior.

Ms. Geerken's education, training and experience made her well-qualified to administer and interpret components of the PEP-3 that measured social and emotional functioning, including maladaptive behaviors. Student displayed enjoyment during play, and could sometimes work with persistence and display feelings through body postures,

such as pushing away unwanted toys. He did not use facial expressions to clearly communicate feelings, regulate his attention span or express emotions during testing. Socially, Student could initiate the repetition of games and social interaction, and demonstrated emerging skills in imaginative play, taking turns, making eye contact when directed, and seeking help, but throughout testing, Student struggled to cooperate with assessor requests or to make eye contact. In comparison to other children of the same age with autism, Student displayed a moderate degree of atypical affective expression and social reciprocity development.

Ms. Geerken administered a rating scale to Parent to measure Student's problem behaviors, self-care skills and adaptive behavior based on Parent's daily observations. In most areas, Parent reported that Student had a moderate degree of problem behaviors. However, Parent reported severe behavior problems in the areas of language, developing appropriate friendships, initiating and maintaining conversations, and spontaneously sharing enjoyment with others. She reported moderate problems in the areas of eye contact, facial expressions, using gestures to communicate, and repetitive motor mannerisms such as hand flapping, but also that Student did not use repetitive language but was able to express his feelings and recognize them in others.

Ms. Geerken administered another rating scale to Mr. Pate and Parent to measure Student's emotional functioning, social problems, behaviors, academic difficulties and language problems. Mr. Pate reported average concerns regarding Student's emotional and behavioral functioning, but elevated concern in language and social skills, and that Student's problems seriously affected his schoolwork and relationships with peers. Mr. Pate reported that Student played with others, but did not interact well with them. Parent reported elevated levels of concern regarding Student's social skills, academic

difficulties, particularly in math, and language skills. On another rating scale designed to measure behaviors associated with autism, both Parent and Mr. Pate scored Student in the elevated or very elevated range. However, Mr. Pate did not report aggressive or disruptive behaviors at school, consistent with school assessors' observations.

During Ms. Geerken's observations of Student, he did not display disruptive behaviors in the classroom. Student's aide took him out of the classroom five or six times per day, for five minutes, when Student needed a break. Student did not routinely speak at school, but he did make noises in class, which the other students ignored. Student could participate in class with prompting from his aides, but usually responded with one, two or three words, and not complete sentences. Student sometimes ran on the playground during his breaks, and used a weighted blanket to calm himself. Student engaged in parallel play during recess, and did not have verbal exchanges with his peers. The adult one-on-one aide stayed next to Student throughout recess, and held Student's hand while they ran around the field in a structured game of baseball.

Ms. Geerken interviewed Mr. Wong, the BCBA who oversaw Student's behavioral intervention program at home and at school and supervised Student's aides. Mr. Wong reported that, at school, Student participated in physical education activities, engaged in structured play activities, and liked to be near two to three peers. In an April 2019 behavior update sent to Ms. Geerken, Mr. Wong reported that Student had five behavior goals: to sit and attend for 10 minutes, to use three to five words to communicate, to reduce automatic behavior, to reduce aggressive behavior, and to reduce self-injurious behavior. Automatic behavior meant Student holding his head at an odd angle, called head stimming, looking at toys from the side of his eyes, called eye stimming, and

repeating scripted phrases from videos or songs, called scripting. Aggressive behavior was defined as hitting or throwing something at another person. Self-injurious behavior meant hitting himself with a closed fist. In April 2019, Student could sit and attend without maladaptive behaviors for two minutes, could communicate his wants and needs with two-word utterances, and exhibited aggression once every two days. Student was head stimming five times per day, eye stimming about three times per day, and scripting 23 times per day.

Ms. Geerken summarized the test results, rating scale responses, and interview information in the multidisciplinary report. She concluded that Student had social emotional skills in the extremely low range, and behaviors that impeded his learning.

ADAPTIVE DEVELOPMENTAL SKILLS

Due to his history of inattention, disconnection and other autistic behaviors, Alta Loma assessed Student for deficits in adaptive skills. The PEP-3 allowed Ms. Geerken to sample Student's interactions with peers, activities, objects and other people, to provide helpful information in managing Student's behaviors in school and with transitions from home. Parent reported that Student regularly changed activities during the day without protest, did not hesitate to try new activities, and approached peers to initiate play. She reported that Student regularly learned new skills, played with other children, and transitioned independently between activities. She reported that Student was sometimes "out of touch" with his immediate surroundings, but was learning to make better eye contact and to play imaginatively with toys. Student lacked safety awareness when crossing the street and made frequent odd movements when sitting or standing.

Mr. Pate reported that Student's adaptive skills were in the extremely low range overall. Student worked quietly in class without disturbing others, and followed classroom routines, but did not show respect when using others' possessions or work with his classmates. Mr. Pate reported that Student followed school rules and used materials correctly, but did not indicate when he was ill or hurt, and did not obey requests from unfamiliar adults. He reported that in the classroom Student often looked at books during free time, and sometimes played games with others, waited his turn in classroom activities and followed rules. Student relied on Mr. Pate to select free-time activities, and would only participate in games or activities with others with prompting. Student could not perform classwork independently, did not ask for help when needed, and could not attend to a classroom activity for 15 minutes. Socially, Mr. Pate reported that Student was well-liked by his peers, but did not have friends, did not laugh at funny comments, did not say "please" or "thank you," or express his emotions.

Ms. Geerken summarized these responses and concluded in the multidisciplinary report that Student exhibited a moderate degree of atypical adaptive behaviors, with Mr. Pate's responses rating Student in the low range of adaptive skills.

GROSS MOTOR, FINE MOTOR, AND SENSORY FUNCTIONING

The PEP-3 measured Student's fine motor skills, eye-hand coordination and gross motor skills. Student scored with a moderate degree of atypical fine motor, or coordination, development. His gross motor skills, or the ability to control his body parts, was an area of strength, with only mild delays. However, his visual motor skills, or the ability to imitate visual and motor tasks, was severely impaired. Student demonstrated a severe degree of characteristic motor behaviors, such as preoccupation

with parts of objects and repetitive motor mannerisms, with emerging skills in appropriately examining textures such as play-dough, responding to auditory stimuli, shifting between tasks, and completing age-appropriate tasks independently.

Licensed occupational therapist Elizabeth Ragaza assessed Student for sensory needs, which Parent had identified as an area of concern. Parent and Mr. Pate completed a sensory processing rating scale that would identify sensory processing issues in elementary school children and yielded norm-referenced standard scores. Mother reported that Student was bothered by ordinary sounds, easily distracted, and sometimes covered his ears at loud noises. Student sought out body motion activities such as pushing, pulling, lifting, jumping and spinning around. Mother reported, and several assessors saw during their observations, that Student enjoyed looking at moving objects out of the corner of his eye. Mr. Pate reported that Student exhibited problems in body awareness and planning, such as moving his chair roughly, running and hopping instead of walking, and stomping his feet. Student had difficulty imitating movements, and demonstrated limited imagination in play. The results of the rating scales showed that his sensory issues caused definite dysfunction in social participation.

Mr. Pate also completed a non-standardized checklist used by occupational therapists to identify areas in which a Student was having difficulty at school. Student had difficulty attending, following directions, initiating tasks and organizing his work. Student had trouble with spacing between letters and words, tying his shoes, washing his hands, and opening wrapped lunch items.

Ms. Ragaza attempted to administer a standardized test of visual motor abilities, but Student would not follow the instructions. She observed during assessment

sessions that Student could hold a pencil correctly, string beads, use a pegboard and open a jar. He could build a block tower, but not imitate block designs. He could write all the numbers and uppercase letters, but could only go to "g" with lowercase letters. His writing was legible, but placement and spacing on the page needed improvement, which was not uncommon at his age. Student did not color within the lines as instructed.

Ms. Ragaza summarized the rating scale responses and her observations in the multidisciplinary report and concluded that Student presented with fine and visual motor skill delays, as well as sensory processing difficulties. She also concluded that Student lacked skills needed for successful participation in a school setting in the areas of attention/behavior, handwriting and some self-care tasks.

ADAPTED PHYSICAL EDUCATION

Student was assessed for the need for adapted physical education by credentialed adapted physical education teacher Ms. Escareno. She used a test of gross motor functions frequently taught in early elementary classes to measure how Student coordinated his trunk and limbs during movement tasks. Overall, Student scored at less than the first percentile in locomotor skills, such as running, and object control skills, such as kicking or dribbling a ball. Ms. Escareno administered a criterion-referenced evaluation of Student's gross motor skills, and he demonstrated locomotor and balance skills at the 3-year-old level, and object control skills at the 5-year-old level.

On another criterion-referenced scale of development administered by Ms. Escareno, Student demonstrated skills in strength, balance, mobility and coordination at the level of approximately a 2- to 5-year-old, depending on the task.

Ms. Escareno summarized her assessment results in the multidisciplinary report, and concluded that Student performed below age expectancy on many motor skills in both object control and gross motor areas, and recommended that the team consider offering adapted physical education services.

The multidisciplinary assessment report identified Student had needs in the areas of cognitive processing, academic achievement, social emotional functioning, adaptive functioning, communication, fine and gross motor skills and sensory processing. Ms. Geerken, Ms. Openshaw and Ms. Rogers opined persuasively that the IEP team identified all of Student's areas of need based on the information gathered by the multidisciplinary assessment.

Student contends that Alta Loma did not identify all areas of suspected disability, specifically apraxia. Student's private speech pathologist had concerns about apraxia, which is characterized by inconsistencies of sound due to inability to make the sounds. Prior speech assessors had recommended monitoring for apraxia in large part because Student was essentially nonverbal, and his oral motor abilities were unknown. In May 2019, Ms. Openshaw observed during assessment that the few words Student did say were clear, and Mr. Pate reported that Student's speech was intelligible, leading her to conclude that Student did not have apraxia. No witness testified that Student's speech, as limited as it was, was unclear, and no speech language pathologist testified to contradict Ms. Openshaw's professional opinion. Accordingly, Alta Loma did not fail to identify all of Student's suspected areas of need.

In summary, the assessments fully identified Student's educational needs, and the May 1, and May 16, 2019 IEP teams had accurate, reliable and sufficiently comprehensive assessment information to develop an IEP for Student.

IEP DOCUMENT

An annual IEP must contain a statement of the child's present levels of academic achievement and functional performance, including the manner in which the child's disability affects involvement and progress in the general education curriculum. (34 C.F.R. 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1)(a).)

An IEP must contain a statement of the special education, related services, supplementary aids and services, and program modifications or supports to be provided to the student. It must also specify the frequency, duration, and location of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) & (VII); 34 C.F.R. § 300.320(a)(4) & (a)(7); Ed. Code, § 56345(a)(4) & (a)(7).) It must contain an explanation of the extent to which the student will not participate with nondisabled children in the regular class. (20 U.S.C. 1414(d)(1)(A); 34 C.F.R. §300.320(a)(5); Ed. Code, §56345, subd. (a)(5).)

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

An IEP must state whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3).)

If a child's behavior interferes with his or her learning or the learning of others, the IDEA requires that the IEP team, in developing the IEP, "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

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

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

An IEP is not required to include the particular instructional methodologies that will be utilized in instruction. (34 C.F.R. § 300.320(d)(1); 71 Fed. Reg. 46,665 (Aug. 14, 2006).) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See *Adams, supra* 195 F.3d at 1149; *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84 (*T.B.*).) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.) A parent's disagreement with a school district's educational methodology is insufficient to establish an IDEA violation. (*Carlson v. San Diego Unified School Dist.* (9th Cir. 2010, unpublished) 380 F. App'x 595; see also, *Lachman v. Illinois State Board. of Education* (7th Cir. 1988) 852 F.2d 290, cert. denied at 488 U.S. 925 [holding that parents do not have a right to compel a school

district to provide a specific program or employ a specific methodology in providing for the education of a student with a disability].)

The IEP document must fulfill the IDEA's explicit requirement of written prior notice to parents when a school district proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. § 300.503(a).)

The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*)

The formal IEP offer may be clarified by a prior written notice letter in conformity with Title 34 of the Code of Federal Regulations, section 300.503. (See 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. § 300.503; *Union, supra*, at 15 F.3d p. 1526 [permitting a prior written notice letter to clarify placement offer].)

A school district may have two or more equally appropriate locations that meet the child's special education and related service needs, and school administrators have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement. (71 Fed. Reg. 46588 (Aug.14, 2006).) The IDEA does not remove from school authorities control over decisions as to where to allocate resources and locate instructional facilities (*Letter to Angelo* (OSEP) 213 IDELR 168A (September 13, 1988).) However, special classes that serve students with similar and more intensive educational needs must be made available. (Ed. Code, § 56364.2, subd. (a).)

Procedural violations that do not result in a loss of educational opportunity or which do not constitute a significant infringement of parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992), *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B).) A due process hearing decision cannot be based solely upon a nonsubstantive procedural error unless it is also found that the error resulted in the loss of educational opportunity to the pupil or interfered with the opportunity of the parent to participate in the formulation process of the IEP. (Ed. Code § 56505(j).)

PRESENT LEVELS OF PERFORMANCE

Student's present levels of academic achievement and functional performance as reported in the multidisciplinary assessment, including the manner in which his autism and language impairment affected his participation and progress in the general curriculum, were accurately summarized in the March 1, 2019 IEP. Relevant sections of that information were also included in the IEP as baselines by which to measure Student's progress on annual goals.

STATEMENT OF PLACEMENT AND RELATED SERVICES

The May 1, 2019 IEP contained a clear statement of the special education and related services offered, including the frequency, duration, and location of those services:

- Specialized academic instruction for 1,860 minutes per week, or a full day, in the County autism program

- Intensive individual services, for 1,860 minutes per week, as one-to-one aide services, or a full day
- Language and speech services, delivered in a small group, for two 30-minute sessions per week, in a separate classroom
- Occupational therapy for thirty 30-minute sessions per year individual, and thirty 30-minute sessions in a group setting, in a separate classroom, and
- Adapted physical education for fifty-five 20-minute sessions, individual or group depending on the skill or activity being learned, in a separate classroom

Towards the end of the May 16, 2019 IEP team meeting, district team members opened the placement discussion by recommending the County autism program. For the remainder of the meeting, approximately 20 minutes, Parent and Student's advocate interrupted, spoke over, and made demeaning and inaccurate statements to district IEP team members in an attempt to prevent discussion of the continuum of options. As a result, the discussion was chaotic. Parent then left the meeting because it had run over the time scheduled, and refused Alta Loma's subsequent attempts to schedule a third meeting to revisit placement options.

Alta Loma promptly clarified its placement offer in a prior written notice letter to Parent on May 24, 2019 that complied with federal regulations. The prior written notice contained a revised May 1, 2019 IEP that explained the extent to which the student would not participate with nondisabled children in the regular class, by offering 75 percent of the school day in the County autism program, and 25 percent of the school day in general education. The revised IEP also increased the number of speech sessions from 50 per year to two per week, as requested by Parent.

SUPPLEMENTARY AIDS, MODIFICATIONS AND SUPPORTS

The IEP contained a long list of supplementary aids and services and other supports, such as adapted writing materials, preferred seating, and movement breaks. It specified that no program modifications were needed, but offered support for Student and school district personnel by:

- Collaboration between the classroom teacher and Student's various service providers to assist with consistency and carryover of skills and strategies learned in service sessions to the classroom, for 10 minutes per week, and
- BCBA support to the one-on-one aide and teacher for 120 minutes per month from August through October 2019, and 60 minutes per month from November 2019 through May 2020.

The IEP specified the start date, end date, and frequency of program accommodations and personnel supports, and that both would be provided in the classroom. Additional details of the offer of services, accommodations and supports was also contained in the IEP team meeting notes section of the IEP.

The IEP provided that Student would not participate in statewide testing, and was exempt from statewide physical fitness testing, so no accommodations were needed for those purposes.

EXTENDED SCHOOL YEAR

IEPs must be reviewed at least annually (20 U.S.C. § 1414(d)(4)(B); 34 C.F.R. § 300.324(b)(1)(i); Ed. Code, §56341.1, subd. (d)). The IEP team wrote the May 1, 2019 IEP to offer services from May 1, 2019 through May 1, 2020, which both ensured that an IEP

was in place at the beginning of the 2019-2020 school year, and that an annual review would be held by May 1, 2020.

The March 1, 2018 settlement agreement between Parents and Alta Loma stated that Alta Loma would develop an educational program for Student for the 2019-2020 school year, and that Parents would be exclusively responsible for providing any educational services to Student prior to the commencement of the 2019-2020 school year. For that reason, the May 1, 2019 IEP did not offer an extended school year program for Summer 2019, prior to the commencement of the 2019-2020 school year.

Similarly, the May 1, 2019 IEP did not offer an extended school year program for Summer 2020, because an annual review of Student's IEP would take place prior to May 1, 2020. Whether Student would require and be offered extended school year services in Summer 2020 would be decided at that annual review. The IEP specifically noted that the team anticipated Student would likely need extended school year services in Summer 2020, and that an offer would be discussed at the annual review.

The May 1, 2019 IEP complied with the parties' written settlement agreement. Any procedural error in drafting the IEP to offer services from May 1, 2019 through May 1, 2020, rather than beginning on the first day of the 2019-2020 school year, was nonsubstantive. It did not result in the loss of educational opportunity to Student or interfere with the opportunity of Parent to participate in the formulation process of the IEP, and therefore did not deny Student a FAPE.

BEHAVIOR INTERVENTIONS

Ms. Geerken gathered extensive information on Student's behavior from Student's private BCBA, Mr. Wong, and from several rating scales completed by Parent

and Mr. Pate, as well as the assessors' observations. Student displayed attention deficits, and some self-injurious behavior, aggressive behavior, and automatic behaviors such as scripting that impeded his learning. Ms. Geerken relayed that information to the IEP team and recommended that it develop a behavior intervention plan.

The IEP team considered the use of positive behavioral interventions, supports and other strategies to address Student's behaviors, and included them in the May 1, 2019 IEP. Those included a token economy, a high level of structure and routine, consistent expectations, materials to be ready, frequent physical activity, choices of non-preferred activities, front-loading and self-control using the token economy board. The IEP also included behavior goals in self-advocacy and requesting sensory diet items as needed. Accordingly, the IEP identified and contained appropriate positive behavioral interventions to address the behaviors resulting from Student's disability.

PLACEMENT

The May 1, 2019 IEP identified the location for Student's specialized academic instruction as the County autism program, which was confirmed in a May 24, 2019 prior written notice. The IEP documented that placement in the County autism program would limit Student's access to the general education curriculum and typically developing peers, but explained that a general education setting without the supports and services identified in the IEP would not meet Student's needs in all developmental areas. The prior written notice explained that Student required a classroom setting with highly-structured routine, visual supports throughout the school day, and a program implementing evidence-based learning strategies embedded in the curriculum. It explained that Student required a program in which highly-trained teaching staff provided social skills, activities, and lessons to encourage Student to develop

appropriate and cooperative peer interactions and relationships, which the County autism program offered. It also offered Student 25 percent of his school day in general education as the least restrictive environment, including lunch, recess, physical education, assemblies, school-wide activities and general education classes. Alta Loma, in the May 1, 2019 IEP and May 24, 2019 prior written notice, adequately documented its rationale for not placing Student in his home school, and explained why Student's disability prevented his needs from being met in a less restrictive environment with supplementary aides and services at his home school.

Student contends that Alta Loma failed to include all necessary elements in the IEP because it did not identify the curriculum it was proposing, correctly identify the grade that Student would be entering, specify how the mainstreaming offered would be implemented, specify which of the County autism program classroom locations it was offering, clearly document the speech services offered, or identify embedded classroom supports.

Student contends that the IEP should have identified the curriculum to be used in the classroom. The IDEA has no requirement that a specific curriculum be identified. However, the IEP clearly identified on the first page that Student's disability, including communication deficits, motor deficits, maladaptive behaviors affected involvement and progress in the general education curriculum. Student's academic goals made reference to State standards, which are part of the general education curriculum, and which Ms. Rogers testified persuasively were the curriculum standards that Alta Loma sought to have Student achieve. Ms. Freer and Mr. McDermott testified convincingly that Student would have access to grade-level curriculum if he demonstrated grade-level skills.

The IEP also documented that Student's academic skills were well below grade level, and the May 24, 2019 prior written notice explained that Student's academic curriculum would be taught at a functional level using evidence-based learning strategies such as Treatment and Education of Autistic and Communication Handicapped Children, or TEACCH, methodology and applied behavior analysis, or ABA. However, the IDEA did not require Alta Loma to specify a particular methodology in the IEP.

Student contends that the IEP was left unclear as to Student's grade level. However, the IEP team meeting notes, the audio record of the May 1, and May 16, 2019 IEP team meetings, and the testimony of district witnesses established that Alta Loma offered to place Student in first grade for the 2019-2020 school year. Student had left the district a year earlier as a kindergartener, and the software that generated draft IEPs, and automatically populated such fields as date of birth, parent address, and grade level, identified Student as a first grader. Mr. Pate taught a kindergarten-first grade combination class. Alta Loma staff reasonably believed when creating the draft IEP that Student attended first grade at his private school for 2018-2019 and was returning for second grade in 2019-2020. Once informed by Parent and Mr. Pate that Student repeated kindergarten, the team discussed placement in first grade for the 2019-2020 school year, but requested that Parent provide documentation from the private school that Student had been retained. Parent failed to provide this information to Alta Loma, and cannot now complain that the IEP offered second grade placement when she herself withheld the information the IEP team required to change Student's grade level on the IEP.

Testimony from expert witnesses varied as to the importance of grade placement for Student, particularly as all witnesses agreed that Student would need individualized

academic instruction at his developmental level in any setting, whether general education or a special classroom. Mr. Wong opined that there were benefits for both, as a second grade placement would place Student with same-aged peers, and a first grade placement would place Student at an academic level closer to his ability to perform. The County autism classroom taught by Mr. McDermott was for students with moderate to severe disabilities in kindergarten through second grade, and each student was taught at their individual academic and functional level, regardless of grade designation. Accordingly, the evidence did not demonstrate that the nonsubstantive failure to identify Student as attending kindergarten rather than first grade in the IEP resulted in a loss of educational opportunity to Student or interfered with Parent's opportunity to participate in the formulation of the IEP, and so did not result in a denial of FAPE.

Student contends that the IEP did not include specificity on when and where Student would be mainstreamed. However, the IDEA requires only that the IEP explain the extent to which the student will not participate with nondisabled peers in the regular class and activities. The May 1, 2019 IEP's statement of the percentage of time that Student would be mainstreamed in general education classes and activities, with the explanation that Student's core classes required specialized academic instruction in a special education classroom, met that requirement. Alta Loma was not required to incorporate a class schedule for the following school year, assuming one had been finalized, or to specify times and activities during which mainstreaming would take place. Ms. Freer and County autism program teacher Mr. McDermott testified persuasively that such decisions are best left to the classroom teacher, who can determine which general education teachers, classes, times and activities offered on the comprehensive school campus would be expected to provide Student with the best opportunity to benefit from integration with typical peers.

Student speculated that Alta Loma might not have implemented the 25 percent mainstreaming offer because the IEP team did not know how mainstreaming was coordinated between County classrooms and the school sites where they were located. However, Mr. McDermott testified passionately and convincingly that if he had a Student in his class who required 25 percent mainstreaming, he would work with the campus administrators to make sure it happened. All County autism programs were housed on comprehensive public school campuses with access to typical peers. Alta Loma and County had the resources necessary to implement Student's IEP, and Student's argument that they would have failed to implement the IEP was both premature and unsupported by the evidence. (See *Z.R. v. Oak Park Unified Sch. Dist.* (9th Cir. 2015) 622 Fed.Appx. 630, 631 (*unpublished*) [finding speculative failure to implement claim premature].)

Student argued that Alta Loma's offer of a County autism program was unclear because it did not specify the teacher's experience and the other students' special education eligibility profiles. That is, Student asserted that not all County autism classrooms were the same due to those factors. The evidence established that the County autism program classrooms were substantively the same. Ms. Freer and Mr. McDermott testified convincingly that all County autism program classrooms implemented the same program, and that Student would receive the same specialized instruction and embedded supports in any of the County autism program classrooms. Student offered no evidence of a significant disparity between the classrooms, let alone in teacher experience or student mix. Alta Loma was able to offer two or more equally appropriate County autism program locations, and the IDEA permits Alta Loma the flexibility to assign Student to the particular school or classroom made available by the County. In *Rachel H. v. Dept. of Ed., State of Hawaii* (9th Cir. 2017) 868 F. 3d 1085, 1093,

the Ninth Circuit held that the IDEA did not procedurally require identification of a particular school in every instance. Here, Alta Loma's designation of a County autism program classroom was a sufficiently specific placement offer for Parents to consider seriously whether such placement was appropriate.

Student argued that the failure to specify a specific location violated the IDEA because Alta Loma could not ensure that Student was educated as close to home as possible. Ms. Freer explained that Alta Loma could not offer a specific classroom until it consulted with the County autism program on space availability, and it could not consult with the County autism program until and unless an offer of placement in the autism program was made. The May 1, 2019 IEP document and May 24, 2019 prior written notice letter provided sufficient information to explain that Alta Loma did not have a program that met Student's extensive educational needs, at his home school or elsewhere, and that Student required the specialized instruction of the County autism program. Alta Loma team members also attempted to explain the difference between Alta Loma's classrooms for children with moderate to severe disabilities and the County autism program at the May 16, 2019 IEP team meeting, but Parent and Student's advocate would not let them speak.

The County had space available for Student in Mr. McDermott's autism classroom for the 2019-2020 school year, and Ms. Freer informed Parent prior to the beginning of the 2019-2020 school year. Alta Loma also offered to arrange for Parent to observe Mr. McDermott's classroom and convene a third IEP team meeting to review the placement offer, but Parent declined. Accordingly, even if the failure to designate the specific classroom location in the IEP was a procedural error, it did not deprive Student of educational benefit or interfere with Parent's opportunity to participate in the IEP development process, and did not deny Student a FAPE.

Student contends that the offer of group speech services in a “separate classroom in public integrated facility” was unclear as to whether these were push-in or pull-out services. However, the May 1, 2019 IEP clearly documented the speech services location as other than the County autism program classroom, and Ms. Openshaw stated multiple times at the May 16, 2019 IEP team meeting that the services would be provided as pull-out services.

Lastly, Student attacks the May 1, 2019 IEP as not informing Parents that a County speech pathologist and occupational therapist regularly visited the County autism classroom to support Mr. McDermott and his students as part of the County autism program. Student argues that this constituted a denial of information to Parents about the level of services being provided. Student speculates that service providers providing supports embedded in the program could get into mischief by suggesting changes in methodology that would not be in Student’s best interests. Student’s argument is speculative, and at best constitutes a premature implementation claim. An IEP does not need to specify services that are part of the program curriculum, and methodology is left to the discretion of the school district.

The May 1, 2019 IEP, as clarified by the May 24, 2019 prior written notice letter, met all IDEA procedural documentation requirements. It also clearly stated the special education and related services, placement, and other program components, offered at the May 16, 2019 IEP team meeting.

IEP TEAM MEETING

Once a student has been referred for an initial assessment to determine whether the student has a disability and by reason thereof needs special education and related services, an IEP team meeting must be held to determine of eligibility, and to develop an

IEP if the student is found eligible. (20 U.S.C. § 1414(a)(1)(C); Ed. Code, § 56302.1, subd. (a).) An IEP required as a result of an assessment must be developed within a total time not to exceed 60 days, with exceptions not relevant here, from the date of receipt of the parent's written consent for assessment, unless the parent agrees to an extension in writing. (Ed. Code, § 56344, subd. (a).)

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

The fact that it may be difficult to schedule meetings or to work with a parent does not excuse a failure to include the parent in the IEP team meeting. (*Doug C. v. Hawaii Dept. of Education*, (9th Cir. (2013) 720 F.3d 1038, 1045 (*Doug C.*); *Roberts v. Santa Monica-Malibu Unified School Dist.* (9th Cir. 2015) 606 Fed.Appx. 359.) Educational agencies have timelines to meet, which may be jeopardized by having to reschedule or continue meetings, and the Ninth Circuit explained the deliberation process that the agency must use:

The more difficult question is what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, in this case parental participation and timely annual review of the IEP. In considering this question we keep in mind the purposes of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. It is also useful to consider our standard for determining

when a procedural error is actionable under the IDEA. We have repeatedly held that “procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of FAPE.” When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in a denial of FAPE. In reviewing an agency’s actions in such a scenario, we will allow the agency reasonable latitude in making that determination.

(*Doug C.*, *supra*, 720 F.3d at p. 1046 (internal citations omitted, emphasis added). The Ninth Circuit noted that it previously held that delays in meeting deadlines did not necessarily deprive the student of educational benefit (see *A.M. v. Monrovia* (9th Cir. 2010) 627 F.3d 773, 779), and held that an agency’s decision to prioritize strict deadline compliance over parental participation was not reasonable.

TIMELINESS OF MEETING

The parties agreed in the March 1, 2018 settlement that Alta Loma would complete comprehensive assessments and review them at an IEP team meeting by April 30, 2019. However, Alta Loma did not convene a meeting to review the completed assessments until May 1, 2019, and was a day late.

Convening the IEP team meeting to review assessments one day late was a minor procedural error. It did not result in a loss of educational opportunity to Student because the purpose of the meeting was to develop an IEP for the following school year, which did not begin until August 5, 2019. The evidence did not support that a one-day

delay constituted a significant infringement of Parent's opportunity to participate in the IEP process.

The Alta Loma assessors were present at the May 1, 2019 IEP team meeting and reported on their portions of the multidisciplinary assessment. Parent was regularly asked if she had any questions regarding the assessments. When Parent or Student's advocate had questions about the assessment procedure or assessment results, the appropriate assessor promptly responded with relevant information or an explanation. Review of the assessments was completed at the May 1, 2019 IEP team meeting, although the meeting was adjourned to be reconvened on May 16, 2019 to complete the full IEP agenda.

Parent, Student's aunt and Student's advocate were zealous advocates for Student. However, Parent and Student's advocate were also often argumentative and misinformed on Alta Loma's legal responsibilities. The discussions at each meeting were frequently civil, but were also frequently involved and contentious, resulting in the need to continue the May 1, 2019 team meeting to complete the full IEP agenda. Student's advocate frequently treated district IEP team members with obvious disdain, which conduct seriously jeopardized the collaborative process envisioned by the IDEA, and caused delays as district staff responded to perceived professional attacks or became hesitant to offer information or opinions.

The number and scope of the comprehensive multidisciplinary assessments and robust discussions at both IEP team meetings resulted in delays that placed Alta Loma in the difficult position of being unable to complete the IEP in one team meeting. Alta Loma made the reasonable determination that allowing additional parental participation promoted the purposes of the IDEA and was least likely to result in a denial of FAPE.

Alta Loma is not only entitled to reasonable latitude in prioritizing Parents' participation, the purpose of the meetings was to develop an IEP for the 2019-2020 school year, and continuing the meeting for a few weeks did not deprive Student of educational benefit or deny him a FAPE.

Parent and Student's advocate intentionally disrupted the May 16, 2019 IEP team meeting during the district team members' attempts to discuss the continuum of placement options and terminated the meeting. Parent declined Alta Loma's multiple requests to schedule a third IEP team meeting to revisit placement or review the IEP. This required Alta Loma to clarify its placement offer by a prior written notice letter, which it promptly did on May 24, 2019. The prior written notice contained all statutorily required information, and reiterated both the reasons for Alta Loma's offer of placement and the other components of the IEP document being offered as a FAPE. The one-week delay in clarifying the IEP placement offer for the 2019-2020 school year did not result in a loss of educational opportunity for Student or interfere with Parent's opportunity to participate in developing the IEP, and was a nonsubstantive procedural error that did not deny Student a FAPE.

MEETING PARTICIPANTS

Alta Loma contends that all necessary team members were present at the May 1, and May 16, 2019 IEP team meetings. Student contends that the failure to invite Mr. Pate to the May 1, 2019 IEP team meeting was a violation of its obligation to ensure the participation of Student's teachers. Student was also critical of Alta Loma's failure to invite Student's physical education teacher from his private school, Student's private speech pathologist, or Student's public school kindergarten teacher from Fall of the 2017-2018 school year.

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

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

The team must include an individual who can interpret the instructional implications of assessment results. At the discretion of the parent, guardian or school district, other individuals may be included with knowledge or special expertise regarding the student; and, if appropriate, the student. (20 U.S.C., § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

The IEP team must include at least one teacher or specialist with knowledge in the suspected area of disability. (See *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1499.) Any team member who is qualified to interpret the results of an assessment may do so. (20 U.S.C. § 1414(d)(1)(B)(v); 34 C.F.R. 300.321 (a)(5); Ed. Code, § 56341, subd. (b)(5).) An IEP team member may fulfill more than one role if he or she meets the criterion. (34 C.F.R. §§ 300.321(d), 300.321(a)(5).) School districts are responsible for inviting teachers to the IEP team meeting. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 644 (*M.L.*))

The Ninth Circuit has expressly held that the IDEA reference to a regular education teacher “of the child” at IEP team meetings does not require the presence of

the student's current general education teacher on the IEP team. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 939). However, the teacher chosen as an IEP team member should be knowledgeable about the child and implementation of the IEP developed. (*Id.*)

The IDEA does not require related services personnel to attend IEP team meetings. (See *Letter to Rangel-Diaz* (OSEP April 25, 2011) 58 IDELR 78, p. 1 (*Rangel-Diaz*)). The IDEA's implementing regulations provide that each child's IEP team must include "[n]ot less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child." (34 C.F.R. § 300.321(a)(3).) A special education teacher or provider, not both, is a required member of the IEP team. The teacher or provider who is a member of the IEP team and must be designated by the school district should be the person who is, or will be, responsible for implementing the child's IEP. (*Rangel-Diaz, supra*, at p. 2.)

Each team member of Student's IEP team attended both the May 1, and May 16, 2019 IEP team meetings, and all required team members were present, except the school nurse, who was excused by Parent in writing from the May 16, 2019 IEP team meeting. Parent attended with Student's aunt and Student's advocate. Ms. Won, a first grade general education teacher, attended. Ms. Rogers, who held both general education and special education teaching credentials, was present. She was also knowledgeable about the general education curriculum, which she taught to elementary school students in her resource specialist program. Special education director Beth Freer, the designated administrator, also held a special education teaching credential. Ms. Freer was qualified to supervise the provision of specially designed instruction to meet Student's unique needs, and was knowledgeable about the availability of district resources. Ms. Geerken, Ms. Openshaw, Ms. Rogers, Ms. Ragaza, Ms. Escareno and

Ms. Stevens were there as part of the multidisciplinary assessment team, and well-qualified to interpret assessment results. Ms. Rogers, Ms. Freer, Ms. Geerken, and Ms. Openshaw were also familiar with Student's disabilities of autism and language impairment. Ame Vigil, a school psychologist, was also present, and at Parent's request, private behavior program supervisor, Mr. Wong, was present.

Alta Loma was not required to have Student's current private school general education teacher on the IEP team. Mr. Pate was invited to the May 16, 2019 IEP team meeting, but declined to attend. Mr. Pate would have been unfamiliar with implementation of an IEP. Nonetheless, Mr. Pate contributed a significant amount of information to the assessors, by multiple questionnaire responses and by interview. The evidence did not show that there was any information that the IEP team needed from Mr. Pate that was not provided. Mr. Pate's assessment input did not reveal that the grades on Student's report card were not based on independently demonstrated skills or knowledge, but Ms. Geerken had already determined that some information from Mr. Pate was skewed by aide intervention. Ms. Geerken voiced her opinion at the IEP team meetings that Student was receiving significant help in completing classwork from the aides and needed to learn to perform work independently.

In addition, Alta Loma had two credentialed general education teachers at the IEP team meetings, who were familiar with the general education curriculum and available resources. Ms. Rogers had participated in Student's multidisciplinary assessment and familiar with Student and his unique educational needs. Ms. Won was a first grade teacher. Together, these teachers could discuss the extent to which general education curriculum and placement in general education would address Student's educational needs, and met the mandatory general education teacher attendance criteria.

Student's physical education teacher, private speech pathologist, and special education teacher from the 2017-2018 school year were not mandatory members of the IEP team, and Alta Loma was not required to invite them. The multidisciplinary assessment team gathered appropriate information on Student's academic, developmental, and functional performance from a variety of sources, including an observation of a speech session and an interview with the private speech pathologist. The evidence did not establish that the IEP team needed additional information from the physical education teacher or private speech pathologist to develop an appropriate educational program for Student. Similarly, the evidence did not establish that Student's preschool teacher from two years earlier would have had information relevant and necessary to the development of a first grade program. This is especially true as Student contended that his abilities at the private school for the 2018-2019 school year were a more accurate reflection of his ability than the 2017-2018 school year at an Alta Loma school.

Alta Loma did not limit Parent's right to bring another individual to Student's IEP team meetings who was not employed by the public agency but possessed knowledge or special expertise regarding her child. In fact, Parent arranged for Mr. Wong to attend the meeting as a discretionary team member, but chose not to do the same for Student's private speech pathologist.

Accordingly, the May 1, and May 16, 2019 IEP teams convened by Alta Loma had all necessary IEP team members present.

GOALS

Alta Loma contends that the IEP team developed appropriate goals to meet Student's needs resulting from his disability. Student contends that Alta Loma failed to develop goals in all Student's areas of need, and drafted inappropriate goals.

An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).)

However, a school district is not required to develop goals for areas covered by the general curriculum for which the student needs only accommodations and modifications. (Fed. Regs., Appendix A, *Part 300 – Assistance to States for the Education of Children with Disabilities* (1999), discussing language also contained in the 2004 reauthorization of the IDEA at 20 U.S.C., § 1414(d)(1)(A)(i)(II).

Student's IEP team developed annual goals in all areas of need. The annual goals were designed to meet Student's educational needs resulting from his autism and communication deficits, and to enable him to be involved in and make progress in the general curriculum. They described what Student could reasonably be expected to accomplish over a 12-month period.

The IEP included appropriate objective criteria, evaluation procedures, and schedules for determining, on an annual basis whether the annual goals were being achieved and a statement of how Student's progress toward the goals would be measured. Incremental objectives ensured that Student's progress would be measured no less than three times during the school year, including an annual review. Both the method of calculation of progress and the frequency of measurement met the statutory requirements for measurability of annual goals.

Goal 1 was a social emotional and self-advocacy goal that Student would use functional communication skills to request a want or need, such as asking for help or asking for a break, with no more than one staff prompt in four out of five trials according to teacher collected data. This goal was developed based on the assessors' observations that Student did not verbally request a break or ask for help, and Mr. Pate's report that Student did not ask for help when needed, and was appropriate to address Student's need to use functional communication.

Student contends that he was already able to make requests and self-advocate, and that Student might fail to meet this goal if the teacher prompted Student to request something that Student didn't want. This argument was unpersuasive. Contrary to Parent's report, the weight of the evidence demonstrated that Student did not make requests when he needed help. Student's highly-qualified and credentialed special

education teacher would be working with Student for approximately six hours per day, five days per week, for ten months over the course of the 2019-2020 school year, and could reasonably be expected to conduct meaningful trials. The goal itself included a series of trials over time and per collected data, also ensuring that an occasional misjudgment of Student's wants and needs during a trial would not result in failure to make progress on, or meet, Goal 1.

Student also suggested that he might be able to manipulate the trials to obtain preferred items like time in a quiet area, which is speculative. That argument does not take into account Mr. McDermott's experience with behavioral interventions, or the likelihood that an unexplained increase in the request for accommodations would be recognized by the teacher and the one-on-one aide, and reported to the BCBA, who could address such manipulation during the supervision hours offered in the IEP.

Goal 2 was a social development goal that called for Student, with no more than one staff prompt, to initiate at least one verbal interaction, such as saying "Want to play" or "Watch me" or "How are you?" during a structured or unstructured activity with peers in four out of five consecutive trials according to teacher collected data. The goal was developed because multiple assessors observed Student in class and on the playground but failed to see Student interact with his peers during structured or unstructured activities. Mr. Pate had also reported that Student did not engage in verbal exchanges with his peers, and did not have good interactions with them. This was an appropriate goal to address Student's social development delays.

Student argues that he already initiated verbal interactions with peers, and that his echolalia would enable him to meet the goal if he was verbally prompted incorrectly. However, assessor observations and Mr. Pate's report indicated that Student never or

almost never initiated verbal interactions with his peers, inside or outside the classroom. The IEP team reasonably determined that this was an area of need at school despite Parent's report of Student's verbal interactions in the home. No evidence was submitted that it would be ineffective to teach Student to initiate verbal interactions by modeling conversation starters for Student to repeat, and Student's argument that the goal was inappropriate because Student had echolalia was unpersuasive.

Goal 3 was a social emotional and behavior goal that required Student to respond to his name by looking in the direction of the speaker, whether a familiar or unfamiliar staff member, when the speaker used no more than one alerting sensory strategy, such as light or firm touch or voice, in four out of five trials as measured by teacher data. Both the classroom teacher and the occupational therapist were responsible for working with Student on this goal. This goal was developed because Student could respond to one- and two-word verbal directives, but did not make eye contact with the speaker, and Mr. Pate reported that Student did not respond to requests from unfamiliar adults. This goal was appropriate to address an important social emotional and behavioral need.

Goal 4 was a behavior goal for Student to have no more than three instances of self-injurious behavior, defined as hitting himself with a closed fist, in one week in the school setting across teacher collected data. The classroom teacher was responsible for this goal. This goal addressed the self-injurious behavior identified in Mr. Wong's April 2019 behavior program report. According to Mr. Wong's data, over the preceding three months, aggression towards others had decreased, but Student's self-injurious behavior had increased. All witnesses who testified regarding this behavior by Student stated that the fist-to-body contact was very light, and appeared to be more of an

automatic behavior than an attempt to hurt himself. This goal was appropriate to address Student's self-injurious behavior.

Student contends that a goal to reduce, rather than extinguish, instances of self-injurious behavior was dangerous, and would allow Student to continue to harm himself within the parameters of Goal 4. Ms. Geerken opined that self-injurious behavior had not been observed by district assessors. Ms. Flores-Fiumara opined that the fist to head behaviors were little more than barely noticeable self-stimulatory taps. Mr. Wong, opined that Student's self-stimulatory behaviors only interfered with learning for a few moments, and noted in his report that the private behavior program had not been able to extinguish the behavior over the past six months. There was no reason to anticipate that Student would suddenly engage in serious self-harm rather than minor head taps, and the head taps had been identified by the private behavior program as an automatic behavior that had proved difficult to extinguish. Therefore, the May 1, 2019 IEP team appropriately identified this as an area of need for Student, and reasonably estimated the degree to which this behavior could be reduced, if not eliminated, within 12 months.

Goals 5, 6 and 7 were communication goals developed to increase Student's use of functional communication. Each of these goals was an appropriate means of addressing Student's expressive, receptive or pragmatic language needs. Goal 5 addressed Student's expressive language deficits and called for him, during a structured task, to be able to produce a complete sentence, including a subject, accurate verb tense, adjective and object, with no more than three prompts. Goal 6 was a receptive language goal that required Student, during a structured task, to follow a two-element direction, such as to put the small, blue ball on the table, or go and get the ball, with no more than three prompts. It targeted Student's inconsistent ability to follow two-step

directions. Goal 7 was a social communication, or pragmatics, goal to address his inability to maintain a conversational exchange. It required Student make an on-topic comment or ask a question related to the task during a structured, joint attention task. Then, when the clinician responded, Student would produce a contingent response with no more than three prompts. Ms. Openshaw drafted these three communication goals and persuasively opined that they were appropriate to address Student's speech and language needs.

Student contends that he already used complete sentences, and that receptive language Goal 5 was not sufficiently challenging because it was limited to a structured task, and should have been written to generalize the skill across settings. Student contends that expressive language Goal 6 was too easy and allowed excessive prompting, and that pragmatic language Goal 7 was too easy and could possibly be met with echolalic responses. The speech language pathologist was responsible for these goals, and it was reasonable for the IEP team to anticipate that a licensed speech language pathologist would be able to tell the difference between use of a pragmatic skill and echolalia. Alta Loma's expert, Ms. Openshaw, was the only speech language pathologist called as a witness, and she opined that all three communication goals were appropriate and sufficiently challenging. Her opinion was uncontroverted by an expert in her field, and therefore persuasive. Goals 5, 6 and 7 were appropriate to address Student's speech and language needs.

Student argues that Alta Loma failed to develop goals in all areas of need, because Student's private speech provider told Ms. Openshaw that apraxia was a concern and no apraxia goal was written. However, Student did not present any evidence that he had apraxia or needed a goal in this area. Ms. Openshaw persuasively explained that past assessors had recommended that Student be monitored for apraxia

because they had been unable to elicit sufficient utterances to diagnose apraxia, and she had also been unable to obtain a sufficient language sample. However, apraxia is characterized by inconsistent or imprecise articulation, and although Student rarely spoke, when he did the words were clear, and Ms. Openshaw did not see any overt characteristics of apraxia. Accordingly, apraxia was not an area of need, and Alta Loma was not required to develop an apraxia goal.

Student contends that Ms. Openshaw should have continued Student's private speech therapy goals, but had erroneously disregarded them as medical treatment goals, and did not give sufficient consideration to the implications of stopping Student's private speech therapy or Lindamood Bell instruction. However, Student did not offer persuasive or objective evidence that Student was making progress on the private speech goals, or in the Lindamood Bell program. Neither the private speech pathologist nor the Lindamood Bell instructor was called to contradict Ms. Openshaw's well-reasoned opinion that the May 1, 2019 IEP's goals addressed all of Student's speech and language needs.

Ms. Rogers drafted the academic goals in the May 1, 2019 IEP. Goal 8 targeted reading, and required Student, when given word cards with a picture depicting a consonant-vowel-consonant word, to sound out and say each word aloud without prompting. Goal 9 addressed reading comprehension, a significant area of need for Student. It required him to, after listening to grade level text, answer correctly two of three who, what or where questions with visual support. Goal 10 was a writing numbers goal, and required Student to independently, without hand-over-hand support, write numbers to 20 when given visual supports and no more than five prompts. Goal 11 was a writing simple sentences goal that required Student to legibly copy a grade level narrative sentence starter and independently complete the sentence.

Although Student could read sight words, which by definition cannot be sounded out, the assessors observed that Student needed multiple prompts to decode phonetic words. Student could not answer questions regarding a picture book, and Mr. Pate reported that Student was never or almost never able to answer questions about a story. Student could give verbal answers to math questions after counting objects, but was unable to write the number without maximum prompting and hand-over-hand support. Student had difficulty writing in general, and Mr. Pate had not introduced Student to sentence writing. Ms. Rogers persuasively opined that Goals 8 through 11 appropriately addressed Student's areas of academic need, and all of his areas of academic need.

Student contends that reading Goal 8 was not appropriately ambitious, and that he could meet the goal by memorizing the word rather than sounding it out. Ms. Rogers acknowledged that a student memorizing words was always a risk, but it did not invalidate a goal requiring a student to decode words, which is an important skill.

Student argues that a sight word goal should have been written. Reading sight words was the only academic area where Student was making documented progress, and the evidence did not demonstrate that this was an area of academic need for Student. Student also contends that academic goals should have been written in additional areas, such as vocabulary, decoding without pictures, reading fluency, reading comprehension, math calculation, math problem solving, math fluency, and spelling. Student's proposed goals are for foundational skills on State standards, and would be introduced to Student as part of the general curriculum. In addition, Ms. Rogers persuasively opined that Goals 8 through 11 appropriately addressed all Student's areas of academic need. Ms. Rogers was the only credentialed special education teacher to testify, and her opinions on Student's academic needs and how to address them were uncontroverted by a qualified expert and persuasive.

Student speculated that Mr. McDermott's curriculum would not allow Student to work on his academic goals. Student's argument was irrelevant to whether the goal was appropriate, but rather an IEP implementation matter, which was not before this ALJ.

Goals were developed by Ms. Ragaza and Ms. Escareno to address Student's fine motor, visual motor, gross motor, sensory processing and physical education needs. Goal 12 was a fine and visual motor skill goal that called for Student to write all upper and lower case letters on lined paper with proper placement and letter size. Goal 13 was a gross motor skill goal that required Student to slide for 20 feet with functional form when given a demonstration and with prompts. Goal 14 was an object control skill that required Student to bounce a basketball or playground ball four consecutive times with one hand when given a demonstration and with prompts. The evidence, including the assessment reports, IEP team meeting notes, and transcripts of the IEP team meetings established that all of Student's fine motor, visual motor, gross motor, sensory processing and physical education needs were identified by Alta Loma's multidisciplinary assessment, and that Goals 12 through 14 appropriately targeted those needs.

Goal 15 was a behavioral development goal that required Student to request sensory objects, such as putty, playdough, slime and water beads, as a replacement for seeking sensory input by head stimming, eye stimming, and scripting. This goal was appropriate to address both Student's sensory seeking behaviors and his need to self-advocate. Student contends that this goal misidentified appropriate sensory materials, but this goal was drafted and being implemented by Mr. Wong and his staff, and Alta Loma reasonably carried this goal over to the IEP at Mr. Wong's request. Ms. Ragaza explained to the IEP team that this goal appropriately addressed Student's sensory processing needs, and Ms. Geerken opined persuasively that this goal would

reduce sensory-seeking behaviors. Dr. Bailey expressed concern that the identified sensory items were highly enjoyable and would reinforce the sensory seeking behavior, and Ms. Flores-Fiumara would have liked to have seen a functional behavior analysis done of that behavior, but these opinions were speculative and did not establish that the goal was inappropriate.

In summary, the May 1, 2019 IEP contained measurable annual goals appropriately designed to meet all of Student's educational needs resulting from his autism and language impairment.

PARENTAL PARTICIPATION

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

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

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

Student argues that Parent was denied meaningful participation in the IEP team meeting because Alta Loma team members predetermined the placement offer. Student's argument is based upon the draft IEP stating that Student was in a classroom for children with moderate to severe disabilities, the placement discussion taking place towards the end of the May 16, 2019 meeting, the district team members' rejection of Parent's request for public school placement in general education, and a theory that one member's request for Ms. Freer to speak for the team implied that the team had predetermined placement.

Student's argument is speculative, contrary to the evidence, and unpersuasive. Multiple district IEP team members testified credibly and convincingly that they had not met outside of the meetings to discuss placement, let alone to predetermine the offer, and came to the IEP team meetings with open minds. District team members did not come to the May 16, 2019 IEP team meeting with a take-it-or-leave-it attitude. Team members informed Parent that the software program that generated the draft IEP filled in the document with Student's last placement at Alta Loma, which was a special day class, but the IEP would be changed to reflect the current offer after the placement discussion. Reasonable rejection of Parent's request to place Student in general

education constituted an expression of disagreement by district team members during the placement discussion, and does not imply a predetermined offer. The placement discussion was admittedly hurried due to Parent's time constraints and the actions of Parent and Student's advocate to prevent in-depth discussion. However, Alta Loma offered to hold another IEP team meeting to further discuss placement, both at the May 16, 2019 IEP team meeting and by letters dated July 31, 2019 and August 15, 2019, although Parent declined. Accordingly, the hurried discussion did not significantly impede the opportunity of Parent to participate in the IEP decision making process, and the evidence did not establish that Alta Loma team members predetermined the placement offer.

Parent was informed of Student's problems, attended the May 1, and May 16, 2019 IEP team meetings, expressed disagreement regarding the IEP team decisions on present levels of performance, goals, services and placement, and requested that the IEP be changed. Present levels of performance were modified, and goals were modified and added at Parent's request. Accordingly, Parent actively and meaningfully participated in the decision making process of developing a FAPE for Student.

In summary, the IEP developed on May 1 and May 16, 2019 met all procedural requirements for development and documentation of an IEP.

SUBSTANTIVE COMPLIANCE

Alta Loma contends that it offered Student an appropriate placement to promote independent functioning in the least restrictive environment, with appropriate supports and services. Student contends that the IEP was substantively inappropriate because insufficient goals had been developed, resulting in an insufficient offer of services, and

because key accommodations were omitted. In addition, Student contends that the placement offered was overly restrictive.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F., supra*, 580 U.S. ____ [137 S.Ct. at p. 1000].)

For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the school district's offer of educational services and placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).)

A school district has the right to select the program offered, as long as the program is able to meet the student's needs, and the district is ultimately responsible for ensuring that FAPE is offered. (*Letter to Richards*, 55 IDELR 107 (OSEP 2010).) No one factor is determinative in placement, and parental preference cannot be either the

sole or predominant factor in placement decisions. (See, e.g., *Letter to Burton*, 17 IDELR 1182 (OSERS 1991); *Letter to Anonymous*, 21 IDELR 674 (OSEP) 1994); *Letter to Bina*, 18 IDELR 582 (OSERS 1991).) The Ninth Circuit has held that while the school district must allow for meaningful parental participation, it has no obligation to grant the parent a veto over any individual IEP provision. (*Vashon Island, supra*, at 337 F.3d p. 1131.)

A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education...designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.)

LEAST RESTRICTIVE ENVIRONMENT

To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers, and that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

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

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.)

If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L., supra*, 394 F.3d at p. 640, fn. 7.) The continuum of program options includes, but is not limited to: regular education, resource specialist programs, designated instruction and services, special classes, nonpublic nonsectarian schools, state special schools, specially designed instruction in settings other than classrooms, itinerant instruction in settings other than classrooms, and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.) Related services under the IDEA are referred to as designated instruction and services in California. (Ed. Code § 56363, subd. (a); 20 U.S.C. § 1401(26); 34 C.F.R. 300.34.)

Applying the *Rachel H.* factors shows that Student could not have been satisfactorily educated in a regular education environment.

As to the first *Rachel H.* factor, the educational benefits of a full-time placement in general education, Student's educational benefit from regular education classes would be adversely impacted by his short attention span, communication delays, and inability to independently perform academic work. These disability-related deficits

interfered with his ability to participate in learning activities that required whole group instruction and cooperative play. Despite his strength in learning rote academic skills, he required frequent and multiple prompts to maintain attention to task, provide redirection and clarify directions. Student needed individualized academic instruction at his level, rather than at grade level as taught in general education classes.

Ms. Flores-Fiumara observed that Student was not benefitting from whole group instruction, and did not benefit from Mr. Pate's cues without prompting from his aide. Alta Loma's assessors observed that Student needed a very high level of support in the classroom, including hand-over-hand assistance with writing assignments. Mr. Pate was unsure of Student's academic skills because Student could not complete classwork independently. Although Ms. Rogers could not assess Student's academic achievement with standardized testing, collected data indicated that Student's independent academic skills were below grade level. Ms. Flores-Fiumara opined that Student could receive one-on-one instruction at his own level in the classroom, but if Student was working on academic skills very different from his classmates, his peers would notice the discrepancy and Student would be more likely to be left out of peer interactions. She also opined that students in general were more likely to engage in escape behaviors if given work above their academic level. This information weighed against a finding that Student would benefit from placement in general education.

Contrary to Parent's assertions at IEP team meetings and at hearing, the evidence did not establish that Student was making academic progress in general education beyond an increasing number of rote skills that did not require abstract reasoning. Mr. Pate could not opine on Student's academic skill levels, and was consistent in his reports and opinion that Student never or almost never understood what he read, even when he could decode the words in a sentence. Student did not demonstrate the

academic or communication progress that Mother reported in formal testing, during assessor observations, or on Mr. Tate's rating scale responses. Even had Student been making progress in the kindergarten curriculum, Ms. Geerken explained that it is not uncommon for students to score higher on curriculum they are seeing for the second time, and that those higher scores tend to go down when new information is presented. Here, Student had attended two years of kindergarten, and was still functioning at well below grade level in all areas except scattered rote skills.

Even with one-on-one aide support, Student would not receive individualized instruction at his level in a general education classroom. Student required instruction at a functional level, in light of his cognitive processing delays, lack of independent academic skills, receptive and expressive language deficits and low adaptive skills. General education teachers lack credentials to teach students with disabilities, whether mild to moderate or moderate to severe. Mr. Pate candidly admitted that he had never before taught a student as profoundly impacted by his disability as Student, and heavily relied on the behavior program aide to help Student complete work and set up interactions between Student and his peers. A one-on-one behavior aide in a general education classroom cannot replace a credentialed special education teacher and specialized academic instruction. Student needed more support than general education classes and regular academic instruction could provide.

As to the second *Rachel H.* factor, the nonacademic benefits of a general education placement, the evidence did not show that Student sufficiently benefitted socially to warrant placement in general education. Student's attention and communication deficits significantly interfered with his ability to absorb language through casual modeling. Student did not interact with his peers in the classroom, and did not interact with them during observations of him on the playground. His physical

education teacher testified that he was unsure if Student noticed when his peers attempted to explain things like game rules to him, as Student did not react or engage with them. Anecdotal testimony that, after being in Mr. Pate's classroom for one and a half years, Student sometimes engaged in chasing fellow students during recess, or participated in structured activities when prompted and physically guided by his adult aides, did not persuasively demonstrate that Student was sufficiently learning communication and social skills through peer modeling in general education.

The subjective opinions of Dr. Bailey and Ms. Flores-Fiumara that Student would acquire language skills from interactions with typical peers were not supported by objective data, and their reports and opinions were not available to the May 1, and May 16, 2019 IEP teams. Ms. Openshaw's opinion that Student could be expected to acquire language skills more readily in the County autism program class, with functional communication embedded in the curriculum and with peers at his communication level, was persuasive. Ms. Openshaw also explained that typical peers were not always the best language models for a student learning basic language skills. Student did not present any speech and language expert to contradict Ms. Openshaw's opinion. The May 1, and May 16, 2019 IEP team members reasonably believed that Student would receive little nonacademic benefit from full-time placement in general education.

The third *Rachel H.* factor did not weigh against a general education placement, as there was little evidence that a regular classroom placement would have adversely impacted the teacher or Student's classmates. Mr. Pate testified that Student made incomprehensible babbling noises, but that classmates had learned to ignore them. Student's maladaptive behaviors had decreased, and with one-on-one aide support, Student could be taken out of the classroom if his behavior became disruptive. Mr. Pate would get the attention of Student's aide if Student was behaving inappropriately, and

the aide could act to minimize any disturbance. As Student's aides were providing Student with constant attention, Student's presence in a general education classroom did not take Mr. Pate away from work with the other students to their detriment. There was no evidence that the fourth *Rachel H.* factor, cost, affected the IEP team's placement decision.

Student could not have been satisfactorily educated solely in a regular education environment. Therefore, the least restrictive environment analysis requires a determination of whether Student was to be mainstreamed to the maximum extent appropriate per *Daniel R.R.*

Student had processing delays and below grade-level academic skills that required specialized academic instruction by a credentialed special education teacher, provided at his developmental and functional level. Such individualized instruction could not be delivered in a general education classroom, or by a general education teacher, and mainstreaming was not appropriate during core academic classes, which constituted most of the County autism program's school day.

Mainstreaming was not appropriate during Student's speech therapy, occupational therapy, or adapted physical education sessions. Half of the occupational therapy sessions, and some of the adapted physical education sessions depending upon the skill or activity being learned, were delivered as individual services, which could not be provided in the general education classroom. Other occupational therapy, adapted physical education, and speech therapy hours were to be delivered to Student in a group and involved instruction and work on specific goals, and could not appropriately take place in the general education classroom. For related services, the therapy room or other small group setting was the least restrictive environment.

Accordingly, Alta Loma, in the May 24, 2019 prior written notice, reasonably limited Student's integration with typical peers to the nonacademic and non-specialized activities of recess, lunch, assemblies and extracurricular activities. Mainstreaming into general education for 25 percent of Student's school day, or that portion of the school day not devoted to core academics or related services, was the maximum extent appropriate. The IEP also offered a full-day one-on-one aide to accompany Student during mainstreaming, which would allow facilitation of interaction with typical peers and generalization of acquired language and social skills across school settings.

Mother preferred that Student be placed in a general education classroom with a one-on-one aide so that he could socialize with typical peers, and practice communication skills with typical peers, for the entire school day. However, the evidence established that Student could adequately and appropriately socialize and practice communication skills learned in the autism classroom with typical peers during mainstreaming for 25 percent of his school day.

Student contends that the May 16, 2019 IEP team did not consider a continuum of placement options when deciding the least restrictive environment. Some discussion of placement options took place during the assessment presentations, where it was noted that Student's language difficulties made it difficult for him to participate in a regular classroom. Discussions of Student's need for a structured classroom and specialized materials took place as the IEP team decided what related services and supplementary aides and supports to offer. Parent asserted throughout the IEP team meetings that Student was making progress in general education, which placement was periodically discussed in that context.

A less restrictive setting of designated instruction and services with a general education placement, that is, with the support of a grade level resource specialist program for academics, would be insufficient to enable Student to access the general education curriculum. The evidence established that Student required specialized academic instruction for core academic classes throughout the day, in a classroom with embedded communication and social skills supports. No amount of related services in a general education setting, or at grade level, would meet Student's academic needs in lieu of specialized academic instruction. Further, if Student were routinely removed from class for designated instruction and services, he would miss significant hours of classroom instruction and would miss the lessons and general knowledge shared by his typical classmates.

Ms. Rogers's less restrictive resource class was for students at or near grade level who could work independently, and Ms. Rogers persuasively opined that a resource specialist program was not appropriate for Student, who was below grade level. Assessors have been unable to obtain standardized achievement scores of Student's abilities beyond a few subtests of rote skills, and Mr. Pate was unable to verify Student's academic skills beyond memorization and rote skills. Student was unable to comprehend the words he read. In addition, his severe receptive and expressive communication delays, and his inability to follow multi-step directions, were barriers to instruction in a grade-level resource program. The evidence established that even with a one-on-one aide, Student needed more intensive instruction and support, at a more functional level, than available in a resource program.

Continuum options of a nonpublic school, state special school, specially designed instruction in settings other than a classroom, itinerant instruction, instruction by telecommunication in home, or in-home instruction, were each more restrictive than the

County autism program's special class. Any failure to discuss these placement options did not deny Student a FAPE, as it did not deprive him of educational benefit. It did not interfere with Parent's opportunity to participate in the development of Student's IEP, as District expressly offered a third IEP team meeting to revisit placement options.

Parent and Student's advocate attended the May 16, 2019 IEP team meeting and fully participated until becoming angry about the direction the discussions were taking when placement was the agenda item. Parent and Student's advocate both, by talking over and cutting off other team members, prevented Alta Loma team members from effectively discussing a continuum of options. Parent unilaterally terminated the meeting before the discussion was completed, and did not respond to offers to convene another meeting. Alta Loma was not required to provide Student with a placement preferred by Parent. It would be inequitable to find Alta Loma responsible for failing to discuss the continuum of options with Parent when Parent disrupted the discussion, terminated the IEP team meeting, and refused to participate in required special education procedures.

In summary, the County autism program was the least restrictive environment, and also an appropriate placement. Student required individualized and specialized academic instruction by a credentialed special education teacher. Parent asserted that Student had made academic progress in Mr. Pate's classroom with one-on-one instruction from his behavior aides, but Student's inability to demonstrate academic progress to Mr. Pate or in formal testing suggests that Student did not make significant, if any, academic progress. Student received one-on-one instruction at Lindamood Bell, but there was no evidence of the qualifications of his instructor, and no evidence of improvement in reading skills. Lindamood Bell baseline scores were not offered, so there was no evidence of progress in that program. The weight of the evidence strongly

supported Student's need for specialized academic instruction to meet his reading, math and writing goals.

Each student in the County autism program classrooms received one-on-one instruction from the credentialed special education teacher, and support from highly-qualified teaching staff as directed by the teacher. Students were taught at their own developmental level. Students who could access grade level curriculum in a particular academic area, such as math, would be taught at grade level for that subject, and could attend general education classes on the comprehensive school campus in that subject. Accordingly, the County autism program met Student's need for individualized academic instruction at his developmental level.

The County autism program classroom had a low student to adult ratio, with a credentialed special education teacher and multiple highly trained aides. The classroom was highly structured, and used a variety of evidence-based teaching methodologies aligned with autism to teach the students at their own developmental level. Each student's behavior was supported with teacher-taken data, which was used to determine intervention strategies, and the classroom had a reinforcement system in place. The class focused on independence, communication and social skills. The classroom was supported four days each week by a speech language pathologist, and weekly by an occupational therapist and an adapted physical education teacher. The classroom provided a language rich environment, and the teaching staff created structured play and social situations to facilitate learning socialization skills. The County autism program met Student's need for a classroom environment that provided him with opportunities throughout the school day to learn and practice functional communication and social skills

Parent, Dr. Bailey, Ms. Flores-Fiumara and Mr. Wong opined that Student would pick up maladaptive behaviors if he was placed in a County autism program classroom. There was no evidence presented that Student acquired maladaptive, or other, behaviors from other students. Student's physical education teacher testified that Student did not notice when typical peers were speaking to him. Mr. Pate testified that Student needed his aide to do work in small groups. Student's current aide, Mr. Paniagua, testified that when he observed Student's aide in May 2019, Student had virtually no interaction with his peers. Mr. Wong's anecdotal story that Student wanted to play with spinning toys brought to school by other students, and asked to play with them, did not convincingly demonstrate that Student modeled his peers' behavior. Ms. Flores-Fiumara observed that Student had to be prompted and directed by his aide twice to stand with his peers in line at a playground slide, suggesting that interaction with the aide, and not peer modeling, shaped Student's behavior. There was no evidence that Student had previously picked up maladaptive behaviors from other students, and the speculative and unsupported opinions of Student's experts were unpersuasive. In addition, Mr. McDermott testified convincingly that none of the students in his class for the 2019-2020 school year had significant maladaptive behaviors. Accordingly, Parent's concerns that Student might pick up maladaptive behaviors from other students in the County autism program was insufficient to establish that the placement offered was inappropriate.

Student contends that the district IEP team members took a negative view of inclusion for students with autism, exaggerated the gaps in abilities and functioning between Student and his grade level peers, ignored evidence-based practices that encourage integration, and sought to segregate Student. These arguments were all

speculative, unsupported by the evidence, and failed to take into account the plethora of data from multiple assessments, teacher report and service provider reports that weighed in favor of placement in a classroom that provided individualized instruction and embedded social and communication curriculum for core learning.

In sum, the County's autism program class for individualized core instruction at Student's level was an appropriate placement. The County autism program classroom with mainstreaming supported by a one-on-one aide during lunch, recess, assemblies and campus activities for 25 percent of the school day, ensured that Student was educated with non-disabled peers to the maximum extent appropriate. Accordingly, the May 1, 2019 IEP offered Student an appropriate placement in the least restrictive environment. Student did not offer any evidence to persuasively rebut Alta Loma's evidence beyond unsupported speculation.

SPECIAL EDUCATION AND RELATED SERVICES

Applying the *Rowley* standard, as clarified in *Endrew F.*, the evidence established that the May 1, 2019 IEP was designed to meet Student's unique needs and reasonably calculated to provide Student with the educational benefit to make appropriate progress in light of his unique circumstances.

Alta Loma's comprehensive assessments informed the IEP team that Student's ability to access the curriculum was severely impacted by his disability. Student demonstrated cognitive processing delays, below grade level academic skills, a significant degree of atypical communication development, sensory processing issues, and low to extremely low social emotional and adaptive functioning, that interfered with

his ability to understand and perform grade level work. Appropriate goals were developed to address Student's unique educational needs in the areas of academics, communication, fine and gross motor functioning, sensory processing and behaviors. Based on the information available and discussions at the team meetings, the IEP team developed an IEP that offered Student educational services and placement designed to meet these needs and reasonably calculated to enable Student to make progress on his annual goals.

In addition to the supports embedded in the County autism program, the May 1, 2019 IEP offered Student a one-on-one aide to accompany him throughout the school day, including to related services sessions and mainstreaming. The aide would provide prompting for attention and behavior, but would also assist Student in generalizing skills learned in speech therapy, occupational therapy and adapted physical education to a classroom of typical peers, or unstructured activities with typical peers such as recess and lunch.

The aide was to be directed by the County autism program classroom teacher, who would be highly trained in ABA techniques and strategies. The May 1, 2019 IEP offered two supports to ensure generalization across school settings. First, it offered collaboration between the classroom teacher and the speech language pathologist, occupational therapist, school psychologist and adapted physical education teacher to assist with consistency and carryover of skills on a weekly basis. Second, it offered BCBA support for Student's one-on-one aide and the classroom teacher. All County autism program classes utilized teaching methodologies that aligned with autism and used

applied behavior analysis principles, with teachers collecting data used by County or district BCBA's to determine the functions of maladaptive behavior and designate positive replacement behaviors.

Ms. Geerken testified persuasively that the staggered BCBA supervision offered as a supplementary support was appropriate in frequency and duration to support Mr. McDermott and Student's aide in providing Student with behavioral interventions. The IEP offered 120 minutes per month through October 2019, and 60 minutes per month from November 2019, which Ms. Geerken persuasively opined provided a higher level of supervision during Student's transition to the County autism program classroom than would reasonably be anticipated to be necessary once Student settled into the routine of the classroom.

Student argued that the same level of supervision he had with the private behavior program should have been included in the May 1, 2019 IEP. Mr. Wong was critical of the number of hours offered, which was far less than the eight hours per week of supervision funded by Student's medical insurance and Parents. However, Mr. Wong was supervising both a home and school program. The home program was based on a medical treatment model. The private school program required the aide to implement behavior strategies and collect data in a general education classroom, without the benefit of a credentialed special education teacher or program supports, and was not comparable to the program offered in the IEP. Student's district one-on-one aide would have the support of BCBA's, speech pathologists, occupational therapists and school psychologists who provided Student with specialized services, and those who regularly visited the classroom as embedded supports for the County autism program. The aide

would also be directed and supported by an autism classroom teacher highly trained and experienced in implementing a token economy and other positive behavior interventions, and who would share responsibility for collecting data on Student's behaviors and progress on goals. Ms. Geerken was familiar with the County autism program, and testified persuasively that the hours of BCBA support offered were sufficient to provide the aide and classroom teacher with the level of support necessary to meet Student's behavioral needs.

Alta Loma offered Student two 30-minute sessions of speech therapy per week. Ms. Openshaw persuasively testified that the frequency and duration of those services, delivered in a small group, would allow Student to make progress on his expressive language, receptive language and pragmatic language goals. Working on those goals would teach Student necessary communication skills for expressing his wants and needs, following two-step directions, learning social cues, and how to initiate and maintain conversational turns, which were all areas of need identified by Alta Loma's assessments.

The May 1, 2019 IEP offered Student occupational therapy and adapted physical education, which specifically addressed Student's goals in writing, fine and visual motor skills, gross motor skills, object control skills, and behavioral development/sensory diet. The evidence showed that the frequency, duration and delivery model of occupational therapy and adapted physical education offered in the May 1, 2019 IEP were appropriate to support Student's progress on goals related to occupational therapy and adapted physical education.

The May 1, 2019 IEP offered Student instructional accommodations and supplementary aids and support, such as the behavior supervision, visual models to

assist with writing tasks, preferred seating, sensory strategies and positive reinforcement and praise. These accommodations were reasonably designed to support Student in accessing the curriculum and regulating behavior across school settings. Ms. Geerken, Ms. Openshaw and Ms. Rogers testified credibly and persuasively that these accommodations were appropriate to support Student's educational program.

In summary, the May 1, 2019 IEP provided a level of individualized academic instruction and related services, with supplementary supports, reasonably calculated to enable Student to make progress in light of his circumstances, and offered him a FAPE in the least restrictive environment.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

The IEP developed at the May 1, and May 16, 2019 IEP team meetings offered Student a FAPE in the least restrictive environment. Alta Loma prevailed on the sole issue presented.

ORDER

1. Alta Loma's May 1, 2019 IEP offered Student a FAPE in the least restrictive environment.
2. Alta Loma may implement the May 1, 2019 IEP without parental consent if Student is enrolled in an Alta Loma school and requests special education and related services.

RIGHT TO APPEAL THIS DECISION

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

/s/

Alexa J. Hohensee

Administrative Law Judge

Office of Administrative Hearings